WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TYLOR BUNDY, *Applicant*

vs.

COUNTY OF SAN LUIS OBISPO, PERMISSIBLY SELF-INSURED; ADMINISTERED BY INTERCARE, *Defendants*

Adjudication Number: ADJ9708136
San Luis Obispo District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration (Petition). Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the January 20, 2020 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that there was good cause to reopen applicant's April 3, 2017 Award; that applicant was in need of future medical care to the hip; and that applicant was entitled to a permanent disability award of 14 percent.

Applicant contends that the reporting of applicant's vocational expert establishes a greater diminished future earnings capacity (DFEC) than is reflected in the WCJ's ratings, and that the cost of the vocational reporting should be allowed.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations in the 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 rescind

[1] Commissioner Sweeney, who was a member of the panel granting reconsideration to study the factual and legal issues in this case, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

the F&A and return the matter to the trial level for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant sustained injury to the left knee while employed as a Sheriff's Correctional Deputy on January 24, 2014. The parties entered into a stipulated Award at 14 percent permanent disability, approved by the WCJ on April 3, 2017.

On September 14, 2017, applicant accepted a "voluntary reduction" from his pre-injury position of "Correctional Deputy" to that of a "Correctional technician." (Ex. 1, Memorandum of Understanding, August 4, 2017, p. 1.)

On September 29, 2017, applicant filed a Petition to Reopen, averring the injury caused new and further disability "in that applicant needs further medical care and attention and may have additional permanent disability beyond that which has already been determined." (Petition to Reopen, September 29, 2017, at p. 1:17.) Applicant further averred that since the stipulated Award, he had suffered "increased diminished earning capacity." (*Id.* at p. 1:23.)

On January 10, 2018, applicant was reevaluated by Agreed Medical Evaluator (AME) Jeffrey M. Lundeen, M.D. (Ex. 6, Report of Jeffrey Lundeen, M.D., January 10, 2018.) The AME diagnosed a left knee anterior cruciate ligament tear and lateral meniscus tear with arthroscopic repair, and left hip trochanteric bursitis. Dr. Lundeen opined that, to a reasonable medical probability, applicant's left hip trochanteric bursitis condition was "a compensable consequence of [applicant's] left knee injury and left knee treatment." (*Id.* at p. 14.)

On July 19, 2018, applicant's vocational expert P. Steven Ramirez issued a "Vocational Feasibility Report," confirming applicant to be amenable to vocational rehabilitation. (Ex. 2, Report of P. Steven Ramirez, July 19, 2018, p. 7.) Mr. Ramirez further calculated applicant's pre- and post-injury wage capacity, utilizing applicant's post-injury position of "Correctional Technician II," as the basis for the post-injury earning capacity. The report concluded that applicant sustained a 36 percent reduction in his post-injury earning capacity. (*Id.* at p. 10.)

On June 4, 2019, Mr. Ramirez issued a supplemental report updating his calculations of applicant's diminished future earning capacity, resulting in an increase of applicant's estimated DFEC to 40 percent. (Ex. 9, Report of P. Steven Ramirez, June 4, 2019, p. 3.)

On October 15, 2019, defense vocational expert Ray C. Largo issued a "Forensic Disability Evaluation Report," confirming applicant's amenability to vocational rehabilitation, and estimating applicant's DFEC at 34.6 percent. (Ex. C, Report of Ray C. Largo, October 15, 2019, p. 25.)

On October 28, 2019, the parties proceeded to trial, framing issues of whether there was good cause to reopen applicant's prior award, new and further permanent disability, need for further medical care to the hip, attorney fees, and costs associated with the vocational reporting. (Minutes of Hearing and Summary of Evidence (Minutes), October 28, 2019, at p. 1:25.) Applicant testified, and the parties submitted the matter for decision.

On November 20, 2019, the WCJ issued his Formal Rating, in which the combined knee and hip disability described in the January 10, 2018 report of AME Dr. Lundeen yielded 14 percent permanent disability. (Formal Rating, November 20, 2019, p. 1.)

On January 20, 2020, the WCJ issued his F&A, determining there to be good cause to reopen applicant's Award (Finding of Fact No. 1), that there was need for future medical care to applicant's hip (Finding of Fact No. 2), that applicant's injuries including both the knee and hip injuries resulted in 14 percent disability (Finding of Fact No. 3), and that there was no basis for the award of attorney fees (Finding of Fact No. 4). In the accompanying Opinion on Decision, the WCJ noted that applicant's Petition to Reopen "essentially…asked the undersigned to rely upon the report of Mr. Ramirez for constituting good cause to reopen." (Opinion on Decision, p. 3.) The WCJ posited that applicant's knowledge of an impending pay differential when he agreed to the initial Award on April 3, 2017 precluded his subsequent argument that he was unaware of the degree to which his earnings would be impacted. (*Id.* at pp. 3-4.) The WCJ opined:

> It is also readily apparent that applicant knew beyond any doubt that he was going to continue to work for the county in different capacity. The only thing that might not have been known but was certainly readily ascertainable was the percent of applicant's pay cut. These facts and their significance were certainly known and indeed, applicant was seeking an accommodation so he could continue at his former pay rate which was certainly not forth coming. It simply doesn't constitute grounds for reopening the case, in reality, as a matter of law.
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> (Opinion on Decision, p. 4.)

Applicant's Petition avers applicant requested an interactive accommodation process two days prior to the issuance of the April 3, 2017 Award, and that it was not until after the issuance

of the Award that the employer and applicant agreed to a permanent accommodation with a reduction in pay. (Petition, at p. 2:3.) Applicant contends there is good cause to reopen "permanent disability based upon a 'change in circumstances,' i.e. the reduction in pay and diminished earning capacity did not develop until after 4-3-17 Award." (*Id.* at p. 4:26.)

Defendant's Answer responds that the fact that the exact amount of wage loss was not finalized at the time of the Stipulations "does not relieve applicant of the clear knowledge that wage loss was an issue prior to entering the Stipulation." (Answer, at 2:4.) Defendant concludes that applicant possessed knowledge of the impending wage loss prior to the stipulated Award, precluding the assertion of change in circumstances in support of good cause to reopen.

The WCJ's report asserts that "the applicant was certainly very aware that he was not going back to his former position and that he would be going into a position that made significantly less," and accordingly, "there is nothing new and there is noting that was not and could not have been known at the time of the prior findings and award." (Report, at p. 2.)

DISCUSSION

Applicant's Petition to Reopen avers his industrial injuries have caused new and further disability "in that applicant needs further medical care and attention and may have additional permanent disability beyond that which has already been determined." (Petition to Reopen, September 29, 2017, at p. 1:17.) Applicant further contends that since the stipulated Award, he has suffered "increased diminished earning capacity." (Id. at p. 1:23.)

We begin our discussion by noting that applicant's Petition to Reopen makes two factual allegations responsive to two different mechanisms for reopening a prior Award. A Petition for New and Further Disability pursuant to Labor Code[2] section 5410 derives from the Appeals Board's authority "to make awards for new and further disability caused by an earlier industrial injury …" (*Zurich Ins. Co. v. Workmen's Comp. Appeals Bd.* (*Cairo*) (1973) 9 Cal.3d 848, 854-858 [109 Cal.Rptr. 211, 512 P.2d 843] (conc. opn. of Sullivan, J.).) On the other hand, sections 5803 and 5804, "together with section 5805 define the power of the Board to rescind, alter or amend previous awards of compensation where "good cause" is shown." (*Ibid.*; see also *Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920 [72 Cal.Comp.Cases 778] (*Sarabi*);

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

Nicky Blair's Rest. v. Workers' Comp. Appeals Bd. (*Macias*) (1980) 109 Cal.App.3d 941 [45 Cal.Comp.Cases 876] (*Macias*).)

Here, the F&A makes the determination that there is good cause to reopen applicant's prior award. (Finding of Fact No. 1.) The F&A awards future medical care to applicant's hip, and awards 14 percent disability without provision for attorney fees. (Findings of Fact Nos. 2, 3 & 4.) The ratings in the F&A reflect the Formal Rating issued by the WCJ on November 20, 2019, and are in turn based on impairment identified by AME Dr. Lundeen in his report of January 10, 2018, based on injury to the left knee and left hip. (Formal Ratings, November 20, 2019, p. 1.)

However, notwithstanding the fact that the WCJ found good cause to reopen the prior Award, the WCJ's Opinion on Decision sets forth the WCJ's rationale for why applicant has not established good cause to reopen the award with respect to applicant's DFEC contentions. The Opinion on Decision notes that applicant knew of his likely reduction in pay at the time he entered into the April 30, 2017 Award, albeit not the precise amount or percentage of the reduction. (Opinion on Decision, pp. 3-4.) The WCJ concludes that because applicant knew of an impending reduction in pay prior to the Award, the actual confirmation of this reduction in pay following the Award is not newly discovered information, and does not constitute a reasonable basis to reopen the Award. (*Ibid.*)

It is well settled that, "in order to constitute 'good cause' for reopening, new evidence (a) must present some good ground, not previously known to the Appeals Board, which renders the original award inequitable, (b) must be more than merely cumulative or a restatement of the original evidence or contentions, and (c) must be accompanied by a showing that such evidence could not with reasonable diligence have been discovered and produced at the original hearing." (*Macias, supra*, at p. 956.) Here, applicant testified that although he knew the jobs available to him would likely pay less than his prior position, he was not actually offered a position with a fixed rate of pay until three months after the Award issued. (Minutes, at 3:8.) Thus, while applicant testified that he felt he was likely to receive a position with a lower salary following the accommodation process, the record reflects that defendant had not yet tendered any specific offer of an alternate position as of the April 30, 2017 Award. (Minutes, at 3:21.) In addition, had applicant raised the issue of reduced earning capacity based on a mere suspicion that he was likely to receive less pay in an alternate position, issues of ripeness and sufficiency of the evidence would likely have arisen, especially in the absence of a verified reduction in wages. Moreover, such a

preliminary assertion would have provided an incomplete basis for calculation of diminished future earnings, at best. We therefore conclude that applicant's *suspicion* of possible lower pay prior to the issuance of the Award is not the functional equivalent to knowledge of *actual* reduced earning capacity. We are therefore persuaded that applicant did not possess the requisite knowledge of a change in earning capacity until he had received a specific job offer through the work accommodation process, an offer which was only made *after* the issuance of the April 30, 2017 Award.

Irrespective of this issue, however, the WCJ found good cause to reopen the Award on grounds of new and further disability. (Lab. Code, § 5410; Finding of Fact No.1.)

Once the continuing jurisdiction of the WCAB has been invoked, the WCJ and the Appeals Board possess the authority to reconsider the entire case, including applicant's assertions related to the sufficiency of the Award. (*Bland v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 324, 475 [35 Cal.Comp.Cases 513, 517] ["in a petition to reopen, the injured employee need not request any particular classification of compensation in order to vest the Board with jurisdiction to reconsider the entire case"]; see also *Sarabi, supra*, at p. 925 [very broad or general petitions are sufficient to invoke the continuing jurisdiction of the Appeals Board].)

Thus, the WCJ's determination of good cause to reopen applicant's Award had the effect of throwing open the entire case for review, obviating issues of the sufficiency of collateral grounds asserted for reopening, including issues related to applicant's alleged knowledge of an impending reduction in earning capacity.

Labor Code Section 5313 provides:

> The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.

As required by section 5313 and explained in *Hamilton v. Lockheed Corporation* (2001) 66 Cal. Comp. Cases 473 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc) (*Hamilton*), "the WCJ is charged with the responsibility of referring to the evidence in the opinion

on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952, subd. (d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

Section 5815 also provides:

> Every order, decision or award, other than an order merely appointing a trustee or guardian, shall contain a determination of all issues presented for determination by the appeals board prior thereto and not theretofore determined. Any issue not so determined will be deemed decided adversely as to the party in whose interest such issue was raised.

Sections 5313 and 5815 thus require the WCJ to "file finding upon *all* facts involved in the controversy" and to issue a corresponding award, order or decision that states the "reasons or grounds upon which the [court's] determination was made." (Italics added; see also *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621-622 [2010 Cal. Wrk. Comp. LEXIS 74] (Appeals Board en banc).)

The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision…." (*Hamilton, supra,* at p. 476.) The Supreme Court has further observed that pursuant to Labor Code section 5908.5, decisions of the WCAB must state the evidence relied upon and specify in detail the reasons for the decision. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351] (*Evans*).) The purpose of the requirement is "to assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." (*Evans, supra*, at p. 755.)

Here, following the WCJ's determination of good cause to reopen applicant's Award, sections 5313 and 5815, as well as our decision in *Hamilton, supra*, require the WCJ's decision to address all facts and issues involved in the controversy, including applicant's allegations of increased disability as a result of diminished future earnings capacity. The applicant's successful invocation of the continuing jurisdiction of the Appeals Board had the effect of throwing open the entire basis of the Award for reconsideration, which in turn required a determination of the issues

and arguments advanced by the parties. Here, the Petition to Reopen raises issues of both new and further disability, as well as the sufficiency of the Award given applicant's reduced future earnings capacity. While the F&A addresses applicant's contentions regarding new and further disability, the F&A does not substantively address the merits of applicant's DFEC contentions, having foreclosed the issue based on a jurisdictional analysis.

In addition, we observe that insofar as the Award addresses new and further disability, the Award itself is nonspecific as to which hip requires future medical care, and whether the award reflects a compensable consequence injury, that is, an injury arising out of and in the course of employment, or the award of medical treatment to a nonindustrial body part necessary to treat an industrial body part. (See, e.g., *Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159 [48 Cal.Comp.Cases 566]; see also *Laines v. Workmen's Comp. Appeals Bd.* (1975) 48 Cal.App.3d 872 [40 Cal.Comp.Cases 365]; *Southern California Rapid Transit Dist. v. Workers' Comp. Appeals Bd.* (Weitzman) (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107].) In addition, the decision does not adequately address why the award after reopening, encompassing additional disability to the left hip, results in permanent disability levels unchanged from the prior Award.

Accordingly, we will grant reconsideration, rescind the January 20, 2020 F&A, and return this matter to the trial level for further proceedings consistent with this decision. We observe that irrespective of the mechanism for invoking the Appeals Board's continuing jurisdiction, if the WCJ determines there is good cause to reopen the Award, the WCJ must thereafter address all facts and issues raised by the parties in order to comply with sections 5313, 5815 and *Hamilton, supra*. In the present matter, so long as the jurisdiction of the Appeals Board is properly invoked, the WCJ will need to substantively address applicant's contentions with respect to diminished future earnings capacity, as well as applicant's contentions of new and further disability.

Upon return of this matter to the trial level, we offer the following nonbinding guidance to the parties. With respect to the DFEC issue raised by applicant, the Court of Appeal in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1273 [129 Cal.Rptr.3d 704] has observed that:

> [T]he cases have always recognized the schedule to be rebutted when a party can show a factual error in the application of a formula or the preparation of the schedule. (See *Fidelity & Cas. Co. v. Workmen's Comp. App. Bd.* (1967) 252 Cal.App.2d 327, 335 [60 Cal. Rptr. 442] [rebuttal based on one element of

> disability being included in the permanent disability rating that should not have been, and another not being included that should have been]; *State of California v. Ind. Acc. Com.* (1954) 129 Cal.App.2d 302, 304 [276 P.2d 820] [schedule's prima facie evidence was rebutted because the injured employee's congenital deaf-mutism was included in the rating as if he had lost his hearing and speech in the industrial accident in which he injured his hand]; *Young v. Industrial Acc. Com.* (1940) 38 Cal.App.2d 250, 255 [100 P.2d 1062] [the schedule did not constitute prima facie evidence because the schedule did not cover the impairment involved]; *National Kinney v. Workers' Comp. Appeals Bd.* (1980) 113 Cal.App.3d 203 [169 Cal. Rptr. 801] [employee's duties required application of a different group].) A challenge to an employee's presumptive disability rating thus appears to remain permissible on the basis that the schedule, or one of its component factors, was incorrectly calculated or applied.
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> (*Id.* at p. 1273.)

However, the *Ogilvie* decision also specifically rejected the substitution of an alternate methodology used in determining the DFEC: "Nothing in Senate Bill No. 899 (2003–2004 Reg. Sess.) authorizes or compels the calculation of an alternative diminished earning capacity adjustment factor as the WCAB devised in order to resolve Ogilvie's claim." (*Ogilvie, supra*, at p. 1277; see also *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [193 Cal. Rptr. 3d 7, 80 Cal.Comp.Cases 1119] ["the *Ogilvie* court did not sanction rebuttal of the statutory Schedule by a competing empirical methodology—no matter how superior the applicant and her expert claim it may be"].)

Further, the Court of Appeal decided *Ogilvie* under the auspices of section 4660, which applies to dates of injuries prior to January 1, 2013, and provides:

> (a) In determining the percentages of permanent disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an *employee's diminished future earning capacity*.
>
> (Lab. Code, § 4660(a), italics added.)

However, for dates of injury after January 1, 2013, section 4660.1 removed the reference to the employee's diminished future earning capacity, in favor of a fixed multiplication factor of 1.4. (Lab. Code, § 4660.1(b).) (See *Wilson v. Kohls Dept. Store*[3] (December 6, 2021,

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See

ADJ10902155) [2021 Cal. Wrk. Comp. P.D. LEXIS 322].) Thus, the WCJ may wish to instruct the parties to address these legislative changes, and their interaction with applicant's assertions of increased disability as a result of diminished future earning capacity. The WCJ may also wish to direct the parties to develop the record with their respective vocational experts.

In summary, we observe that the WCJ's finding of good cause to reopen applicant's Award had the effect of throwing open the entire case for reconsideration, and that pursuant to sections 5313, 5815 and our en banc decision in *Hamilton, supra*, the F&A must address all facts and issues raised by the parties, including applicant's assertion of change to disability ratings as a result of diminished future earnings capacity. We further note that the F&A is nonspecific as to the body parts injured, and as to the basis for the award. Accordingly, we will rescind the F&A and return the matter to the trial level for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to *Wilson v. Kohls Dept. Store* because it considered a similar issue.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award issued on January 20, 2020 is **RESCINDED** and the matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 25, 2023

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

TYLOR BUNDY
WILLIAM HERRERAS
STOCKWELL HARRIS

SAR/abs

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