WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GARY CROTEAU, *Applicant*

vs.

COLORADO ROCKIES CKA NEW JERSEY DEVILS; CALIFORNIA GOLDEN SEALS; ARGONAUT INSURANCE COMPANY; KANSAS CITY SCOUTS NKA NEW JERSEY DEVILS; ACE AMERICAN INSURANCE COMPANY, administered by ESIS; RED WINGS, Self-Insured, *Defendants*

Adjudication Number: ADJ10839374
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case.[1] We now issue our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration (Applicant's Petition) of Findings of Fact and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on May 31, 2022, wherein the WCJ found in pertinent part that applicant's injuries became permanent and stationary on March 21, 2018, and that applicant's permanent disability award payments were to commence on that date.

Applicant contends that permanent disability indemnity payments should begin shortly after he retired as a professional hockey player in 1980, pursuant to Qualified Medical Examiner (QME) Michael Einbund, M.D.'s report, rather than as of the date of Dr. Einbund's orthopedic evaluation in 2018.

Defendant ACE American Insurance (Defendant's Petition) also seeks reconsideration of the F&A issued by the WCJ on May 31, 2022.

Defendant contends that the reports of applicant's Qualified Medical Examiners do not constitute substantial medical evidence and, moreover, that the reports are inadmissible.

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[1] Commissioner Sweeney, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panelist has been assigned in her place.

We have not received an answer from any party.

The WCJ issued Reports and Recommendations on both Petitions for Reconsideration (Reports) recommending that the Petitions be denied.

We have considered the allegations in the Petitions and the contents of the Reports with respect thereto.

Based on our review of the record, for the reasons stated in the WCJ's Reports, which we adopt and incorporate, and as discussed herein, we will amend the F&A to reflect that Finding 11 refers to apportionment of applicant's left knee permanent disability. Otherwise, we will affirm the F&A.

On May 31, 2022, the F&A issued. In the Opinion on Decision, the WCJ re-rated permanent disability based solely on orthopedic and neurological injuries.[2] While the WCJ apportioned 70% of applicant's left knee permanent disability in the Opinion on Decision, there is no corresponding finding of fact with respect to applicant's left knee. (F&A, pp. 1-2.) We note that Finding 12 apportioned 100% of applicant's right knee permanent disability, while Finding 11 apportioned 70% of applicant's right knee permanent disability. (Emphasis added.) Based on the record as a whole, including the report of QME Dr. Einbund and the rating in the Opinion on Decision, it appears that the WCJ meant to apportion 70% of applicant's left knee permanent disability in Finding 11. (Emphasis added.) Decisions of the Workers' Compensation Appeals Board have the benefit of the harmless error rule. (*Reinert v. I.A.C.* (1956) 46 Cal. 2d 349 [21 Cal.Comp.Cases 78].) The permanent disability rating is unchanged if applicant's left knee permanent disability is apportioned at 70% and his right knee permanent disability is apportioned at 100%, e.g., the rating remains 98%. As such, we find that this constitutes a harmless error.

We observe that it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) When deciding a medical issue, such as whether an injured worker sustained a cumulative trauma injury, the WCJ must utilize expert medical opinion. (See *Insurance Company of North America*

[2] "[A] WCJ may elect to independently rate an employee's permanent disability." (*Blackledge v. Bank of America, ACE American Insurance Company* (2010) 75 Cal.Comp.Cases 613, 616 (Appeals Bd. en banc).) En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd*. (*Garcia*) (2005) 126 Cal.App.4th 298, 316, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

v. Workers' Comp. Appeals Bd. (*Kemp*) (1981) 122 Cal.App.3d 905 [46 Cal.Comp.Cases 913].) Generally, and especially in cases of cumulative injury, medical causation cannot be established without corroborating expert medical opinion. (*Peter Kiewit Sons v. Ind. Acc. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188].)

With respect to the WCJ's findings regarding substantial medical evidence, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place, supra,* at 378-379; *Zemke v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 794, 798.) The chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Bd. en banc); *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144.)

Applicant's orthopedic QME Dr. Einbund performed a physical examination of applicant, reviewed medical records and numerous radiology reports, and took a detailed history. Dr. Einbund opined that applicant "became permanent and stationary approximately three months following his retirement from professional hockey" in approximately October 1980. (Ex. 1, Dr. Einbund's March 21, 2018, report, p. 17.) However, the earliest medical records reviewed by Dr. Einbund were diagnostic studies from 2018. (Ex. 1, Report of QME Michael Einbund, M.D., dated March 21, 2018, pp. 13-16.[3]) Because Dr. Einbund did not review medical records or reports from prior to 2018, his opinion that applicant was permanent and stationary <u>in 1981</u> is based on speculation and conjecture and therefore is not substantial medical evidence. (Emphasis added; *Escobedo, supra,* at 621; see also *Hegglin, supra*; *Place, supra*; *Zemke, supra*.)

Defense orthopedic QME Christopher Fleming, M.D., performed a physical examination of applicant on June 10, 2019, reviewed medical records and the results of diagnostic studies, and took applicant's medical history. (Ex. B, Report of QME Christopher Fleming, M.D., dated June 10, 2019.) Dr. Fleming issued a supplemental report on March 7, 2020. (Ex. C, Dr. Fleming's

[3] We note that the March 21, 2018 medical report of QME Dr. Einbund is variously referred to as his March 2, 2018 report and his March 21, 2018 report. March 2, 2018 appears to be a typographical error, as Dr. Einbund issued only one report in March 2018. The WCJ noted the same in the July 5, 2022 Report. (July 5, 2022 Report, p. 6.)

March 7, 2020, report.) Dr. Fleming opined that applicant can be considered permanent and stationary in approximately 1982. (Ex. B, Dr. Fleming's June 10, 2019, report, p. 25; Ex. C, Dr. Fleming's March 7, 2020 report, p. 15.) However, as Dr. Fleming did not review records or reports from prior to 2018, his opinion that applicant was permanent and stationary in approximately 1982 is based on speculation and conjecture. (Ex. B, Dr. Fleming's June 10, 2019, report, pp. 10-22, 25; Ex. C, Dr. Fleming's March 7, 2020 report, pp. 1-9, 15.) Accordingly, Dr. Fleming's opinion that applicant became permanent and stationary in 1982 is not substantial medical evidence. (Emphasis added; *Escobedo, supra,* at 621; see also *Hegglin, supra*; *Place, supra*; *Zemke, supra*.)

However, both Dr. Einbund and Dr. Fleming took applicant's medical history, performed physical examinations, reviewed medical records and diagnostic reports, and articulated the basis for the remainder of their opinions. Therefore, to the extent that WCJ determines that the remainder of their opinions are substantial medical evidence, we will not disturb the findings.

Applicant contends that his permanent disability indemnity payments should commence using 1981 as the permanent and stationary date, based on Dr. Einbund's report. (Ex. 1, Dr. Einbund's March 21, 2018, report, p. 17 ["[Applicant] last played professional hockey in approximately October 1980" ... and "became permanent and stationary approximately three months following his retirement from professional hockey."].)

Generally, and especially in cases of cumulative injury, medical causation cannot be established without corroborating expert medical opinion. *(Peter Kiewit Sons v. Ind. Acc. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831, 838-839 [30 Cal.Comp.Cases 188].) Determination of the "date of injury" is a two-part analysis: 1) when did the employee first suffer a compensable disability from a cumulative injury; and 2) when did the employee know, or in the exercise of reasonable diligence should have known, that the compensable disability was caused by his or her employment. (Lab. Code, § 5412.) Medical treatment alone is not "disability" for purposes of determining the date of a cumulative injury pursuant to section 5412. (*State Compensation Insurance Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [69 Cal.Comp.Cases 579].)

As discussed above, Dr. Einbund did not review material from prior to 2018. Consequently, March 21, 2018, is the first date that applicant 1) suffered a compensable disability and 2) had knowledge, based on substantial medical evidence, that his disability was caused by his employment as a professional hockey player. (Lab. Code, § 5412.) For the same reasons,

Dr. Einbund's opinion of a permanent and stationary date prior to 2018 is based on speculation and conjecture. (*Escobedo, supra; Hegglin, supra*; *Place, supra*; *Zemke, supra*.) As the WCJ concluded, there is not substantial medical evidence that applicant was permanent and stationary in 1981, or, indeed, at any other time prior to Dr. Einbund's March 21, 2018, report. (WCJ's Report regarding applicant's Petition, pp. 5-6.)

Section 4650 provides for the coordination of temporary disability indemnity payments and permanent disability indemnity payments. Section 4650(b)(1) provides that if "the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity, except as provided in paragraph (2)...." (Lab. Code, § 4650(b)(1).) Relevant here, section 4650(b)(2) provides that "... when an award of permanent disability indemnity is made, the amount then due shall be calculated from the **last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, whichever is earlier**." (Lab. Code, § 4650(b)(2), emphasis added; *Brower v. David Jones Constr*. (2014) 79 Cal.Comp.Cases 550, 561, fn. 9.)

There is no evidence before us that applicant received temporary disability indemnity payments prior to the permanent and stationary date of March 21, 2018. Thus, we concur with the WCJ that applicant's permanent disability indemnity payments should be calculated from March 21, 2018, the date upon which applicant's permanent and stationary determination is supported by substantial medical evidence. (Lab. Code, § 4650(b)(2); *Brower supra*, at 558-559, 561, fn. 9.)

Accordingly, we amend the F&A as follows: 70% of the applicant's permanent disability for his left knee is a result of his employment as a professional hockey player. Otherwise, we affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on May 31, 2022 is **AFFIRMED, EXCEPT** that is **AMENDED** as follows.

***

11. 70% of the applicant's permanent disability for his left knee is a result of his employment as a professional hockey player.

***

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 3, 2023

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

GARY CROTEAU
GLENN, STUCKEY & PARTNERS
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN
ADELSON MCLEAN

JB/mc

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Applicant's Occupation:	Professional Hockey Player
Applicant's age at date of injury:	71
Date of injury:	September 30, 1968 through October 15, 1980
Parts of Body Injured:	head, neck, back, shoulders, elbows, wrists, hands, fingers, knees, hips, ankles, feet, toes, and neuro.
Manner in which it occurred :	Continuous Trauma
Identity of Petitioner:	Applicant Gary Croteau
Timeliness:	The Petition is timely
Verification:	The Petition is verified
Date of Findings and Order :	May 31, 2022

Petitioner contends that the WCJ erred in finding that:

a) The applicant's injuries became permanent and stationary on March 21, 2018;
b) The applicant's permanent disability award payments were to have commenced on March 21, 2018.

II
FACTS

The parties stipulated at trial that applicant Gary Croteau, born [], was employed as a professional hockey player from September 30, 1968 through October 15, 1980.

The applicant's employment was at various locations; by the Colorado Rockies, now known as the New Jersey Devils, from 1976 through 1980; the Kansas City Scouts, now known

as the New Jersey Devils, between 1974 and 1976; the California Golden Seals from 1970 through June 12 of 1974; the Redwings for 1970; and the Los Angeles Kings from 1968 through 1970.[4]

The matter proceeded on the record on June 22, 2020, and continued to March 4, 2021, when the applicant's testimony commenced. The applicant's testimony was completed on May 3, 2021, and the matte was submitted for determination on May 24, 2021, after the parties were allowed to file trial briefs.

The matter was subsequently sent to the Disability Evaluation Unit for a formal rating. Defendant objected to the rating, and a cross-examination of the rater was completed on January 13, 2022. The matter was resubmitted for determination. However, the submission was vacated due to the filing of a petition to withdraw the applicant's claim of injury to all body parts except orthopedic and neurological.

The matter was set for a Status Conference on March 9, 2022. After a discussion about the nature and reasoning of the applicant's petition, the undersigned Judge granted the petition and ordered the matter resubmitted for decision.

The undersigned judge issued his Findings and Order on May 31, 2022.

III
DISCUSSION

Permanent and Stationary Date

The applicant asserts that the undersigned judge erred and found an arbitrary date upon which the applicant's injuries became permanent and stationary.

In support of his position the applicant states that Dr. Einbund's report unequivocally cites to the record and was not based on speculation or conjecture. The applicant asserts that Dr. Einbund

[4] MOH/SOE June 22, 2020, EAMS Doc ID: 72917405, Page 2, Lines 1 to 11

did, in fact, base his permanent and stationary findings on the applicant's history, his clinical examination and a review of available medical records.

Dr. Einbund stated that the applicant's condition became permanent and stationary approximately three months following his retirement from date.[5]

Dr. Einbund provides no explanation or rational as to why the applicant was permanent and stationary other than the applicant's participation in hockey activities impede the healing process and subjected his body to further harm.[6]

The undersigned judge in reviewing Dr. Einbund's report notes that Dr. Einbund, nor any other doctor reporting in this matter, was given any medical records contemporary with 1981. The oldest medical records reviewed by Dr. Einbund were March 22, 2018 diagnostic studies.[7] Wherefore, Dr. Einbund's finding of the applicant's permanent and stationery date is based only on the applicant's provided history.

The applicant testified at trial at the time of his retirement, he did feel that he could have continued playing. He believed he was in good shape and that he had fully recovered from his knee surgery.[8] However, after the applicant had stopped playing hockey he continued to have pain in most of his body.

After retirement the applicant worked for the Walker Group and in 1984 he started working for Coldwell Banker. He testified that he had no injuries while working for Coldwell Banker.[9] Subsequent to Coldwell Banker the applicant worked for Implied Consultants and then again for Coldwell Banker until 2018 when he resigned [due] to an inability to show properties.[10]

[5] APPLICANT'S 1: Medical report of Dr. Einbund dated March 2, 2018. Page 17
[6] APPLICANT'S 1: Medical report of Dr. Einbund dated March 2, 2018. Page 17
[7] APPLICANT'S 1: Medical report of Dr. Einbund dated March 2, 2018. Pages 14 & 15
[8] Page
[9] Page 19 line 1
[10] Page 10 line 11 to 14

The applicant testified that he had had several surgeries since leaving his career as a professional hockey player. These included left knee surgery, right shoulder surgery, left shoulder surgery, right hip surgery, and left hip surgery.[11]

The record shows that the applicant continued to work after his hockey career, with no further injury, but as time progresses his symptoms and injuries worsened until he was required to undergo a number of surgeries.

Wherefore, Dr. Einbund's opinion that the applicant was permanent and stationary three months after his hockey career ended is not supported by the facts and appears to be based on speculation.

With the evidence supporting a determination that the applicant's injuries deteriorated after he stopped playing professional hockey, there is no substantial evidence that the applicant was permanent and stationary within the first year or two after ending his professional hockey playing career.

The with the evidence showing that the applicant was not permanent and stationary within a year or two of ending his hockey career the undersigned judge looked two the medical reporting submitted by the parties. Dr. Einbund evaluated the applicant on March 21, 2018. In this report Dr. Einbund stated that the applicant was permanent and statuary. This report is the first definitive evidence that the applicant industrial injuries had reached permanent and stationary stature.

Based on the above the undersigned judges finding of the applicant's permanent and stationary date as March 21, 2018 is support by the evidence and the applicant's petition for reconsideration should be denied.

Permanent Disability Award Payments Were To Have Commenced On March 21, 2018

The applicant's next assertion is that the judge erroneously found that the applicant's permanent indemnity pays should have commenced on March 21, 2018.

[11] MOH/SOE 3/4/2021 EAMS Doc ID: 74012851 Page 5, Lines 17 to 19

The applicant asserts that disability payments should be award from the date Dr. Einbund provided in his March 2018 report, i.e. three months post retirement.

As discuss previously there is substantial evidence to support the undersigned judges finding of March 21, 2018 was the applicant's permanent and stationary date.

However, assuming arguendo that the applicant was permanent and stationary three months after his retirement for professional hockey the applicant would still not be entitled to permanent disability payments.

A finding of permanent and stationary status does not necessary establish disability, as there are times when an applicant after undergoing treatment recovers fully.

The applicant testified to continuing discomfort but also that he continued to work until 2018 when he left Coldwell Banker due to his inability to physically perform his duties.

Furthermore, no medical records or other evidence was submitted that established disability in 1981, or at any other time prior to Dr. Einbund's March 21, 2018 report.

It has been established that regardless of the date of exposure, an applicant has no cause of action and no rights accrue to him until that point in time when the cumulative effects of his injuries result in a compensable disability.[12]

In this matter there is no evidence that three months after the applicant retired from professional hockey that he had sustained disability.

The parties have not disputed the courts finding of a date of injury for the applicant claim of March 21, 2018.

[12] Van Voorhis v. Workmen's Comp. Appeals Bd., 37 Cal. App. 3d 81, 86

The undersigned judge determined this date pursuant to California Labor Code Section 5412 that states that the date of injury in cumulative trauma claims is the date an applicant fists suffers disability and knew or should have known it was industrial in nature.

According to the evidence submitted the earliest evidence of compensable disability was March 21, 2018, when Dr. Einbund evaluated the applicant and issued his report.[13]

This is also this date upon which the undersigned judge found the applicant first had knowledge that this disability was caused by his employment as a professional hockey player.

It was March 21, 2018 that the cumulative effects of the applicant's injuries result in a compensable disability and the applicant's right to seek compensation arose.

It would be incorrect to award the applicant disability and life pension payments for the 37 years before the applicant's right to claim those benefits arose.

Based on the above the undersigned judge was not in error in finding that the applicant's permanent indemnity pays should have commenced on March 21, 2018.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the applicant's petition for reconsideration be denied.

Dated in Santa Ana on July 5, 2022

OLIVER CATHEY
WORKERS' COMPENSATION JUDGE

[13] Please note that there was a typo on page 12 in the undersigned judge's opinion on decision stating that Dr. Einbund's evaluation was on March 2, 2018 and not March 21, 2018 which is the correct date.

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Applicant's Occupation:	Professional Hockey Player
Applicant's age at date of injury:	71
Date of injury:	September 30, 1968 through October 15, 1980
Parts of Body Injured:	head, neck, back, shoulders, elbows, wrists, hands, fingers, knees, hips, ankles, feet, toes, and neuro.
Manner in which it occurred :	Continuous Trauma
Identity of Petitioner:	Defendant ACE American Insurance
Timeliness:	The Petition is timely
Verification:	The Petition is verified
Date of Findings and Order :	May 31, 2022

Petitioner contends that the WCJ erred in finding that:

a) The reports of the Applicant's Qualified Medical Examiners' reports are admissible;
b) Relying on the reporting of the Applicant's Qualified Medical Examiners, as their reports should not constitute substantial medical evidence.

II
FACTS

The parties stipulated at trial that applicant Gary Croteau, born [], was employed as a professional hockey player from September 30, 1968 through October 15, 1980.

The applicant's employment was at various locations; by the Colorado Rockies, now known as the New Jersey Devils, from 1976 through 1980; the Kansas City Scouts, now known

as the New Jersey Devils, between 1974 and 1976; the California Golden Seals from 1970 through June 12 of 1974; the Redwings for 1970; and the Los Angeles Kings from 1968 through 1970.[14]

The matter proceeded on the record on June 22, 2020, and continued to March 4, 2021, when the applicant's testimony commenced. The applicant's testimony was completed on May 3, 2021, and the matte was submitted for determination on May 24, 2021, after the parties were allowed to file trial briefs.

The matter was subsequently sent to the Disability Evaluation Unit for a formal rating. Defendant objected to the rating, and a cross-examination of the rater was completed on January 13, 2022. The matter was resubmitted for determination. However, the submission was vacated due to the filing of a petition to withdraw the applicant's claim of injury to all body parts except orthopedic and neurological.

The matter was set for a Status Conference on March 9, 2022. After a discussion about the nature and reasoning of the applicant's petition, the undersigned Judge granted the petition and ordered the matter resubmitted for decision.

The undersigned judge issued his Findings and Order on May 31, 2022.

III
DISCUSSION

Admissibility of the medical reporting of the applicant's Qualified Medical Examiners

At trial, the defendants object to the admissibility of the Applicant's Exhibits 1 through 5 on the grounds that they were obtained in violation of Labor Code Sections 4060 and 4062.2.[15]

[14] MOH/SOE June 22, 2020, EAMS Doc ID: 72917405, Page 2, Lines 1 to 11
[15] MOH/SOE June 22, 2020, EAMS Doc ID: 72917405, Page 4, Lines 8 to 9

Labor Code Section 4060 provides that if a medical evaluation is required to determine compensability at any time after the filing of the claim form, and the employee is represented by an attorney, a medical evaluation to determine compensability shall be obtained only by the procedure provided in Section 4062.2. This section was effective April 19, 2004, and applies to all claims filed subsequent to date.

Labor Code Section 4062.2 provides whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.

The Undersigned Judge noted that the defendant had submitted, as evidence, "Defense" qualified medical examination reports from Dr. Christopher Fleming, Dr. Paul Grodan, Dr. Sara Watkins, and Dr. Charles Glatstein. These reports were also obtained outside the procedures outlined in California Labor Code Section 4060 and 4062.2.

Furthermore, no evidence was submitted that the defendants objected to the medical reporting before trial. The defendants had conducted themselves in a manner that led the applicant to believe that the parties intended to procure their own medical-legal evaluation in lieu of one per Labor Code Section 4062.2.

The Undersigned Judge initially found that the defendant securing "Defense" qualified medical examination reports in violation of California Labor Code Sections 4060 and 4062.2 and submitting said documents to the Court as evidence was estopped from asserting an objection to the evidence procured in violation of Labor Code Section 4062.2. Furthermore, the Undersigned Judge, in doing so, the defendants waived any objection to the medical reporting obtained by counsel for the applicant in the same manner.

The defendant now asserts that the Undersigned Judge was in error in allowing both the applicant’s and the defendant’s Qualified Medical Examiners’ reports to be taken in as evidence. The defendant further asserts that since both the applicant’s and the defendant’s Qualified Medical

Examiners' reports are inadmissible, there was no evidence to find industrial injury and that the undersigned Judge should have ordered a take-nothing on the applicant's claim.

The Undersigned Judge disagrees. Thought the undersigned Judge found that the defendant should be estopped from objecting to the admissibility of the medical reporting of the applicant's Qualified Medical Examiners, Dr. Prakash Jay, Dr. Einbund, Dr. Kenneth Nudleman, and Dr. Michael Wells, this is not the most compelling reason for their admissibility.

It has been determined that a void in the law was created when sections 4061 and 4062 were amended under Sen. Bill 899 to apply the medical evaluation and reporting procedure of section 4062.2. This void occurred because the medical evaluation and reporting procedure in section 4060, section 4061, or 4062 are limited to represented cases for dates of injury occurring on or after January 1, 2005.

In addressing this void, the Appellate Court has found that the Legislature intended former sections 4060 et seq. to remain operative for represented cases with a date of injury before January 1, 2005.[16]

The Appeals Board has provided additional clarification in the case of *Tanksley v. City of Santa Ana, 2010 Cal. Wrk. Comp. P.D. LEXIS 74*.

In the *Tanksley* case, the defendant employed the applicant as a police officer. He was diagnosed with hypertension and filed a claim for workers' compensation benefits in July 2003. In November 2005, a second claim was made alleging injury to the heart and internal system during the cumulative trauma period of December 2003 to December 2004."

The parties obtained separate qualified medical examiner reports outside the procedures delineated in Labor Code 4060 and 4062.2.

[16] Nunez v. Workers' Comp. Appeals Bd., 136 Cal. App. 4th 584

At trial, the trial judge found that the physicians' reports were inadmissible as neither were Panel Qualified Medical Examiners (QME) and were not obtained pursuant to the procedures outlined in Labor Code §4060(d).

The Appeals Board vacated the trial judge's decision stating that the question of the process that applies to an applicant's claim does not first require a finding of the date of injury. Instead, for injuries claimed to have occurred prior to January 1, 2005, section 4062, as it existed before its amendment by SB 899, continues to provide the procedure by which medical-legal reports are to be obtained.[17]

The Undersigned Judge's finding of the applicant's date of injury pursuant to Labor Code Section 5412 is not controlling in determining the process that applies to an applicant's claim. In the matter at hand, the applicant filed a claim of injury for the period of September 30, 1968 through October 15, 1980. As the claim of injury is before January 1, 2005, section 4062, as it existed before its amendment by SB 899, provides the procedure by which medical-legal reports are to be obtained.

Based on the above, the undersigned Judge was not in error in admitting the reports of Applicant's Qualified Medical Examiners Dr. Prakash Jay, Dr. Einbund, Dr. Kenneth Nudleman, and Dr. Michael Wells, and the defendant's Petition for Reconsideration should be denied.

Substantial Medical Evidence

The defendant asserts that the undersigned Judge was in error in relying on the medical reporting of Dr. Einbund and Dr. Nudleman on the grounds that neither doctors' reporting was substantial medical evidence.

In support of its position, the defendant asserts that Dr. Einbund did not have a complete work history and that this incomplete history is fatal to his options on causation.

[17] Tanksley v. City of Santa Ana, 2010 Cal. Wrk. Comp. P.D. LEXIS 74, *11 (W.C.A.B. January 25, 2010)

Defendant provides that Dr. Einbund, in his reporting, provided a work history following the applicant's hockey career as being a marketing director for Hartford Insurance from 1980 to 1984, as a sales and leasing agent for Coldwell Banker from 1984 to 1989, as an independent consultant from 1989 to 1994, and a broker for Coldwell Banker from 1994 to 2010. Missing is the applicant's employment after surgery with Coldwell Banker in 2018, the applicant's employment with Wal-Mart in greeter post and loss mitigation positions, and the applicant's work in the Sudbury nickel mines, which he did during high school and his off-time in college.

The applicant work at Coldwell Banker in residential sales. This was a desk job, but it did require him to show properties to potential buyers.[18]

The applicant stopped working in 2011 but maintained his real estate license as active. After his surgery, the applicant returned and worked at Coldwell Banker until 2018.[19]

Subsequently, the applicant obtained employment with Wal-Mart. The Court noted that the applicant's employment with Wal-Mart was also after Dr. Einbund's examination. The applicant testified that Wal-Mart allowed him to use a cart to help maintain his balance and would allow him to sit down if this became too much.[20]

Dr. Einbund was aware of the applicant's employment with Coldwell Banker and did not find that it contributed to the applicant's injuries. The applicant's employment was not significantly physical compared to the years of hockey the applicant played.

As to the applicant's employment within the Canadian mines, during high school and college, the applicant testified that he sustained no injuries during this employment.[21]

Dr. Einbund's lack of knowledge of the applicant's employment with Wal-Mart, in the Canadian mines, and the number of years the applicant worked at Coldwell Banker, are not significant deficiencies in Dr. Einbund's employment history. With no medical history or other

[18] MOH SOE March 4, 2021, EAMS Doc ID: 74012851 page 16, Lines 10 to 11
[19] MOH SOE March 4, 2021, EAMS Doc ID: 74012851 page 16, Lines 11 to 12
[20] MOH SOE March 4, 2021, EAMS Doc ID: 74012851 page 5, Lines 24 to 25, and Page 6, Lines 1 to 2
[21] MOH SOE March 4, 2021, EAMS Doc ID: 74012851 page 5, Lines 24 to 25

evidence suggesting that the applicant's work for these companies caused the applicant injury, the history deficiency is not fatal to Dr. Einbund's opinions.

The defendant also alleges that Dr. Einbund was not provided a copy of the transcript of the applicant's deposition, taken on May 1, 2019, after he examined the applicant.

In reviewing the record, the undersigned Judge found the applicant's complaints as described to Dr. Einbund[22] were consistent with the complaints he testified to in trial.[23]

The defendant asserts that having not reviewed the applicant's deposition, Dr. Einbund did not have the most accurate medical and social history. However, the defendant does not identify discrepancies between the applicant reporting to Dr. Einbund during his evaluation and what the applicant testified to in the deposition.

There is no evidence that the information in the applicant's deposition is contrary to or inconsistent with Dr. Einbund's examination.

The defendant also asserts that Dr. Einbund reported only one of the applicant's multiple falls. Dr. Einbund reported that the applicant fell in 2005 when his right leg gave way. The applicant landed on the sidewalk and fractured his left wrist, for which he underwent treatment, including physical therapy.

Defendant asserts that the applicant in his deposition, the applicant testified to falling approximately five times. The defendant, in his assertion, references the applicant's deposition, which was not taken into evidence. However, the applicant did testify at trial that he had fallen approximately five times since playing hockey. The applicant did not report these falls to Dr. Einbund because they were either after Dr. Einbund's evaluation or the falls required no medical care.[24]

[22] APPLICANT'S 1: Medical report of Dr. Einbund dated March 2, 2018. Page 5 and 6
[23] MOH SOE March 4, 2021, EAMS Doc ID: 74012851 page 9, Lines 2 to 13
[24] MOH SOE May 5, 2021, EAMS Doc ID: 74233152, Page 3, Lines 19 to 21

With no medical history or other evidence suggesting that the applicant's additional falls caused the injury, the history deficiency, are not fatal, to Dr. Einbund's opinion.

The defendant's final assertion is that Dr. Einbund's reliance on staff assistance to take the applicant's history, x-rays, and measurements inexcusably invites the possibility of error that may only be cured by Dr. Einbund performing every aspect of an evaluation personally.

The defendant provides no bases for his assertion that Dr. Einbund's staff is not competent to perform these tasks. The defendant's assertion is based on speculation, which cannot be the basis for a determination.

Based on the above, Dr. Einbund's reporting is substantial evidence, and the undersigned Judge was not in error in relying on the opinions of Dr. Einbund.

The defendant also takes issue with the medical reporting of Dr. Nudleman.

Specifically, the defendant asserts that Dr. Nudleman's reporting suffers from the same deficiencies as the reporting of Dr. Einbund.

As discussed above, no medical reporting of other evidence suggests that the inconsequential deficiencies in the history reporting by the applicant's qualified medical examiners resulted in a fatal flaw in the doctor's opinions. As such, Dr. Nudleman's report is substantial evidence.

The defendant further asserts that the medical opinions of Dr. Nudleman were premature. The defendant states that Dr. Nudleman indicated in his report that he had arranged for the applicant to undergo a brain MRI and that he was awaiting those results.

Dr. Nudleman states in his report that he was waiting for a brain MRI but did not defer any of his conclusions pending receipt.

In reviewing the report of Dr. Nudleman, his conclusion are predicated on the nerve conduction studies and his examination of the applicant. Dr. Nudleman did not qualify his conclusion as incomplete without the Brian MRI, and the obtained Brain MRI does not appear to conflict with Dr. Nudleman's findings.[25]

Although the employee bears the burden of proving that his injury was sustained in the course of his employment, the established legislative policy is that the Workmen's Compensation Act must be liberally construed in the employee's favor (Lab. Code, § 3202), and all reasonable doubts as to whether an injury arose out of employment are to be resolved in favor of the employee.

In the typical course of litigation, the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge inaccessible to the unguided rudimentary capacities of lay arbiters.[26]

However, in some cases, the issues, while of a medical nature, are sufficiently within the grasp of lay experience and understanding to permit a finding without expert medical evidence.[27]

In the matter before the Board, the undersigned Judge looked at the information that was missing and/or not provided to the medical examiners and determined that it was inconsequential or consistent with the examiners' conclusions.

As such, in light of the objective findings upon which Dr. Nudleman's based his opinions and the lack of conflict between those objective findings and the Brain MRI results, Dr. Nudleman's opinions are substantial medical evidence.

Based on the above, the Undersigned Judge was not in error in relying on Dr. Nudleman's opinions.

[25] APPLICANT'S: 7, Imaging reports of United Medical Imaging dated March 22, 2018 Page 1
[26] Peter Kiewit Sons v. Industrial Acci. Com., 234 Cal. App. 2d 831, 839
[27] Peter Kiewit Sons v. Industrial Acci. Com., 234 Cal. App. 2d 831, 838

IV
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that the defendant's petition for reconsideration be denied.

Dated in Santa Ana on July 5, 2022

OLIVER CATHEY
WORKERS' COMPENSATION JUDGE