WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

AUDREY CRAWFORD, *Applicant*

vs.

RISK MANAGEMENT SERVICES, UNITED STATES FIRE INSURANCE COMPANY (ONE OF THE CRUM FORSTER GROUP OF COMPANIES), *Defendants*

Adjudication Number: ADJ10073209
San Bernardino District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER 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, and for the reasons stated below, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the June 29, 2021 Findings, Award and Order.

Labor Code[1] section 4663(a) provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Section 4664(a) states that "[t]he employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).) The defendant has the burden of proof on the issue of apportionment. (*Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

We agree with the WCJ that the opinion of primary treating physician (PTP) Paul Burton, M.D., is not substantial medical evidence supporting a finding of apportionment. (*Hegglin v. Workers' Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) [a medical

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

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].) In order to consist of substantial medical evidence on the issue of apportionment, a medical opinion

> [M]ust 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 v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621-622 (Appeals Board en banc).)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the June 29, 2021 Findings, Award and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 29, 2021 Findings, Award and Order is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

9. There is no legal basis for apportionment for the right knee.

* * *

11. The injury herein caused 31% permanent disability.

12. Applicant's attorney has performed services of a reasonable value of 15% of the permanent disability awarded herein.

* * *

AWARD

AWARD IS MADE in favor of **AUDREY CRAWFORD** against **UNITED STATES FIRE INSURANCE COMPANY (ONE OF THE CRUM FORSTER GROUP OF COMPANIES)** of:

a. Permanent disability of 31%, equivalent to $40,020.00, payable at the rate of $290.00 per week, for a total of 138 weeks, less credit to defendant for all sums previously paid for this date of injury, and less $6,003.00, payable to Law Offices of Kampft, Schiavone & Associates as attorney fees, whose lien is hereby allowed, with jurisdiction reserved at the trial level for any dispute.

* * *

c. Reasonable attorney fees pursuant to paragraph "a" above.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 17, 2021

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

AUDREY CRAWFORD
LAW OFFICES OF BRADFORD & BARTHEL
KAMPF SCHIAVONE & ASSOCIATES

PAG/oo

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.

INTRODUCTION

1. Applicants Occupation: Licensed Vocational Nurse, LVN
2. Applicants Age: 69 years old (62 years old on DOI)
3. Date of Injury: June 9, 2015
4. Parts of Body Claimed: Right wrist, right arm, right knee, right hip, and left wrist
5. Identity of Petitioner: **Applicant** has filed the Petition.
6. Timeliness: Timely filed on July 19, 2021
7. Verification: A Verification is attached to the Petition
8. **Petitioners Contention:**
    1. **The WCJ's holding that substantial evidence supports apportionment of permanent disability pertaining to the right knee is contrary to evidence and the law.**
    2. **The WCJ's refusal to allow further development of the record deprives applicant of due process and is contrary to the law.**
    3. **Should the Appeals Board find that further development of the record is warranted, the Appeals Board should remand the case and direct the WCJ to appoint an independent medical examiner because applicant asserts the PQME Dr. Robert Kolesnik is biased against the applicant.**

II.

FACTS:

Applicant, Audrey Crawford, while employed on June 9, 2015 as a Licensed Vocational Nurse (LVN) by defendant, Risk Management Services LLC, sustained an admitted injury arising out of and in the course of her employment to her right wrist, right arm, right knee and right hip. Applicant also claims to have sustained a compensable consequence injury to her left wrist which is denied.

Applicant sustained injury while lifting a special needs nine-year old with spina bifida off the floor on June 9, 2015.

The parties stipulated that applicant had two Primary Treating Physicians: with Dr. Paul Burton acting as the Primary Treating Physician for the right knee and Dr. Jason Solomon acting as the Primary Treating Physician for the right wrist. Dr. Robert Kolesnik served as the Panel Qualified Examiner.

Applicant underwent a total knee replacement performed by Dr. Paul Burton, on April 16, 2018, and was subsequently determined to have reached Maximum Medical Improvement (MMI) on August 15, 2018. Applicant was evaluated multiple times by Dr. Robert Kolesnik and he issued a MMI report following his September 23, 2019 examination of applicant.

Applicant originally filed an Application for Adjudication on August 13, 2015 asserting a cumulative trauma injury for the period of June 9, 2014 through June 9, 2015, to the arm, wrist, hand, fingers, right hip and right knee. Applicant then amended the Application for Adjudication on March 10, 2020 to include the left wrist as a compensable consequence injury. The parties later stipulated that the date of injury was June 9, 2015 on the Pre-Trial Conference statement drafted in connection with the March 2, 2020 Mandatory Settlement Conference.

Defendant filed a Declaration of Readiness to Proceed to Trial on October 8, 2020 and a Mandatory Settlement Conference was held on December 2, 2020. The matter proceeded to Trial on January 6, 2021 and was submitted following the second day of Trial on April 27, 2021.

III.

DISCUSSION:

This WCJ recommends the Petition for Reconsideration be granted in part and denied in part. In that regard, the Petition for Reconsideration should be granted with regard to apportionment, but denied with regard to the request for further development of the record.

I. The Apportionment Analysis of Dr. Paul Burton is Not Substantial Medical Evidence.

Although this WCJ agreed with the apportionment determination of Dr. Paul Burton, and found that the basis of the apportionment analysis to be accurate, this WCJ upon further consideration of applicant's arguments is now persuaded that the legal standard to discuss apportionment in terms of reasonable medical probability was not met. Dr. Paul Burton stated his

opinion was based on reasonable medical evidence, rather than reasonable medical probability and as such does not rise to the level of legal apportionment as outlined in *E.L. Yeager Construction v. WCAB* (Gatten) (2006) 145 Cal. App. 4th 922, 929. Although it can be inferred as to how applicant's history of obesity and age led to 50% of applicant osteoarthritis due to the added stress placed upon applicant's knees over an extended period of time, Dr. Paul Burton himself does not provide this analysis and thus his apportionment analysis is incomplete. It is defendant's burden to prove apportionment and this burden has not been met due to Dr. Paul Burton's failure to articulate that his determination was based on reasonable medical probability and for failure to explain how applicant's obesity and age would be a causative factor for applicant's osteoarthritis.

As such, this WCJ recommends the Board amend the Findings and Award to reflect a non-apportioned award of 31% permanent disability based on the following permanent disability rating strings.

RIGHT KNEE

17.05.10.08 - 15 - [1.4] 21 - 340G - 23 - 30%

RIGHT WRIST

16.01.02.02 - 1 - [1.4] 1 - 340F - 1 - 1%

TOTAL COMBINED RATING 30 C 1 = 31%

Should the Board amend the Findings and Award to reflect 31% permanent disability, then the Award should reflect applicant's entitlement to 138 weeks of disability indemnity, payable at the rate of $290.00 per week in the total sum of $40,020.00.

The reasonable attorney fee of 15% should also be amended to $6,003.00, based on the revised permanent disability indemnity of $40,020.00.

II. Applicant Contends that Applicant's Due Process Rights Were Violated by this WCJ's Decision to Not Allow Further Development of the Record.

Applicant argues that due process mandates further develop of the record and cites *Tyler v. Workers Comp. Appeals Bd*. 62 Cal. Comp. Cases 924 and *McClune v. Workers' Comp. Appeals Bd.*, 63 Cal. Comp. Cases 261 as authority for the same. Applicant asserts that applicant's right knee has worsened since her MMI evaluations with PTP Dr. Burton and PQME Dr. Kolesnik and that her left wrist has not undergone a Medical-Legal evaluation which applicant argues necessitates further development of the record.

Tyler and *McClune* are distinguishable from this case. In *Tyler*, the WCJ did not feel the medical evidence presented at Trial was substantial, and as such it was determined that the WCJ had authority to develop the record. In the instant matter, the medical reporting of Dr. Paul Burton and Dr. Jason Solomon, reports of which this court relied on, constituted substantial medical evidence. Furthermore, neither party raised the issue of Dr. Paul Burton or Dr. Jason Solomon not being substantial medical evidence on the Pre-Trial Conference Statement. The court did not rely on the PQME reporting of Robert Kolesnik and as such the arguments applicant raised as to why his reporting is not substantial evidence are not relevant. As such, unlike in *Tyler* this court does not see the need to develop the medical record as there is substantial medical evidence that can be relied upon.

The court in *McClune*, felt that the medical reporting presented was not substantial medical evidence as neither parties' expert witnesses discussed the effect of work-related trauma on McClune's left hip condition, and the expert opinions were in conflict with each other so the court had authority to direct the taking of additional evidence. This case is distinguishable from *McClune*, because the PQME Dr. Robert Kolesnik did provide his opinion on the left wrist at the time of his cross-examination. He stated that he had examined the applicant's left wrist during his September 23, 2019 examination which included measurements of the circumferences of both upper extremities, range of motion in both upper extremities, and sensation in both upper extremities. He documented "no atrophy in either upper extremity…there was no atrophy in the right upper extremity that would indicate objectively that she was not using the right arm as much and putting more stress on the left upper extremity." (Joint Exhibit A-3, Pg. 153, Ln. 1 – Pg. 154 Ln.1) He concluded finding "no credence in any compensable effects in regard to the left upper extremity." (Ibid.) Furthermore, both the PTP and PQME addressed the right knee and unlike in *McClune* they both agreed applicant had a 15% whole person impairment.

The decision of *McKernan* is more applicable to this case. In *McKernan*, it was noted the court's power to further develop the record under Labor Code §5701 or Labor Code §5906 may not be used to circumvent the clear intent and language of Labor Code §5502(d)(3). *San Bernardino Community Hospital v. WCAB* (McKernan) (1999) 64 CCC 986.

Applicant's Petition for Reconsideration does not adequately address this WCJ's concern, that the applicant failed to use due diligence to obtain evidence demonstrating an industrial nexus for the left wrist. Applicant's counsel explains that the lack of medical evidence addressing the left

wrist is because of "the denial of the left wrist, applicant could only get a medical evaluation on a lien basis, which is not usually readily available." (Petition for Reconsideration page 24). This explanation is not convincing given that denied claims are regularly adjudicated before the WCAB and are usually supported by medical evidence from physicians treating on a lien basis.

Applicant's due process arguments are also unfounded and as noted in McKernan, due process is "simply notice and the opportunity to be heard," and "diligence and good faith are required of both sides." (Id at 992, 993.) Applicant had notice and the opportunity to be heard. Applicant had nearly nine months before the Mandatory Settlement Conference to obtain medical reporting after filing the Amended Application for Adjudication alleging a left wrist injury and failed to do so. To allow the record to be developed at this time would be relieving applicant from the ramifications of Labor Code §5502(d)(3) as discovery closed at the time of the Mandatory Settlement Conference. Applicant was not prevented from obtaining evidence supporting the argument of an industrial nexus for the left wrist and applicant had ample time to obtain the same.

With regard to applicant's assertion that her knee condition has deteriorated since being evaluated by PQME Dr. Kolesnik, the court finds that applicant has not presented sufficient evidence to warrant further development of the record. Although Primary Treating Physician Dr. Paul Burton's medical report of March 9, 2020 notes applicant's subjective complaint that her condition is worsening Dr. Paul Burton does not himself indicate applicant's condition had worsened. (Applicant Exhibit 2) The most recent medical report offered by applicant is from Dr. Paul Burton dated May 5, 2020, and it notes her condition had remained the same since the last visit. (Applicant Exhibit 1, Pg. 2). Furthermore, the Mandatory Settlement Conference took place on December 2, 2020, and the most recent medical report offered at the time of the Mandatory Settlement Conference was May 5, 2020. Applicant had not provided any explanation in its Petition for Reconsideration as to why applicant could not with the exercise of due diligence have obtained an updated report from the primary treating physician substantiating the deterioration of applicant's right knee. Dr. Paul Burton issued his Maximum Medical Improvement report on August 15, 2018, and applicant attorney could have requested Dr. Paul Burton provide an updated report discussing whether applicant's condition had deteriorated to the point of warranting modification of the findings in his Maximum Medical Improvement report of August 15, 2018.

Applicant had over seven months from the May 5, 2020 report to obtain a medical report from the Primary Treating Physician substantiating that applicant's condition had deteriorated to

the point of warranting a different impairment rating and failed to do so. Therefore, this court finds no need for further development of the record in relation to the applicant's right knee as applicant has failed to provide a medical opinion substantiating a deterioration of Applicant's right knee condition, subsequent to the MMI reports of PQME Dr. Robert Kolesnik and PTP Dr. Paul Burton.

III. Appointment of an Independent Medical Examiner if Further Development of the Record is Warranted

Applicant asserts that if the court grants further development of the record, that the matter should be remanded to this WCJ to appoint an independent medical examiner to evaluate applicant based on the contention that Dr. Robert Kolesnik demonstrated bias against applicant.

In the Petition for Reconsideration Applicant asserts that this WCJ failed to consider the argument that Dr. Robert Kolesnik demonstrated bias against the applicant on the issue of apportionment. This WCJ does not believe that Dr. Robert Kolesnik demonstrated bias against the applicant with regard to the issue of apportionment. Dr. Robert Kolesnik expressed his openness to review and comment on the operative report of Dr. Redix which was never made available to him. (Joint Exhibit A-1, Pg. 93 and 99). He later stated that he did not believe he needed to review these reports due to his impression that the applicant did not sustain a significant knee injury based on the applicant having not twisted her knee, and having not fallen to the floor at the time of injury. He noted that applicant had worse osteoarthritis on her uninjured left knee, and also noted that she had stood on her knees equally during her life. Dr. Kolesnik also noted that he believed applicant's osteoarthritis was following its natural progression and that she would have required a total knee replacement absent the June 9, 2015 injury, although he could not say exactly when she would have needed the total knee replacement absent the June 9, 2015 injury. (Joint Exhibit A-1, pages 138-140). As such, Dr. Robert Kolesnik felt based on his evaluation of the applicant and his 33 years of experience as an orthopedic surgeon that he could make his apportionment determination on the current record before him without the review of the diagnostic imaging studies and operative report of Dr. Redix.

Dr. Robert Kolesnik's opinion that he could provide his apportionment analysis with reasonable medical probability without review of Dr. Redix operative report and other diagnostic imaging studies goes to the evidentiary weight of his report, but does not demonstrate bias that would warrant appointing an independent medical examiner.

Furthermore, there is no need for a replacement panel as the court has relied on the Primary Treating Physician Dr. Burton, and Primary Treating Physician Dr. Jason Solomon.

IV

RECOMMENDATION:

For the reasons stated above, this WCJ's recommends that the Board Amend the Findings and Award to reflect a non-apportioned Award of 31% permanent disability, entitling applicant to 138 weeks of disability indemnity, paid at $290.00 per week in the sum of $40,020.00. In addition, the reasonable attorney fee should be amended to $6,003.00, based on the revised permanent disability indemnity. Alternatively, the Board may remand the matter back to this WCJ to issue a revised Findings and Award.

It is also recommended that applicant's request for further development of the record and appointment of an independent medical examiner be denied.

DATE: AUGUST 2, 2021

Sevan Setian
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE