WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT COLE, *Applicant*

vs.

ENTERPRISE ELECTRIC and CIGA, by its servicing facility INTERCARE, for SUPERIOR NATIONAL INSURANCE COMPANY, in liquidation, *Defendants*

Adjudication Number: ADJ5317442
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and Opinion on Decision, which are both adopted and incorporated herein, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 22, 2023

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

ROBERT COLE
RUCKA OBOYLE
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP

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I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendant filed a timely, verified Petition for Reconsideration of the undersigned's 4/6/23 Findings and Award. (EAMS Doc ID: 46138922.) Applicant filed an Answer on 5/4/23. (EAMS Doc ID: 46233440.)

II
FACTS

Applicant, while employed on 2/27/95 as an electrician, by Enterprise Electric, sustained injury arising out of and in the course of employment to his bilateral knees and back. The claim is covered by CIGA, by its servicing facility Intercare, for Superior National Insurance Company, in liquidation.

Applicant filed an application on 5/21/19, alleging a cumulative trauma injury through 5/30/10 to his low back and knees occurred while employed as an electrician by JM Electric. (ADJ12217508, EAMS DOC ID: 70207009.) Said Application was dismissed for lack of jurisdiction, pursuant to Labor Code section 3201.5. (EAMS DOC ID: 74241980.)

On 1/5/22, in response to Defendant's first Petition for Reconsideration, the court rescinded its 11/29/21 Findings and Award of 88% PD and life pension and ordered the parties to develop the record on the issues of the existence of a cumulative trauma, permanent disability, and apportionment. (EAMS DOC ID: 75047375.) Thereafter, the parties conducted additional discovery and attended four hearings before again setting the matter for trial. At trial, QME Dr. James Mays' two newest supplemental reports, dated 7/18/22 and 9/22/22, were admitted into evidence. (Minutes of Hearing, 1/18/23 Trial, p. 3, Joint Exs. J-8, J-9.)

On 4/6/23, the court awarded Applicant 73% PD and a life pension, without applying apportionment to the alleged CT through 5/30/10 in ADJ12217508. Defendant disputes the Award of 73% "on the grounds that there has been a failure to consider apportionment and overlapping factors of disability as well a failure to explain in detail the reasons/grounds upon which the determinations were made as required pursuant to Labor Code 5313." (Deft's Pet., supra, p. 2.) In determining PD, the court did consider overlap between the body parts in determining the rating. The court also found that good cause was not shown to justify additional discovery to develop the record. (F&A, 4/6/23.)

III
DISCUSSION

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego* v. *W.C.A.B. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ

den.); *Smales v. W.C.A.B.* (1980) 45 Cal.Comp.Cases 1026 (writ den.).) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

Contrary to Defendant's assertions, the undersigned did consider apportionment and overlapping disability. "… [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshall* (2005) 70 Cal. Comp. Cases 604, 621 (en banc).)

Dr. Mays acted as the parties' QME for nine years and issued at least nine reports. (Joint Exs. J-1 through J-9.) In his first report, dated 6/25/13, Dr. Mays determined that the applicant "sustained a traumatic injury to his right knee" while employed by Enterprise Electric. The applicant continued working until retirement. In February 2013, he suffered an exacerbation of his injury." He further stated that no apportionment was indicated. (Joint Ex. J-6: QME Report, James Mays, M.D., 6/25/13, p. 7.)

In his 10/18/13 report, Dr. Mays indicated, "there were no medical records or treatment for Mr. Cole's right knee since February of 1997." In his opinion, "the employment in the last 18 years had no aggravating incidence. This examiner feels that this is a normal progression of the original work injury of 1995." (Joint Ex. J-7: QME Report, James Mays, M.D., 10/18/13, p. 2.)

In his 5/9/18 report, Dr. Mays reiterated that the applicant suffered a traumatic injury to his right knee with an exacerbation in February 2013. He also found that the applicant's left knee injury was a compensable consequence of the applicant's antalgic gait. He further concluded that the applicant's lumbar injury was a compensable consequence of the antalgia of his lower extremities. Dr. Mays again stated that no apportionment was indicated. (Joint Ex. J-5: QME Report, James Mays, M.D., 5/9/18, pp. 6-7.)

In his 11/14/18 report, Dr. Mays mentions his own "undated supplemental report" wherein he addressed a CT injury to the knees from 1995 until 2010. This undated supplemental report was never provided to the court. Dr. Mays indicated agreement that there was a CT and "is apportioning 69% to Enterprise Electric and 31% to J&M Electric." (Joint Ex. J-4: QME Report, James Mays, M.D., 11/14/18, p. 2.)

In his 11/11/20 report, Dr. Mays stated that the medial compartment traumatic arthritis finding in the applicant's left knee was due to his favoring of his right knee, as well as his work of "bending, squatting, kneeling, climbing ladders." Dr. Mays again stated that the applicant sustained a specific injury to his right knee on 2/27/95 with a February 2013 exacerbation. Again, apportionment is not indicated. (Joint Ex. J-2: QME Report, James Mays, M.D., 11/11/20, pp. 7-8.)

In his 1/15/21 report, Dr. Mays stated, "The impairment and the medical treatment apportionment is 69% to Enterprise Electric and 31% to J&M Electric as noted in the supplemental report by James D. Mays, MD on November 14, 2018." (Joint Ex. J-1: QME Report, James Mays, M.D., 1/15/21, p. 2.)

In his 7/18/22 report, Dr. Mays indicated that apportionment of disability "is dictated by work time with employers. 69% is apportioned to enterprise and 31% is apportioned to JM." Within reasonable medical probability, Dr. Mays believed that Applicant's "work activities of walking, lifting, bending, kneeling, climbing ladders, using hand tools, and lifting up to 70 pound[s] multiple times throughout a day are the causes for the injury." Dr. Mays agreed that a CT claim contributed to the need for treatment. (Joint Ex. J-8: QME Report, James Mays, M.D., 7/18/22, pp. 2-4.)

Finally, in his 9/22/22 report, in response to a letter from Defendant's counsel, Dr. Mays then opined, "Reviewing the medical records available indicates that Mr. Cole did not have sufficient medical attention to his right knee prior to the 2013 re-injury, therefore apportionment is inappropriate." (Joint Ex. J-9: QME Report, James Mays, M.D., 9/22/22, p. 2.)

Although the CT claim is not before this court for final determination, the existence of a CT is still key to the apportionment question. Although Dr. Mays stated on several occasions that there was a CT, the court determined that no CT was established. Therefore, no apportionment to the alleged CT to 5/30/10 applies. Defendant failed to meet its burden of proof on this issue.

Labor Code § 3208.1 defines a cumulative injury as "occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." Section 3208.1 also requires that "The date of a cumulative injury shall be the date determined under Section 5412." Labor Code section 5412 provides, "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

The *Rodarte* case clarifies the issue of when a date of injury is established under Section 5412. In the *Rodarte* case, the Court of Appeal stated,

> "When the issue is not simply application of section 5412 for statute of limitations purposes but rather apportionment of liability pursuant to section 5500.5, the Board has further confused the issue by apportioning liability based on when the right to file a claim accrues under section 3208.1, and ignoring the disability requirement of section 5412. (See *American Bridge Co. v. WCAB* (1995) 60 Cal. Comp. Cases 869 [writ denied] [date of injury was when need for medical treatment arose]; and *Travelers Property Casualty v. WCAB (Wright)* (2000) 65 Cal. Comp. Cases 884 [writ denied] [finding need for treatment constituted cumulative injury, citing section 3208.1.)
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> But on facts similar to those in the present case, in *Allianz Ins. Group v. WCAB* (*Hinojosa*) (1994) 64 Cal. Comp. Cases 83 [writ denied], the Board found a date of injury based on permanent disability to have occurred when the injured worker sought medical treatment for carpal tunnel syndrome and was supplied with wrist splints to wear at work. The Board noted that the employee had suffered from the condition for one and one-half years without missing any work time. It cited *Zenith*

> *Ins. Co. v. WCAB* (1998) 63 Cal. Comp. Cases 495 [writ denied], which recorded a similar result citing *Chavira*." (*State Fund v. WCAB (Rodarte)* (2004) 69 Cal. Comp. Cases 579, 583-584.)
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> The Court in *Rodarte* went on to hold: "In summary, we conclude that either compensable temporary disability or permanent disability is required to satisfy section 5412. Medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion. (*State Fund v. WCAB (Rodarte)* (2004) 69 Cal. Comp. Cases 579, 584.)

In this case, there is no evidence of disability caused by cumulative trauma. It appears that the applicant continued to work regular duties without mishap as an electrician until he retired from JM Electric in April or May 2010. There is no evidence in the record that the applicant retired due to an aggravation of his knee injury.

Per the record, there was very little treatment in the years after his 1995 injury; there is also no indication that the applicant's subsequent employment at JM Electric caused either temporary or permanent disability needed to establish a date of injury for section 5412. Treatment for the right knee accelerated only after the February 2013 exacerbation when the applicant's knee gave out while walking. Applicant required surgery on his right knee thereafter. By that time, the applicant had been retired from work for nearly three years.

Based upon the reporting of Dr. Mays, the undersigned found that Applicant sustained permanent partial disability of 73%, after considering overlap and duplication. The court rated Applicant's disability, as follows:

14.5-45-380I-54-56% (knees)
12.1-25-380H-30-32% (lumbar)
MDT = 73% PD

In his 11/11/20 report, Dr. Mays set forth factors of disability, as follows:

> The impairment using the 1997 PDRS for the lumbar spine is preclusion from heavy lifting and moderate pain and two bulging discs which would preclude heavy lifting or bending, which is a 25% impairment.
>
> The left knee pain being moderate to severe, limited range of motion, tender to palpation is a 45% whole person impairment.
>
> The right knee is a moderate to severe level of pain with restricted range of motion and pain with stairs, uneven ground and inclines and declines is a 45% whole person impairment. (Joint Ex. J-2, p. 8.)

In his 7/18/22 report, Dr. Mays indicated that pain and work preclusions for the knees would overlap. Therefore, the standard rating of 45% was utilized for both knees--the ratings were both

based on limited range of motion and moderate to severe pain. In the 7/18/22 report, Dr. Mays indicated that a preclusion from moderate lifting for the knees would be appropriate. Dr. Mays stated that any work preclusions assigned to the knees would also be subsumed/overlap with the lumbar work preclusions. (Joint Ex. J-8, pp. 4-5.) As the moderate lifting preclusion for the knees overlapped with the lumbar preclusion, this factor was not included.

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

ROISILIN RILEY
Workers' Compensation
Administrative Law Judge

Served 6/2/2023 on the following:

OPINION ON DECISION

On 1/5/22, the undersigned's 11/29/21 Findings and Award was rescinded, and the parties were ordered to develop the record on the issues of the existence of a cumulative trauma, permanent disability, and apportionment. Since that time, the parties have attended four hearings before setting the matter for trial again. Admitted into evidence were QME Dr. James Mays' two supplemental reports, dated 7/18/22 and 9/22/22.

Further development of the record with Dr. Mays is no longer possible, because Dr. Mays is no longer acting as a QME, per discussions with the parties and a search of the DWC QME database website. As a result, Defendant would like to obtain a QME panel to replace Dr. Mays to further address apportionment. Considering that Defendant has had years to develop the record on this issue, good cause does not exist to allow further development of the record.

Applicant's claim of cumulative trauma injury through 05/30/2010 in ADJ12217508 against a second employer, JM Electric, is not before the court for purposes of a final determination. On 5/27/21, the application was dismissed due to an ADR carve-out agreement.

Although that claim is not before this court for final determination, the existence of a CT is still key to the apportionment question. While Dr. Mays' opinions on apportionment were somewhat confused, the record is complete enough to determine that no CT has been established. Therefore, no apportionment applies.

Labor Code section 5412 states, "The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." It appears that the applicant continued to work regular duties without mishap as an electrician until he retired from JM Electric in April of 2010. Per the record, there was very little treatment in the years subsequent to his 1995 injury and left knee surgery; and, there is no indication that the applicant's subsequent employment at JM Electric caused either temporary or permanent disability needed to establish a date of injury for section 5412. Treatment for the right knee accelerated only after the February 2013 exacerbation when the applicant's knee gave out while walking. Applicant required surgery on his right knee thereafter. By that time, the applicant had been retired from work for nearly three years.

Based upon the reporting of Dr. Mays, Applicant sustained permanent partial disability of 73%, after considering overlap and duplication. Applicant is entitled to a life pension, at the initial rate of $30.75 per week, after 453.50 weeks of PD at $168.00 per week is paid. The last date of TD paid is unknown. PD should begin the day after the last TD payment.

The undersigned rated Applicant's disability as follows:

14.5-45-380I-54-56% (knees)
12.1-25-380H-30-32% (lumbar)
MDT = 73% PD

Applicant is in need of further medical treatment to cure and relieve the effects of the injury herein.

Applicant's attorney has rendered services the reasonable value of which is 15% of the PD and life pension awarded herein. The undersigned was not able to determine the exact fee from the life pension, because the parties did not provide any payment dates for benefits paid.

The parties may obtain a DEU commutation by completing a commutation request with all relevant information filled out for the undersigned's signature.

ROISILIN RILEY
Workers' Compensation
Administrative Law Judge