

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

RANDALL MALINOFF, *Applicant*

vs.

WIZARD WORLD, INC.; ZURICH AMERICAN INSURANCE, *Defendants*

**Adjudication Number: ADJ10997880
Van Nuys District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of June 20, 2023, wherein it was found that while employed during a cumulative period ending July 5, 2017 as a chief operating officer, applicant sustained industrial injury to his heart, psyche and hemorrhagic system causing permanent disability of 75% and the need for further medical care. It was also found that "Defendant is entitled to credit for reimbursement to EDD in the amount of \$60,996," and that "The value of Applicant's attorney's services is assessed at 15% of the permanent disability set forth above."

Applicant contends that (1) the WCJ erred in finding only 75% permanent disability arguing that applicant's psyche permanent disability should not have been limited by the provisions of Labor Code section 4660.1(c) and arguing that applicant should have been found to have sustained permanent disability for aggravation of his hypertension, (2) defendant should not have been given full credit for reimbursement of the EDD lien, and (3) not specifying the exact attorney fees due to applicant's attorney, including an estimate of future cost of living increases pursuant to Labor Code section 4659(c). We have not received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

In a Report of May 6, 2023, Dr. Grodan wrote:

I should also emphasize that my answers in my depositions were frequently to the hypothetical questions about hypertrophy. I noted in the July 31, 2021 report that the July 2021 echocardiogram was technically poor quality and the only resolution of that issue would be to request Cedars if they can calculate the left

ventricular mass from the MRI performed in December 2019; if not available, then another MRI should be done specifically requesting the assessment of measurement of the ventricular wall, septum, and lateral wall as well as obtaining the left ventricular mass information. The measurement should correlate with the mass in documenting hypertrophy. If that is documented in the MRI then my discussion of going from 20% to 30% in Class 3 would stand. If the MRI documents absence of hypertrophy, then there would be only a 10% Whole-Person impairment with absence of industrial aggravation.

(May 6, 2023 report at p. 5.)

In the Petition, applicant states that he is willing to undergo further magnetic resonance imaging. (Petition for Reconsideration at p. 6.)

We will therefore grant reconsideration and amend the WCJ's decision to defer the issue of permanent disability pending further development of the medical record on the issue of applicant's hypertension impairment. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) We will otherwise affirm the WCJ's decision for the reasons stated by the WCJ in the Report, the relevant passages of which are quoted below (footnotes omitted)¹:

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

Applicant herein is a 57 year old Chief Operating Officer for the Defendant who has filed a timely and verified Petition for Reconsideration claiming that the undersigned erred in finding (1) that his hypertension was not caused by or aggravated by his employment, (2) by finding that his injury was not a catastrophic injury as defined by Cal. Lab. Code sec. 4660.1(c)(2)(B), and (3) the undersigned improperly determined EDD's entitlement to reimbursement from Applicant.

II. STATEMENT OF FACT

Mr. Malinoff was employed in a stressful employment as a COO for the Defendant working long hours including weekends with very stressful demands. He also experienced significant stressors with co-employees. He had been

¹ In footnote 1 of the Report, the WCJ notes that concurrently with the Report, he issued a commutation specifying the exact amount of the attorney's fee awarded. In any case, since an award of permanent disability is deferred, attorneys' fees based on that award is also necessarily deferred.

employed since approximately 2000 in various businesses outlined by Dr. Grodan's initial report (Ex. X-1, pp.2-6). He entered a two-year employment contract with the Defendant to act as COO.

The medical history reveals a lifelong diagnosis of hypertension.

In or around January 2017 he suffered what was either a stroke or TIA at home from which he professed a full recovery (Ex. X-1, p.3).

From the records it appears that he suffered a heart attack in March 2017 for which he was in the hospital 2 days and stents were installed (Ex. X-2, p.4). He continued to work until May 2017 when he was terminated by the Defendant (Ex. X-1, p.3). According to the history given to the QME, there was a meeting with the employer on 5/23/2017 when they tried to "buy out" his two-year contract. It was not successful; so apparently, he was then terminated on 5/30/2017. There was apparent litigation over this termination of employment with Applicant claiming a breach of contract (Ex. Y-2, p.9). The litigation came out in Applicant's favor, but the lawsuit lasted a year through November 2018.

After termination of employment formally in July 2017 the Applicant found employment in September 2017 through a company in Miami called Happenings. He then found further work with a partner in an organization called Glow Media Agency where he continued to work as a consultant through May 2018 (Df. Ex. A).

The parties selected Dr. Paul Grodan as the PQME in internal medicine. His initial report showed a very stressful work environment (Court's Ex. X-1). But the doctor had no records, so he could not finalize his analysis. After reviewing a voluminous file Dr. Grodan declared Applicant to be P&S in Ex. X-2 (12/9/2018). The factors were 20% wpi for coronary artery disease as described in Ch. 3 of the AMA Guides. He apportioned 20% to non-industrial factors most of which was pre-existing hypertension that was often out of control, obesity and a previous bout with cancer. He felt the patient had a 10% wpi for hypertension as described in Ch.4 of the AMA Guides, but that the detailed medical file demonstrated pre-existing hypertension. Hence hypertension was not work-related since his blood pressure was worse before his employment.

The doctor found (based on cardiac MRI's) that there was no left ventricular hypertrophy which would have been related to chronic hypertension (Ex. X-2, p. 27). He recommended a neurological and a psychological consult.

Throughout 2017 to 2019 the Applicant was treated for his heart condition by a Dr. Simonini who provided EDD with disability slips (EDD Exs. 1 to 4). Hence EDD provided temporary disability benefits from 7/12/2017 through 7/12/2018 (\$60,996).

There was an incident in November 2019 that required angiogram and repeat MRI (Ex. 7, Simonini, p3; Ex. 5, Shah). There is no evidence that further stenting was done, but he was in the hospital 2 days. In testimony this was described as another heart attack.

The patient was seen again by Dr. Grodan on 6/28/2021. He found no changes in the condition (20% wpi for CAD).

Dr. Grodan did recommend a psychiatric consult which resulted in Dr. Joshua Pretzky acting as QME (Ex. Y-2). He diagnosed ratable depression with anxiety. There is no doubt at all that the depression and anxiety were caused by the patient's concern for his heart condition. In fact, virtually the entire report from Dr. Pretzky only leads to that conclusion. However, at the end of the report he comments that much of the unreliable results on the MMPI testing stem from Applicant's response to the employment stress *per se*. Consequently Dr. Pretzky concludes that a portion of the impairment (1/3) is the result of work stress *per se*. The remaining impairment (2/3) is a compensable consequence of the heart injury. (Ex. Y-2).

Dr. Grodan also found 5% wpi due to hemorrhagic disorder due to the constant use of Plavix which causes a potential blood clotting risk (Ex. X-9, p21).

After trial on 12/7/2022 the undersigned issued a formal rating utilizing the above ratings and apportionment. Only 1/3 of the psychiatric impairment was allowed under Cal. Lab. Code sec. 4660.1(c)(1).

The Applicant filed a timely objection to the formal rating pointing out that one single question in Dr. Grodan's deposition of 10/28/2022 (Ex. X-8) at p. 31 increased the impairment for CAD from 20% wpi to 40% wpi. Upon reviewing that evidence, the undersigned vacated the formal rating. The parties were instructed to develop the record on this issue since Dr. Grodan had not explained this rather sudden and unsupported substantial increase.

The parties procured the supplemental report from Dr. Grodan dated 5/6/2023 (Ex. X- 11). In that report Dr. Grodan reviewed his records and supported his opinion that the deterioration of the patient's condition warranted a Class III rating for CAD or 40% wpi. Based thereon the undersigned procured a new formal rating from the DEU after which the Findings and Award herein was issued on 6/20/2023.

The undersigned rejected apportionment of the hemorrhagic dysfunction since the dysfunction was a direct result of the use of Plavix caused by the work injury. Hence under *Hikida v. WCAB* (2017) 12 Cal. App. 5th 1249, 82 CCC 679 apportionment was rejected. The undersigned found apportionment on the CAD per Dr. Grodan's analysis.

Per Dr. Grodan's finding the undersigned employed the *Kite* rule by simply adding the psych component with the heart and hemorrhagic component. The heart and hemorrhagic components were combined using the CVC.

The undersigned awarded temporary disability as claimed by Applicant for the period 7/12/2017 to 7/10/2018. EDD paid for that entire period. Consequently, Finding of Fact #9 allows Defendant full credit against the temporary disability for what they have to pay EDD (less interest).

However, Applicant worked during that period while he collected EDD benefits at the same time. So, while EDD is entitled to full reimbursement, Defendant is entitled to credit for the period of time worked during that period. Hence Findings of Fact # 10 allows the Defendant credit for those days worked.

Applicant now files a Petition for Reconsideration claiming that all the psychiatric impairment should be awarded because the injury constitutes a catastrophic injury as envisioned by Cal. Lab. Code sec. 4660.1(c)(2)(B). Secondly, Petitioner claims that a separate impairment for hypertensive heart disease should be awarded. Thirdly, Petitioner claims that credit should not be given to Defendants even though Applicant worked and earned income while receiving EDD benefits.

III. DISCUSSION

Catastrophic Injury

Cal. Lab. Code sec. 4660.1 defines permanent disability. Subsection (c)(1) states:

“Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase....”

Paragraph (2) reads:

“An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

...

(B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury.”

The leading case interpreting the obviously vague expression “but not limited

to,” is *Wilson v. State of California* (2019) 84 CCC 393, en banc. Since clearly the injury herein does not involve any of the specific mechanisms of injury set forth in (c)(2)(B) it becomes necessary to evaluate the nature of the injury on a case-by-case basis to determine if it “catastrophic.”

The first and most important aspect is to realize that the injury must be catastrophic absent any consideration for the psychiatric impairment per se. So, it is only the physical injury that can lead to a finding of catastrophic injury.

Secondly it must be determined if the psychiatric component was a compensable consequence of the physical injury which would invoke subsection (c)(2), or is it a direct injury from work. In this case Dr. Pretzski has found very specifically that 2/3 of the psychiatric impairment is a compensable consequence of the physical heart injury.

The *Wilson* case goes on to suggest that the nature of the physical injury should include questions of (1) the intensity and seriousness of the treatment, (2) the ultimate outcome, (3) the severity of the impact on activities of daily living, (4) whether the injury is closely analogous to the losses specified in the statute, and (5) is the disease incurable and progressive?

Mr. Malinoff continued to work for almost a year after he was fired from his job with the Defendant during which time he engaged in civil litigation against them. His treatment involved three brief hospitalizations for stent placement. His “disability” as set forth by Dr. Grodan precludes heavy lifting and avoidance of emotional stress. The heart condition is incurable, and (as all heart attacks can be) it certainly can be life threatening. But it is not progressive. It also does not analogize to any of the losses set forth in the statute.

There is no doubt at all that the treatment and the status of any patient post MI is going to lead to some emotional factors as Dr. Grodan and Dr. Pretzsky noted. But the diagnosis alone does not equate to a “catastrophic” injury under subsection (c)(2)(B). The patient may have received temporary disability for a year post injury based on his treating physician’s notes. But in fact, he was working most of that time.

Based on all the factors, it is the undersigned’s finding that the physical injuries herein do not equate to a catastrophic injury, and hence the permanent disability that Dr. Pretzky found that was caused by the heart condition is not awardable under sec. 4660.1(c). The remaining 1/3 is awardable as a direct result of work.

Hypertensive Heart Disease

[Discussion omitted.]

EDD Credits and Credits to Defendant

The Petitioner takes the position that Applicant's earnings while working at the same time that he is also receiving EDD benefits should not be credited against his award. The Applicant was found to be temporarily totally disabled while being treated by Dr. Simonini from 7/12/2017 to 7/12/2018. Petitioner does not appeal this finding of fact.

EDD paid all of that. Since temporary disability is payable at the maximum rate in force in 2023 (Cal. Lab. Code sec. 4661.5) EDD will be entitled to full reimbursement with the difference payable to Applicant. Defendant was awarded credit for all payments to EDD against Defendant's liability for temporary disability. Petitioner does not appeal that finding (Finding of Fact #9).

However, Applicant's employment while temporarily disabled clearly entitles the Defendant to a credit against permanent disability (Findings of Fact #10). The Applicant is not entitled to double recovery. Petitioner claims in his petition that he earned only \$29,942.57 during that time. Ex. A suggests earnings were significantly greater. That credit is an amount that the parties will have to determine. The award left that matter to the parties to calculate. As a maximum earner it will be necessary for the parties to determine days worked and base the credit on that information.

However, there is no legal basis for Petitioner's claim that credit for working while on temporary disability is not repayable or credited against an award.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award of June 20, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of June 20, 2023 is **AMENDED** as follows:

FINDINGS OF FACT

1. Randall Malinoff, age 58 on the date of injury, while employed during the period 11/1/2016 through 7/5/2017, as a Chief Operating Officer, Occupational Group # 110, at Los Angeles, California, by Wizard World, Inc., sustained injuries arising out of and in the course of his employment to his heart, psyche and hemorrhagic system.

2. The issue of injury in the form of hypertension is deferred with jurisdiction reserved.

3. The employer's workers' compensation carrier at the time of the injury was Zurich American Ins. Co.

4. At the time of the injury the employee's earnings were maximum for all purposes.

5. The injury caused temporary disability for the period 7/12/2017 to 7/12/2018 payable at maximum rates.

6. The issue of permanent and stationary date is deferred with jurisdiction reserved.

7. The issue of permanent disability is deferred, with jurisdiction reserved.

8. The EDD lien is allowed in its entirety plus interest per Cal. UIC sec. 2629.1.

9. The Defendant is entitled to credit for reimbursement to EDD in the amount of \$60,996.

10. Defendant is entitled to credit for all days worked during the period of temporary disability set forth above.

11. The injury caused a need for future medical care.

12. The issue of attorney's fees is deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of RANDALL MALINOFF against ZURICH AMERICAN INS CO. of:

1. Temporary disability as set forth in Paragraph 5 above,

2. Future medical care as set forth in Paragraph 11 above,

ORDERS

1. The EDD lien is allowed in its entirety as set forth in Paragraph 8 above,
2. The Defendant is entitled to credits against permanent disability as set forth in Paragraphs 9 and 10 above,

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 28, 2023

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

**RANDALL MALINOFF
GOLDSCHMID, SILVER & SPINDEL
ROBERT SLATER
GLASS LAW GROUP
MULLEN & FILIPPI
EDD**

DW/oo

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