WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRAIG MILLS, *Applicant*

vs.

HARRISON DRYWALL, INSURANCE COMPANY OF THE WEST, *Defendants*

Adjudication Number: ADJ10899987
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report 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 which we adopt and incorporate, we will deny reconsideration.[1]

We admonish defense attorney Steven M. Kogen with the law offices of Albert and Mackenzie for attaching documents that are already part of the record in violation of WCAB Rule 10945. (Cal. Code Regs., tit. 8, § 10945(c)(1)-(2).) Failure to comply with the WCAB's rules in the future may result in the imposition of sanctions.

[1] Commissioner Lowe, who was on the panel that issued a prior decision in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 22, 2022

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

ALBERT AND MACKENZIE
CRAIG MILLS
SHATFORD LAW

LN/oo

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendants Harrison Drywall and Insurance Company of the West have filed a timely, verified petition for reconsideration of the May 30, 2022 Amended Findings and Award. There was no answer from applicant at the time this report was prepared. The petition contends that the evidence does not justify the findings of fact, the findings of fact do not support the order and decision, and the undersigned acted in excess of his powers in making the Amended Findings and Award. Specifically, the petition contends that the apportionment opinions of regular physician Gordon Lewis, M.D. constituted substantial medical evidence and the PD award should have been for 11%, not 57%. The petition also contends that the average weekly wage was miscalculated because it was based on a raise applicant received in his final four weeks of employment and did not include a four-week period when applicant was laid off. The petition further contends that all amounts paid to applicant by the Employment Development Department (EDD) should have been credited against the award of temporary disability benefits, and not just the negotiated sum of $3,500.00 paid by defendants in satisfaction 01· EDD's lien. Defendants contend that a credit for temporary disability overpayment should have been allowed.

II
FACTS

The above-entitled matter was originally heard on July 28, 2020, following which a Findings and Order dated September 13,2020 was rescinded based on defendants' petition for reconsideration regarding those findings, and the need to develop the record. Ultimately, the parties were unable to develop the record through supplemental reports or the use of an Agreed Medical Evaluator (AME), so tegular physician Gordon Lewis, M.D. was appointed pursuant to California Labor Code Section 5701.

At further trial on March 3, 2022, the parties stipulated as follows:

1. Craig Mills, born [], while employed on July 29, 2016, as a laborer, Occupational Group No. 380, at Chico, California, 95973, by Harrison Drywall, sustained injury arising out of and in the course of employment to his left knee.
2. At the time of injury, the employer's workers' compensation carrier was ICW Group Sacramento.
3. The employer has furnished some medical treatment. The primary treating physician is Dr. Schaefer.
4. No attorney fees have been paid, and no attorney fee arrangements have been made. On March 3, 2022, the parties submitted the following issues:

   I. Earnings. The employee claims $1,093.75 per week based on wage statements. The employer/carrier claim $810.72 per week based on wage statements.

2. Temporary disability, with the employee claiming the following periods: Two years from elate of injury July 29, 2016 through MM I date of August 15, 2019:
3. Permanent disability.
4. Apportionment.
5. Need for further medical treatment.
6. The lien claim of EDD.
7. Attorney fees.
8. Other issues raised by defendants as follows:
    (a) TTD overpayment.
    (b) EDD liability.
    (c) Costs and sa1ictions per petition filed January 25, 2022.
    (d) Defendant disputes liability for any costs related to vocational rehabilitation evaluation or other discovery performed after closure of discovery on October 27, 2021.
9. Other issues raised by applicant as follows:

(a) Whether vocational expert is required to develop the record as Dr. Gordon Lewis indicates applicant is unemployable.

(b) Applicant's cross petition on costs and sanctions filed February 9, 2022.

Joint Exhibits 1 through 31 were all admitted without objection at trial, and Joint Exhibits 32 through 41, plus Court's X, the May 4, 2021 report of regular physician Gordon D. Lewis, M.D., are all now admitted into evidence, as there is no objection to the March 9, 2022 Notice of Intention to Admit Additional Exhibits, marking these additional exhibits for identification.

Based on the stipulation of the parties, it is found that Craig Mills, born March 7, 1963, while employed on July 29, 2016 as a laborer, Occupational Group Number 380, at Chico, California, 95973, by Harrison Drywall, sustained injury arising out of and in the course of employment to his left knee, and at the time of injury the employer's workers' compensation carrier was ICW Group Sacramento.

The parties abandoned their previous stipulations regarding earnings and amounts due for temporary disability and submitted these issues for a decision. Accordingly, using the wage statement admitted as Joint 1, it was found that applicant's average weekly earnings are $1,093.75 per week. This amount was calculated by averaging the last four weeks of earnings shown in Joint I, which were paid after an increase in pay from $24 per hour to $25 per hour. Under Labor Code Section 4453, the average weekly earnings are supposed to represent the average weekly earning capacity of the injured employee at the time of the injury. It is not reasonable to assume that applicant's earnings capacity at the time of injury was anything less than $25 per hour. Accordingly, the average earnings of the last month, and not of the last year, were used to calculate the average weekly earnings. Based on this earnings rate, the temporary disability rate was found to be $729.17 under Labor Code Section 4653, and the permanent partial disability rate was found to be $290.00 under Labor Code Section 4658.

Based on the medical expert opinion of regular physician Dr. Lewis that applicant reached maximal medical improvement on August 15, 2019, as further supported by the reports of Primary Treating Physician Dr. Schaefer admitted as Joint 19 through 41, it was found that the injury caused temporary disability during the period of July 30, 2016 through the date of maximal medical improvement, August 15. 2019, at the rate of $729.17 per week, less credit for any sums earned during that period, which sum, if any, is to be adjusted by and between the parties. Temporary disability is limited to a maximum of 104 weeks of temporary disability compensation per Labor Code Section 4656, and was awarded less credit for all sums paid by defendants toward temporary disability indemnity, which according to the benefits printout admitted as Joint 2 appears to be $56,114.30, and less credit to defendants for their settlement of the lien of the State of California Employment Development Department (EDD) on its lien herein for the sum of $3,500.00. A reasonable attorney fee was also awarded in the amount of 15% of any net temporary disability due after deduction of credit for sums paid, including the EDD settlement, and earnings, if any.

Also based on the medical expert opinion of regular physician Dr. Lewis finding 30% Whole Person Impairment (WPI) of the left knee using the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition,* as adjusted under the current rating schedule and Labor Code Section 4660.1, it was found that the injury caused permanent disability (PD) of 57%, warranting indemnity at the rate of $290.00 per week for 327.25 weeks, in the total sum of $94,902.50, less credit for all sums advanced toward permanent disability, and less a reasonable attorney fee of $14,235.38, equal to 15% of the gross permanent disability indemnity, which is to be commuted from the far end of the award of permanent disability and paid to applicant's counsel of record. The adjustment of WPI is shown in the following rating string:

17.02.10.00-30- [xl.4] 42- 3801 -51 -57% PD

Dr. Lewis found that "80% of [applicant's] impairment is due to the advanced osteoarthritis already present in the left knee prior to the injury 01· 07/29/16. The remaining 20% is due to the injury of 07/29/l6″ (Court's X, p. 22, lines 4-5). This opinion on apportionment was found not to constitute substantial medical evidence, and accordingly was not applied to the permanent disability.

With respect to Dr. Lewis' comment that applicant "would not be able to return to work because of the amount of lifting required and also due to the fact that he would often have to climb ladders and be on his feet most of the day" (Court's X, p. 23, lines 4-6), it was found that this clearly relates to applicant's ability to return to his former job duties, and is not an indication of total loss of earnings capacity due to the ability to perform any work available in the open labor market. lt was noted as self-evidcnt that not all jobs require climbing ladders and standing most of the day. Accordingly, the permanent disability was not found to be total, nor does the record

appear to require development to answer the question of whether there is permanent total disability as contended by applicant's counsel.

Based upon the medical expert opinion of Dr. Lewis, it was found that further medical treatment is required to cure or relieve from the effects of the injury. It was also found that the lien of the State of California Employment Development Department (EDD) herein was resolved by defendants by payment of the sum of $3,500.00, and that defendants are entitled to credit in this amount from the award of temporary disability herein, in addition to all other sums that defendants paid toward temporary disability indemnity, Defendant's petition for costs and sanctions, and applicant's cross-petition for costs and sanctions, were both denied, without prejudice. Any dispute regarding liability for medical-legal or other costs is deferred, because a claim for payment for such expenses was insufficiently defined in the record at trial.

Defendants Harrison Drywall and Insurance Company of the West have filed a timely, verified petition for reconsideration of the May 30, 2022 Amended Findings and Award, challenging the decision not to apply Dr. Lewis' nonindustrial apportionment and the calculation of applicant's average weekly wage. The petition also seeks credit for temporary disability overpayment.

III DISCUSSION

The petition includes two sections of argument, the first of which addresses the decision not to apply Dr. Lewis' nonindustrial apportionment, and the second of which addresses the determination of average weekly earnings and the temporary disability award. Each will be addressed in this report.

With respect to the decision not to incorporate the nonindustrial apportionment found by Dr. Lewis, the regular physician found that "80% of [applicant's] impairment is due to the advanced osteoarthritis already present in the left knee prior to the injury of 07/29/16. The remaining 20% is due to the injury of 07/29/16" (Court's X, p, 22, lines 4-5), This opinion on apportionment was found not to constitute substantial medical evidence, and accordingly was not applied to the permanent disability. Labor Code section 4663 requires apportionment to be based upon causation of disability, not impairment, and, as explained in *E.L. Yeager Co11strucrio11 v. Workers' Comp. Appeals Ed (Galien)* (2006) 71 Cal. Comp. Cases 1687 and *Escobedo v. Marsha/ls* (2005) 70 Cal. Comp. Cases 604, to 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:

> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability. *(Escobedo, supra,* 70 Cal. Comp. Cases 604 al 621.)

This example from *Escobedo* is, unfortunately, analogous to what regular physician Dr. Lewis did in this case, and provides the legal basis for why the undersigned believes his medical opinions do not constitute substantial medical evidence, at least with respect to apportionment. Although Dr. Lewis identified percentages of causation of the impairment that he found in applicant's left knee, he did not explain how and why the degenerative changes were causing applicant's present permanent disability, or why the approximate percentage of causation Would be 80% as opposed to some other number. The question of how and why past degenerative arthritis is causing current disability is of particular interest in the present case, where applicant's arthritic left knee was completely removed and replaced with an artificial joint. The undersigned is not ruling out the possibility that there could be some kind of cogent explanation for this, however improbable it seems, but Dr. Lewis did not provide it. I-le did not explain how and why the arthritis is causing disability, nor did the defendants, upon whom the burden of proof rests with respect to nonindustrial apportionment, seek to bolster Dr. Lewis' opinion with any further explanation.

With respect to the average weekly earnings issue, Labor Code section 4453(c)(1) indicates that the number of days worked per week should be multiplied by the daily earnings, because applicant was employed for more than 30 hours per week, and five or more days a week, However, the evidence, a wage statement admitted as Joint 1, did not show daily earnings, even though the rate of pay was hourly, not weekly. Alternatively, if for any reason other methods of calculating earnings cannot reasonably and fairly be applied, Labor Code section 4453(c)(4) allows actual earnings to be duly considered to determine "100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury." In this case, the applicant's earning capacity at the time of injury was calculated by averaging the last four weeks of earnings shown in Joint I, which were paid after an increase in pay from $24 per hour to $25 per hour. It is not reasonable to assume that applicant's earnings capacity at the time of injury was anything less than $25 per hour, or that it would be reduced in the future. Also, the fact that applicant experienced a four-week layoff should not be used to reduce the determination of his earning capacity, because there is no evidence to suggest that the layoff has anything to do with applicant's capacity for earnings, nor

that it will be a regular, annual occurrence. Accordingly, the average earnings of the last month, and not of the last year, were used to calculate the average weekly earnings. There is no requirement that 52 weeks be used to determine eamings, even though this is a common practice. Based on the earnings rate, the temporary disability rate was found to be $729.17 under Labor Code Section 4653, and the permanent partial disability rate was found to be $290.00 under Labor Code Section 4658.

Based on the medical expert opinion of regular physician Dr. Lewis that applicant reached maximal medical improvement on August 15, 2019, as further supported by the reports of Primary Treating Physician Dr. Schaefer admitted as Joint 19 through 41, it was found that the injury caused temporary disability during the period of July 30, 2016 through the date of maximal medical improvement, August I 5, 2019, at the rate of $729.17 per week, less credit for any sums earned during that period, which sum, if any, is to be adjusted by and between the parties. The decision noted that temporary disability is limited to a maximum of I 04 weeks of temporary disability compensation per Labor Code Section 4656, and temporary disability indemnity was awarded *less credit for all sums paid by defendants toward temporary disability indemnity,* which according to the benefits printout admitted as Joint 2 appears to be $56,114.30, and counters the contention of the petition for reconsideration that credit was not allowed for temporary disability paid. However, what was not allowed was a credit for benefits paid by the State of California Employment Development Department (EDD), apart from the actual sum paid by defendants to settle EDD's lien herein for the sum of $3,500.00. There appears to be no reason why both applicant and defendant should not benefit from the agreement of EDD to limit its claim for a lien against compensation to this sum.

IV
RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

Date: 7/7/2022

Clint Fedderson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE