WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CAREY FANNING, *Applicant*

vs.

GELSONS MARKET; ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ10862354, ADJ11931099, ADJ11931128
Santa Barbara District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of January 19, 2024 in case ADJ1086234 wherein it was found that, while employed on November 30, 2015 as a deli cutter applicant sustained industrial injury to her right hand, "chronic regional pain syndrome (CPRS) and left trigger thumb," left hand, left wrist, left upper extremity, and psyche causing permanent total (100%) disability.[1]

Defendant contends that the WCJ erred in finding permanent total disability, arguing that the WCJ erred in relying upon the medical reporting of independent medical evaluator orthopedist Peter M. Newton, M.D. in formulating applicant's orthopedic permanent disability, and arguing that the WCJ erred in finding compensable psychiatric permanent disability arising out applicant's physical injury pursuant to Labor Code section 4660.1(c). Defendant also contends that the WCJ erred in finding that permanent total disability indemnity payments should commence on November 28, 2017, prior to the date that applicant's condition became permanent and stationary. We have received an Answer from the applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, we will affirm the finding that applicant is permanently totally disabled. We find that applicant's orthopedic condition caused permanent total disability, without

[1] Previously in this matter, on October 15, 2021, we issued an Opinion and Order Dismissing Petition for Reconsideration and Denying Petition for Removal. Since the issuance of that Opinion and Order, Commissioner Marguerite Sweeney, who participated in that earlier decision, has retired from the Appeals Board. She has been replaced in the instant proceedings by Commissioner Joseph V. Capurro.

regard to the psyche disability. Although the WCJ did not explain his apportionment determination in his Opinion on Decision or Report, we find defendant did not carry its burden of proving apportionment of the orthopedic permanent disability. Because we affirm the WCJ's decision that applicant sustained overall 100% orthopedic disability, we affirm the finding of permanent total disability on that basis, and need not decide whether compensable psychiatric permanent disability is precluded by Labor Code section 4660.1(c). With regard to the permanent disability indemnity start date, the WCJ correctly found that permanent disability indemnity payments were payable after the last payment of temporary disability indemnity. We amend the WCJ's decision to clarify that applicant sustained industrial injury "in the form of chronic regional pain syndrome" and to amend the finding that "there is a legal basis for apportionment." (Finding No. 10.)

Dr. Newton wrote in his October 18, 2022 report:

> This applicant has findings consistent with chronic regional pain syndrome of the right and left wrist with the right significantly more affected than the left. This applicant's right dominant upper extremity is most accurately rated using the table 13-16. Ms. Fanning cannot use her right upper extremity for self-care or activities of daily living. She does have use of the elbow and shoulder however. has no use of her right wrist and hand. There is significant right upper extremity limitation and condition, she should be assigned a 50% whole person impairment per the criteria of table 13-16.
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> For this applicant's left upper extremity. she can use the involved non-dominant upper extremity for self-care. She can grasp and hold objects with difficulty but on examination today, she had difficulty with digital dexterity. The non-dominant upper extremity condition falls under Class II, giving her a 14% whole person impairment.
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> This applicant has a significant limitation of both upper extremities. Because of the limitations to both upper extremities, her overall limitations with ADLs are significantly higher. She only had one upper extremity limitation. Her right and left upper extremity whole person impairments should be added rather than combined and a total of 64% whole person impairment.
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> The above impairment rating is an accurate reflection of this applicant's current loss of function as discussed in the activities of daily living section of my report, where it is noted that this applicant continues to have significant loss of function with activities of daily living. Per the requirements of the *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition*, Chapters 1 and 2, accurate impairment rating is to be based on accurate reflection of an individual's loss of function.

(October 18, 2021 report at p. 21.)

In *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1127 (Appeals Board en banc) (commonly known as, and hereinafter referred to as *Almaraz II*), we held that a "scheduled permanent disability rating may be rebutted by successfully challenging the component element of that rating relating to the employee's WPI under the AMA Guides … by establishing that another chapter, table, or method within the four corners of the Guides most accurately reflects the injured employee's impairment." (*Almaraz II*, 74 Cal.Comp.Cases at pp. 1095-1096.) However, although a physician is not locked into any particular evaluation method found in the AMA Guides, his or her rating must still be based on and consistent with the AMA Guides, as read as a whole." (*Almaraz II*, 74 Cal.Comp.Cases at p. 1104.) Our decision in *Almaraz II* was affirmed by the Court of Appeal in *Milpitas Unified School District v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].

Here, Dr. Newton clearly notes in his report that his rating criteria is the method that most accurately reflects applicant's impairment. We note that this is not a classic case of *Guzman* "rebuttal" as even defendant concedes in its Petition that there is no standard or obvious rating for chronic pain syndrome. We therefore affirm the WCJ's finding of overall 100% permanent disability based on Dr. Newton's impairment analysis.

However, we also find that defendant did not carry its burden of showing apportionment of the orthopedic permanent disability. We note that Dr. Newton initially opined that apportionment was not indicated. (November 15, 2022 report at p. 5.) However, in a subsequent supplemental report of March 7, 2023, Dr. Newton wrote:

> **CAUSATION OF DISABILITY/IMPAIRMENT:**
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> Factors contributing to this applicant's right and left wrist condition/disability/impairment are 04/25/00 injury for which she was seen by Dr. Montgomery and was diagnosed with complex regional pain syndrome for which she received treatment including Neurontin and the 11/30/15 injury. The applicant's condition may have improved after the 2001 injury but the prior condition made her susceptible to the recurrence of those same symptoms.
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> Dr. Ruth made the diagnosis of complex regional pain syndrome on 01/11/16, less than six weeks after the industrial injury. This is early to have developed a new condition.

APPORTIONMENT:

> The issue of apportionment is addressed pursuant to Labor Code Section 4663 and 4664 and the opinions must be made to a reasonable medical probability. My opinion regarding Causation is based on the applicant's history, physical examination, radiologic and other diagnostic studies, and medical records if I have received them. This information is used to consider other significant causative factors including prior documented injuries, permanent disability, or impairments as well as preexisting conditions whether they be congenital, result of injuries, or degenerative conditions, which have evolved over time. These conditions together are taken into consideration in determining other factors, which may have contributed to this applicant's current condition/ disability/impairment.
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> To a reasonable degree of medical probability, 25% of this applicant's right and left wrist condition/disability/impairment is apportioned to the April 2000 injury after which she developed right upper extremity complex regional pain syndrome and 75% to the 11/30/15 injury.

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

> [A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]
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> Moreover, in the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]
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> 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*, 70 Cal.Comp.Cases at p. 621.)

Here Dr. Newton did not explain in the requisite detail "how and why" non-industrial conditions were contributing to applicant's permanent disability and did not adequately explain the level of apportionment decided upon. We therefore amend the decision to reflect that applicant is entitled to an unapportioned award of permanent disability.

Therefore, since applicant sustained permanent total disability without regard to any psyche disability, we need not determine whether psychiatric permanent disability is precluded by Labor Code section 4660.1(c).

With regard to the permanent total disability start date, as correctly noted by the WCJ in the Report (p. 4), permanent disability indemnity liability commences after the last payment of temporary disability indemnity. (Lab. Code, § 4650, subd. (b)(1); *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550, 560-562 [Appeals Bd. en banc].)

We therefore affirm the substance of the WCJ's decision but grant reconsideration and amend the WCJ's decision to reflect that applicant sustained injury "in the form of" chronic regional pain syndrome and to amend the finding that there is a legal basis for apportionment.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of January 19, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of January 19, 2024 is **AMENDED** as follows:

JOINT FINDINGS OF FACT
(ADJ10862354)

1. It is found Carey Fanning, age 51 on the date of injury, while employed on November 30, 2015, at Santa Barbara, California by Gelson's Market, sustained injury arising out of and in the course of employment to her right hand, left trigger thumb, left hand, left wrist, left upper extremity, psyche, and in the form of chronic regional pain syndrome.

2. At the time of the injury, the employer's workers' compensation carrier was Zenith Insurance Company.

3. At the time of the injury Applicant's average weekly wages were $514.56 per week, warranting a weekly temporary disability rate of $343.04.

4. Defendant paid temporary disability at a weekly rate of $343.04 for the period of December 1, 2015, through April 14, 2016.

5. Applicant is entitled to temporary disability for the period of April 15, 2016, through May 23, 2018, subject to the 104-week cap and less credit for temporary disability paid, EDD benefits received, or monies earned.

6. The employer has furnished some medical treatment.

7. No attorney fees have been paid; no attorney fees arrangements have been made.

8. Applicant became permanent and stationary on May 23, 2018.

9. Applicant is permanently totally disabled and entitled to a weekly rate of $343.04 for the remainder of her life commencing November 28, 2017, less attorney fees as provided hereinbelow.

10. It is found there is no legal basis for apportionment.

11. It is found Applicant there is a need for further medical treatment.

12. It is found Applicant is entitled to be reimbursed for all out-of-pocket medical expenses related to this claim in an amount to be adjusted by the parties, subject to proof.

13. Applicant's attorney is entitled to attorney fees of $105,312.25 in connection with the permanent disability awarded herein. Applicant's attorney is also awarded 15% of the additional temporary disability paid herein.

AWARD
ADJ10862354

This Award is made in favor of CAREY FANNING against the ZENITH INSURANCE COMPANY as follows:

a. Additional body parts as provided in Finding number 1;

b. Additional temporary disability as provided in Finding number 5;

c. Permanent disability as provided in Finding number 9;

d. Entitlement for further medical treatment as provided in Finding number 11;

e. Reimbursement for out-of-pocket medical expenses as provided in Finding number 12;

f. Attorney fees as provided in Finding number 11.

ADJ11931099
(April 26, 2016)

Based on the findings of Peter Newton, M.D. it is found this claimed date of injury was an exacerbation of the November 30, 2015, injury and Applicant take nothing by way of this claim.

ADJ11931128
(January 1, 2017)

Based on the findings of Peter Newton, M.D. it is found this claimed date of injury was an exacerbation of the November 30, 2015, injury and Applicant take nothing by way of this claim.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 8, 2024

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

CAREY FANNING
STOUT, KAUFMAN, HOLZMAN & SPRAGUE
TOBIN LUCKS

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