WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL SEFICK, *Applicant*

vs.

VALLEY PACIFIC PETROLEUM SERVICES, INC.; HDI GLOBAL INSURANCE COMPANY, ADJUSTED BY YORK RISK SERVICES GROUP, *Defendants*

Adjudication Number: ADJ9519787 (MF); ADJ10089970
Salinas District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petitions for Reconsideration filed by applicant and defendant. Having completed our review, we now issue our Decision After Reconsideration.

Applicant and defendant each seek reconsideration of the April 29, 2020 Findings, Awards and Orders (F&A), wherein the workers' compensation administrative law judge (WCJ) found that in ADJ9519787 (MF) applicant, while employed as an Inventory Control Specialist on August 9, 2012, sustained industrial injury to the neck and left shoulder. In ADJ10089970, the WCJ found that applicant, while employed as an Inventory Control Specialist through June 20, 2013, sustained injury to the neck, left shoulder and right knee, and did not sustain injury to the back.

Applicant's Petition for Reconsideration (applicant's petition) contends that the last date of injurious exposure was August 9, 2012, rather than June 20, 2013. Applicant also contends he was temporarily totally disabled through the stipulated permanent and stationary date of May 25, 2016, that the reporting of applicant's vocational expert establishes permanent and total disability, and that the vocational expert reports are reimbursable litigation expenses.

Defendant's Petition for Reconsideration (defendant's petition) contends in ADJ10089970 that the F&A improperly awarded permanent disability indemnity at 2015 rates, rather than 2013 rates.

We have received an Answer from applicant in response to defendant's petition. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that both applicant's petition and defendant's petition be denied.

We have considered applicant's petition, defendant's petition, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will amend the award of temporary disability through the stipulated permanent and stationary date, but otherwise affirm the F&A.

FACTS

In ADJ9519787, applicant sustained admitted injury to the neck and left shoulder while employed as an Inventory Control Specialist on August 9, 2012. Applicant alleged injury while driving a fuel truck. Applicant was lifting the truck's fuel hose overhead and felt a sudden pop and associated pain in the neck and left shoulder region. (Ex. 21, report of QME John P. Colman, M.D., dated May 13, 2015, p. 12.)

In ADJ10089970, applicant claimed injury to the neck, left shoulder, back and right knee while employed as an Inventory Control Specialist from August 9, 2011 to August 9, 2012. Defendant denied injury arose out of or occurred in the course of employment (AOE/COE).

Following his injury, applicant continued working with modified duties until June 20, 2013. (Ex. J17, report of John P. Colman, M.D., dated July 7, 2016, p. 2.)

The parties selected John Colman, M.D., to act as Qualified Medical Evaluator (QME) in orthopedic medicine. Dr. Colman's initial report of May 13, 2015 detailed applicant's history of injury and treatment and applicant's clinical presentation. Dr. Colman found that applicant had reached a permanent and stationary status, and that applicant had sustained both specific and cumulative injuries. (Ex. 21, report of QME John P. Colman, M.D., dated May 13, 2015, p. 2.) Dr. Colman provided ratings and apportionment to the cervical spine and left shoulder, but deferred final determinations regarding the right knee pending x-ray studies of both knees. (*Id*. at p. 33.) Dr. Colman concluded that "[i]f the patient returns to his regular duties, it could likely jeopardize the surgical repairs in his neck and left shoulder and potentially cause additional cumulative trauma to his right knee." (*Ibid.*)

In a reevaluation report dated May 25, 2016, the QME reviewed the requested weight-bearing x-ray studies, and assessed whole person impairment and apportionment to the right knee,

in addition to the cervical spine and left shoulder. (Ex. J18, report of QME John P. Colman, M.D., dated May 25, 2016, p. 11.)

Applicant retained Frank Diaz of Diaz & Co. to act as a vocational expert. The consultative report of Mr. Diaz concluded applicant had sustained a one hundred percent loss of labor market access and would not benefit from vocational rehabilitation. (Ex. A9, report of Diaz & Co., dated August 23, 2018, at p. 5.) In subsequent reports Mr. Diaz found the claimed cumulative trauma injury was the sole cause of applicant's non-feasibility for retraining, and disclaimed applicant's age as a factor in the return to work analysis. (Ex. A8, Supplemental Vocational Opinion of Diaz & Co., dated March 20, 2019; Ex. A7, Supplemental Vocational Opinion of Diaz & Co., dated June 13, 2019.)

Defense vocational expert Everett O'Keefe authored a report of January 17, 2020, challenging the findings of Mr. Diaz, and asserting that the flawed methodology used by Mr. Diaz rendered the reporting of applicant's vocational expert unreliable. (Ex. D2, report of Everett O'Keefe, dated January 17, 2020, p. 22.)

The parties proceeded to trial on January 21, 2020, framing issues including, in pertinent part, injury AOE/COE in the cumulative trauma claim, temporary disability from June 21, 2015 to May 25, 2016, permanent disability, and "the correct date of injury (end date) for the CT in ADJ 10089970." (January 21, 2020 Minutes of Hearing, Order of Consolidation, and Summary of Evidence (Minutes), at 3:6; 3:21.)

Applicant testified to having worked for defendant from March, 1979 through June, 2013. (Minutes, at 7:14.) Applicant's job title of Inventory Control Specialist required that he keep inventory of the product, work with a computer, and move product around the warehouse with a truck, pallet jack or forklift. (*Id*. at 7:18.) Applicant also drove a "ten-wheeler" tank truck, and would make deliveries to various customers. When he arrived at a location, he would pull the hose out, check the tank, and pull the hose up to the ladder to fill the tank. (*Id*. at 8:12.) Applicant's injury of August 9, 2012 arose while applicant was moving a hose over his head and felt a "pop" in his neck. (*Id*. at 8:18.) Applicant sought medical treatment, and was restricted from performing any "heavy stuff." (*Id*. at 9:9.) Applicant was assigned to work at a different facility performing maintenance duties, and continued to lift smaller items, but performed no heavy lifting or overhead work. (*Id*. at 11:19.) Applicant continued working until approximately June 20, 2013, when one of the owner's sons called him to the office and asked for applicant's phone and keys. (*Id*. at 9:20.)

No explanation was provided to applicant for this action, and applicant did not return to work thereafter.

The WCJ issued the F&A on April 29, 2020, finding in pertinent part that in ADJ10089970, applicant sustained injury AOE/COE as of June 12, 2015 and that no additional temporary disability from June 21, 2015 to May 25, 2016 was due. In ADJ10089970, the WCJ determined that the injury caused permanent partial disability of 50%, and that the reports of applicant's vocational expert Mr. Diaz were not substantial evidence. Finally, the WCJ deferred the issue of reimbursement for the vocational expert reporting.

Applicant's petition avers the correct ending date "for purposes of deleterious exposure" is August 9, 2012, and that applicant was entitled to temporary total disability through the permanent and stationary date of May 15, 2016. (Applicant's Petition at 6:6; 7:2.) Applicant further contends the reporting of vocational expert Mr. Diaz, as endorsed by QME Dr. Colman, establishes applicant's total and permanent disability, and that the reporting costs of Mr. Diaz are reimbursable litigation expenses. (*Id*. at 9:1; 14:7.) Finally, applicant contends that in addition to permanent and total disability in ADJ10089970, applicant is further entitled to the 52% permanent disability awarded as a result of the specific injury of August 9, 2012. (*Id*., at 15:15.)

Defendant's petition avers the WCJ awarded indemnity resulting from the cumulative trauma injury in ADJ10089970 at 2015 rates. (Defendant's Petition at 2:22.) Defendant does not dispute the awarded permanent disability percentage, but contends the indemnity rates should be awarded at 2013 rates, corresponding to the last date of the claimed cumulative trauma. (*Id*. at 3:1.)

The WCJ's report notes that in the claimed cumulative trauma claim of ADJ10089970, the F&A identified a Labor Code section 5412 date of injury of June 12, 2015, while the period of liability for purposes of section 5500.5 was June 21, 2012 through June 20, 2013.[1] (Report, at p. 4.) The Report observes that permanent disability indemnity rates are fixed by the date of injury under section 5412, rather than the date of last injurious exposure under section 5500.5. (*Ibid.*) The Report further notes that the claimed period of temporary disability from June 21, 2015 to May 25, 2016 arose out of the QME's request for weight-bearing x-ray studies of the bilateral knees. (*Ibid.*) The Report explains that applicant's vocational reporting was not substantial evidence because of its reliance on impermissible factors such as age and work restrictions not

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

otherwise established in the medical record, and because the reports were based on speculation and conjecture. (*Id*. at p. 7-8.) Finally, the Report observes that the issue of reimbursement for the vocational reporting has not been decided, and that the record should be developed to further address defendant's liability for medical-legal expense reasonably, actually and necessarily incurred. (Report, at p. 10; Lab. Code § 4621.) Accordingly, the WCJ recommends both applicant's and defendant's petitions be denied. (Report, at p. 11.)

DISCUSSION

I

Applicant's petition contends the last date of injurious exposure was August 9, 2012, the date of the specific injury, rather than applicant's last day worked of approximately June 20, 2013. (Applicant's petition at 6:6.) Applicant cites to the July 7, 2016 report of QME Dr. Colman who opined that the last date of deleterious exposure was August 9, 2012, because applicant worked with job modifications thereafter. (Ex. J17, report of QME John P. Colman, M.D., dated July 7, 2016.) Dr. Colman's initial report noted that following the specific injury of August 9, 2012, applicant was allowed to continue working modified duties that provided for no lifting and activities above shoulder level with respect to the left shoulder. (Ex. J21. Report of John P. Colman, M.D., dated May 13, 2015, at p. 3.) However, applicant's testimony in this regard regarding his job duties after August 9, 2012 has not been consistent. Applicant testified that he took on *additional* duties involving the maintenance at the fuel facility after another employee quit. (Minutes, at 11:20.) Applicant's trial testimony also confirmed his deposition testimony that he worked full duties from the date of injury until his last day worked on June 21, 2013. (Minutes, at 11:5.) Applicant then testified that "he does not really remember what he was doing between 8/9/12 and 6/20/13." (*Id*. at 11:19.) Applicant also testified that while his employer asked him not to lift things with his left arm, he "probably continued to lift things with his right arm," and was "probably favoring it." (*Id*. at 11:17.) On this record, we are not persuaded that the WCJ erred in determining that the period of injurious exposure extended through applicant's last day worked. (Lab. Code § 5313; § 5500.5.)

Additionally, the parties herein have raised the issue of whether vocational evidence was appropriately considered with respect to injuries occurring after January 1, 2013. (Minutes, at 3:22.) Applicant contends that irrespective of the last date of the cumulative trauma period,

vocational evidence is admissible to rebut the permanent disability rating schedule. (Petition, at 2:6.). We observe that the WCJ has fully considered all of the relevant vocational reporting as part of the F&A, and the WCJ's decision to weigh the vocational evidence is not challenged by either of the pending petitions for reconsideration herein.

Applicant's petition next contends applicant was temporarily disabled from June 21, 2015 to May 25, 2016. (Applicant's Petition, at 7:2.) We agree. QME Dr. Colman evaluated applicant on May 13, 2015, at which time he deemed applicant to be permanent and stationary with respect to the cervical spine and left shoulder injuries. (Ex. J21, report of QME John P. Colman, M.D., dated May 13, 2015, p. 34.) The QME deferred final opinions regarding the right knee injury pending receipt of additional diagnostic studies of the bilateral knees. (*Id*. at p. 33.) The parties submitted the requested diagnostic studies, and on May 25, 2016 the QME addressed causation, and quantified both impairment and apportionment regarding the right knee. (Ex. J18, report of QME John P. Colman, M.D., dated May 25, 2016, p. 10.)

It is well established that an injured worker may be entitled to temporary disability indemnity during the periods of diagnostic testing recommended by an evaluating physician (*Calif. Cas. Gen. Ins. Co. v. Workers' Comp. Appeals Bd. (Farbotnik)* (1995) 60 Cal.Comp.Cases 108 [60 Cal.Comp.Cases 108] (writ denied); *County of Ventura v. Workers' Comp. Appeals Bd.* (Harris) (1982) 47 Cal.Comp.Cases 1233 [1982 Cal. Wrk. Comp. LEXIS 4428] (writ denied); *Brown v. Industrial Acc. Com.* (1941) 44 Cal.App.2d 6 [6 Cal.Comp.Cases 103]), even when the testing results ultimately demonstrate that the injured worker's symptoms are not related to the industrial injury. (*Twentieth Century Fox Film Corp. v. Workers' Comp. Appeals Bd. (Shansey)* (1982) 47 Cal.Comp.Cases 102 (writ denied); *Gray v. Applied Materials*, September 29, 2003, OAK 265491, OAK 2654922003 [2003 Cal. Wrk. Comp. P.D. LEXIS 330].)

Here, the QME requested diagnostic testing on May 13, 2015, and again on September 11, 2015. (Ex. J19, Report of QME John P. Colman, M.D., dated September 11, 2015, p. 1.) The requested testing was finally submitted to the QME in connection with his May 25, 2016 evaluation. On this record, we find applicant entitled to temporary disability during the pendency of the requested diagnostic testing, from June 21, 2015 to May 25, 2016.

Next, applicant contends the vocational evidence constitutes substantial evidence. Applicant avers the reports of vocational expert Mr. Diaz reflect a comprehensive understanding of applicant's vocational history, transferable job skills, and prospects in the open labor market.

(Applicant's Petition at 9:12.) Mr. Diaz concluded that applicant had incurred a one hundred percent loss of labor market access. (*Id*. at 9:20.) When asked to review the reporting of Mr. Diaz, QME Dr. Colman opined that "based on the criteria provided by Mr. Diaz, it would appear that it is medically probably [applicant] has sustained an impairment that makes him 100% unable to compete in the open labor market." (Ex. J8, report of John P. Colman, M.D., dated September 21, 2018, at p. 2.) Applicant notes that Mr. Diaz's reporting concluded that neither applicant's prior injuries nor his age contributed to his total loss of labor market access. (Ex. A8, report of Diaz & Co., dated March 20, 2019; Ex. A7, report of Diaz & Co., dated June 13, 2019.) Applicant contends the reporting of Mr. Diaz is substantial evidence because it appropriately used applicant's job history in determining his transferable skills, and because Mr. Diaz's opinion reflected his expertise in vocational retraining, and was not a medical opinion. (Report, at 13:12.)

An injured worker may rebut the permanent disability rating schedule by offering vocational expert testimony showing 100 percent loss of earning capacity. (*Acme Steel v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 1137, 1142 [78 Cal.Comp.Cases 751]; *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1267 [76 Cal.Comp.Cases 624].) However, "employers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565].)

We agree with the WCJ's Report, which observes that Mr. Diaz limited his analysis of applicant's transferable job skills to those jobs applicant has previously performed, "without truly considering what transferrable skills he could bring to other jobs within his limitations." (Report, at p. 7.) Additionally, the conclusions reached in the reporting are based on Mr. Diaz's non-medical opinion that "were it not for arduous work he performed throughout his entire career, in all vocational probability, the specific injury of August 9, 2012 may not have occurred." (*Id*. at p. 8.) The WCJ's report concludes:

> In terms of amenability to rehabilitation, Mr. Diaz concludes that applicant does not possess the stamina to endure a forty-hour workweek. He also stated that applicant's ability to learn is severely limited by age, pain, and back spasms. (Appl's Ex. A-9, at pp. 25-26.) Mr. Diaz states that applicant may be able to participate in some vocational training programs. "He may be able to take classes online or actually appear and participate in classes. However, his ability to learn is significantly impaired as a result of his age and the fact that the

> majority of his work for over thirty (30) years is that of a semi-skilled worker." (Appl's Ex. A-9, at p. 26, Method #5.) Applicant would require accommodations. But, Mr. Diaz concludes that even if he were to complete a vocational training program, he does not believe applicant will be able to compete in the open labor market. (Ibid.) Mr. Diaz' opinions were not followed, because they are based on speculation, conjecture, and guess and do not constitute substantial evidence. (Report, at p. 9.)

The vocational expert specifically premised his initial opinions of non-feasibility for vocational retraining on applicant's age, pain and back spasms (Ex. A9, report of Diaz & Co., dated August 23, 2018, p. 2.) However, as is noted by the WCJ, the body part of low back has not been identified as industrially related in the medical-legal reporting, and may not in turn form the basis of a determination of work-related vocational disability. (*Id*. at p. 3.) Additionally, the work restrictions utilized by Mr. Diaz in determining applicant's transferable job skills include restrictions not identified in the relevant medical-legal reporting. (*Id*. at p. 23; see also Ex. J10, report of John Colman, M.D., dated December 20, 2017, at p. 6.) Because the conclusions reached by applicant's vocational expert rest on nonindustrial body parts and work restrictions not identified in the medical record, the resulting reporting is not substantial evidence. (*Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal. App. 4th 1137 [78 Cal.Comp.Cases 751]; *Lentz v. Workers' Comp. Appeals Bd.* (2013) 78 Cal.Comp.Cases 1003 [writ den.].)

Applicant further contends that the WCJ erred in deferring the issue of reimbursement for the costs associated with obtaining vocational reporting. However, while applicant may be reimbursed for medical-legal expenses that were reasonably, actually, and necessarily incurred, "such determination will also be made on a case by case basis." (*Costa v. Hardy Diagnostic* (2007) 72 Cal.Comp.Cases 1492, 1493 [2007 Cal. Wrk. Comp. LEXIS 346].) While we agree with applicant that such medical-legal costs, "may be reimbursable even though the applicant is unsuccessful in his or her claim," we find no error in the WCJ's decision to defer the issue pending development of the record. (F&A, Findings of Fact No. 18.) We observe that following development of the record the WCJ will render a decision on the issue, from which any aggrieved party may thereafter seek reconsideration.

II

Defendant's Petition observes the WCJ found the last date of the cumulative trauma to be June 20, 2013. Defendant contends the WCJ erred in awarding permanent disability indemnity at

rates applicable to a 2015 date of injury, rather than rates applicable to a 2013 date of injury (i.e., the end date of the cumulative trauma). (Defendant's Petition at 2:23.)

The WCJ found the date of injury for applicant's cumulative injury to be June 12, 2015. (F&A, Findings of Fact No. 2.) Contrary to defendant's assertion, we observe that the appropriate permanent disability indemnity rate is the rate in existence when the right to claim benefits arises, i.e., the date of injury pursuant to section 5412. (*Argonaut Mining Company v. Industrial Acc. Com.* (Gonzalez) (1951) 104 Cal.App.2d 27 [16 Cal.Comp.Cases 118] ["When the right comes into existence certain rates are applicable. It would seem that these are the rates by which compensation should be payable."]; see also *Dickow v. Workmen's Comp. Appeals Bd.* (1973) 34 Cal.App.3d 762 [38 Cal.Comp.Cases 664]; *Wirth v. State of California Highway Patrol* (October 13, 2013, ADJ6622799) (panel dec.).) Accordingly, it was appropriate for the WCJ to rely upon the section 5412 date of injury as the date for the measure of compensation, consistent with the above cited cases. (See also, *Charlotte Hornets v. Workers' Comp. Appeals Bd.* (Smith) (2018) 83 Cal.Comp.Cases 1444 [2018 Cal. Wrk. Comp. LEXIS 68] (writ den.) [section 5412 date of injury used to determine permanent disability indemnity rate instead of permanent and stationary date]; *Solar Turbines, Inc. v. Workers' Comp. Appeals Bd.* (Gurfinkel) (2007) 72 Cal.Comp.Cases 519 [2007 Cal. Wrk. Comp. LEXIS 96] (writ den.); *Fisher v. Orlando Rage XFL* (ADJ8873756, March 28, 2016) (panel dec.); *Paddio v. Cleveland Cavaliers* (October 1, 2018, ADJ7041227) [2018 Cal. Wrk. Comp. P. D. LEXIS 489].) Accordingly, we decline to disturb the WCJ's findings regarding applicable indemnity rates.

In summary, we will amend the award of temporary disability because applicant was entitled to ongoing temporary disability while awaiting diagnostic testing requested by the QME. However, we agree with the WCJ that the reporting of applicant's vocational expert is not substantial evidence, and will thus affirm the WCJ's findings with respect to permanent disability, as well as the deferral of litigation costs. We further decline to disturb the award of benefits in ADJ10089970 at 2015 indemnity rates.

For the foregoing reasons,

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 29, 2020 Findings, Award and Orders is **AFFIRMED**, except that is **AMENDED** as follows:

JOINT FINDINGS OF FACT

12. Applicant is entitled to temporary total disability at the weekly rate of $908.29 per week for the period June 21, 2015 to May 25, 2016, less credit for sums previously paid, if any.

AWARD
IN ADJ10089970

a. All further medical treatment reasonably required to cure or relieve from the effects of the injury herein.
b. Temporary disability at the weekly rate of $908.29 for the period of June 21, 2015 to May 25, 2016, less credit for sums previously paid, if any.

c. Permanent disability indemnity in the amount of $78,662.50, payable beginning June 21, 2015 and continuing for 271.25 weeks at the weekly rate of $290.00 until paid in full, less credit for sums paid on account thereof, and less $11,799.38 for attorney's fees payable to The Law Office of Redula & Redula, whose lien is hereby allowed. Attorney fees may be commuted from the far end of the award, if necessary, in order to avoid interruption of benefits.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 7, 2022

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

MICHAEL SEFICK
REDULA & REDULA
YRULEGUI & ROBERTS
OFFICE OF THE DIRECTOR-LEGAL UNIT

SAR/abs

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