WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAONALL SMITH, *Applicant*

vs.

ST. LOUIS RAMS and GREAT DIVIDE INSURANCE COMPANY (CARE OF) BERKLEY ENTERTAINMENT INSURANCE, *Defendants*

Adjudication Number: ADJ7803842
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings of Fact, Award and Order (F&O), issued by the workers' compensation administrative law judge (WCJ) on June 13, 2019, wherein the WCJ found in pertinent part that the reports from doctors James K. Styner, M.D. (App. Exhs. 2) Maria Ruby Leynes, M.D. (App. Exhs. 3) and Kenneth L. Nudleman, M.D. (App. Exh. 4) were admitted into evidence; and that the injury caused 85% permanent disability.[2]

Defendant contends that the reports from doctors Styner, Leynes, and Nudleman are medical-legal reports, not treating physician reports, and are not admissible; that the March 8, 2019 Minutes of Hearing and Summary of Evidence (MOH/SOE) are inaccurate and are not a basis for determining applicant's credibility; that several specific injuries were merged into one cumulative injury in violation of Labor Code sections 3208.2 and 5303;[3] and that applicant's permanent disability should have been rated by a Disability Evaluation Unit (DEU) rater.

We did not receive a Report and Recommendation on Petition for Reconsideration from the WCJ. We received an Answer from applicant.

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[1] We had issued an Opinion and Order on May 31, 2017. Deputy Commissioner Newman who was at that time a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in his place.
[2] The captions of various pleadings refer to Great Divide Insurance Company (Care of) "Berkley Entertainment" or "Berkley Specialty." We assume "Care of" is meant to infer "administered by" but Berkley Entertainment Insurance and Berkley Specialty Underwriting Managers, LLC are different entities and it is not clear which if the two companies is involved in this matter. Counsel are reminded that it is their responsibility to accurately identify the parties.
[3] All further statutory references are to the Labor Code unless otherwise noted.

We have considered the allegations in the Petition and the Answer. Based on our review of the record, and for the reasons discussed below, we will affirm the F&O.

BACKGROUND

Applicant claimed injury to his "orthopedic system" including his head, neck, bilateral upper extremities, spine, hips, and bilateral lower extremities, to his neurological and internal systems, and a dental/TMJ (temporomandibular joint) injury, while employed by defendant St. Louis Rams as a professional football player during the period from April 2006, through March 1, 2008.

On July 29 2011, applicant designated orthopedic physician James K. Styner, M.D., to be his treating physician. (App. Exh. 5.) Applicant was seen by Dr. Styner on September 19, 2011, and the doctor diagnosed several spine, and upper and lower extremity conditions. (App. Exh. 2, Dr. Styner, September 19, 2011, p. 10.) The treatment recommendations included an internal medicine consultation and a neurological evaluation. (App. Exh. 2, September 19, 2011, p. 11.) Dr. Styner referred applicant to Kenneth L. Nudleman, M.D., to conduct the neurological evaluation, and he referred applicant to internist Maria Ruby Leynes, M.D., for the internal medicine consultation. Dr. Nudleman diagnosed posttraumatic headaches and sleep disorder. He stated that applicant needed to be "monitored neurologically," and that applicant had 11% whole person impairment (WPI) as a result of his professional football cumulative injury. (App. Exh. 4, Dr. Nudleman, September 20, 2011, pp. 3 - 4.) In her initial report, Dr. Leynes diagnosed applicant as having GERD (gastroesophageal reflux disease) and bilateral hernias. (App. Exh. 3, Dr. Leynes, September 20, 2011, p. 5.) The doctor recommended a course of medical treatment and requested that she be provided additional medical records to review. (App. Exh. 3, September 20, 2011, p. 6.)[4]

On October 10, 2011, Dr. Styner submitted a progress report (PR-2) stating that applicant would need surgery on his left knee and both feet. (App. Exh. 2, Dr. Styner, October 10, 2011.)

After reviewing additional records, Dr. Leynes submitted a "final report" wherein she concluded that applicant's GERD had caused 9%WPI, and the hernia caused 4% WPI. (App. Exh. 3, Dr. Leynes, January 19, 2012, p. 11.) She then apportioned 70% of applicant's gastric disability

[4] The exhibit identified as a 10-20-2011 report from Dr. Leynes as actually a copy of the September 20, 2011 report.

and 75% of his hernia related disability to his cumulative injury. (App. Exh. 3, January 19, 2012, p. 12.)

Dr. Styner submitted his "final report" on February 21, 2012. He determined that applicant had 14% right upper extremity WPI, 14% left upper extremity WPI, 8% lumbar spine WPI, 11% right lower extremity WPI, and 8% left lower extremity WPI. (App. Exh. 2, Dr. Styner, February 21, 2012, pp. 29 – 30.) Dr. Styner concluded that 100% of applicant's orthopedic disability was caused by his cumulative trauma injury. (App. Exh. 2, February 21, 2012, p. 32.)

Orthopedic QME Patrick M. O'Meara, M.D., evaluated applicant on February 8, 2013. Dr. O'Meara examined applicant, took a history, and reviewed the medical record. Dr. O'Meara found that applicant had sustained injury to both shoulders and both knees. (Joint Exh. 101, Dr. O'Meara, February 8, 2013, p. 16.) The doctor assigned 10% WPI to applicant's left shoulder and to 10% WPI to his right shoulder, and as to apportionment he said 6% WPI for each shoulder was caused by the cumulative trauma injury. (Joint Exh. 101, February 8, 2013, pp. 17 – 18.) Dr. O'Meara then stated that applicant had 3% WPI for each knee which was caused by the cumulative injury. (Joint Exh. 101, February 8, 2013, p. 19.)

Dr. Styner was provided additional medical records to review and in his "Primary Treating Physician's Orthopedic Supplemental Report" he stated:

> … I now feel it is appropriate to apportion 10% of his bilateral shoulder disability to non-industrial causes including his college sports injuries, with the remaining 90% of his bilateral shoulder disability resulting from his professional football career.
> (App. Exh. 2, Dr. Styner, November 27, 2013, p. 5.)

In her January 6, 2014 supplemental report, Dr. Leynes stated:

> Information revealed in my review of the above medical records is consistent with the history obtained from the patient and the extensive medical records previously reviewed and discussed in my prior reports. Accordingly my review of these records do not result in any changes to my opinions relative to the industrial nature and extent of this patient's internal medicine injuries and resultant disability.
> (App. Exh. 3, Dr. Leynes, January 6, 2014, p. 5.)

The parties proceeded to trial on November 6, 2015, on the issue of whether the Workers' Compensation Appeals Board (Appeals Board), had subject matter jurisdiction as to applicant's injury claim. (MOH/SOE, November 6, 2015.) The WCJ found that the Appeals Board did have

jurisdiction and in our May 31, 2017 Opinion and Decision after Reconsideration, we agreed with the WCJ that the Appeals Board does have jurisdiction over applicant's workers' compensation claim.

On January 29, 2018, applicant was evaluated by neurological QME Barbara A. McQuinn, M.D. After examining applicant, taking a history and reviewing the medical record, including the report from Dr. Nudleman, Dr. McQuinn explained:

> Dr. Nudleman's whole person impairment ratings for the applicant's headaches and sleep disorder appear to be well reasoned, and I see no reason to modify these. I would agree that, with respect to future medical care this gentleman should be monitored via neuropsychological testing over time, in the event that he should develop additional or progressive symptoms.
> (Joint Exh. 103, McQuinn, January 29, 2018, p. 8.)

Dentistry QME John M. Takla, D.D.S., evaluated applicant on January 30, 2018. Dr. Takla concluded:

> In summary, Mr. Smith experienced CT 04/20/2002-03/01/2008 injury. This resulted in Temporomandibular joint (TMJ) pathology and gastroesophageal reflux disease (GERD). His GERD resulted in dental erosion. Mr. Smith is permanent and stationary. Mr. Smith's TMJ symptomology would be consistent with a 3% impairment of the whole person. Mr. Smith's dental erosion symptomology would be consistent with a 3% impairment of the whole person. One hundred percent of TMJ symptomology is secondary to his CT 04/20/2002-03/01/2008 injury. Seventy percent of his dental erosion is secondary to his CT 04/20/2002-03/01/2008 injury and thirty percent by other factors.
> (Joint Exh. 102, Dr. Takla, January 30, 2018, p. 17.)

QME Dr. O'Meara re-evaluated applicant on July 20, 2018. (Joint Exh. 101, Dr. O'Meara, July 20, 2018.) In his report, Dr. O'Meara only addressed issues related to whether applicant sustained injury as a result of the football games he played in California.[5]

The parties again proceeded to trial on March 8, 2019. (MOH/SOE, March 8, 2019.) The issues submitted for decision included injury AOE/COE, parts of body injured, permanent disability, and the admissibility of applicant's exhibits 2, 3, and 4.[6]

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[5] Our May 31, 2017 Decision that the Appeals Board has jurisdiction over this matter was not appealed and is a final determination as to that issue. It does not appear that Dr. O'Meara's report is relevant as to any issues addressed herein. As such, it will not be further discussed.

[6] The MOH/SOE includes a lengthy list of "issues" that are actually arguments made by the parties regarding the issues identified. (See issues 19 and 20.)

DISCUSSION

The California Supreme Court has discussed the admissibility of medical reports in workers' compensation proceedings, in pertinent part, as follows:

> [T]he comprehensive medical evaluation process set out in section 4060 et seq. for the purpose of resolving disputes over compensability does not limit the admissibility of medical reports…Under section 4064, subdivision (d), "no party is prohibited from obtaining any medical evaluation or consultation at the party's own expense," and "[a]ll comprehensive medical evaluations obtained by any party shall be admissible in any proceeding before the appeals board . . ." except as provided in specified statutes. The Board is, in general, broadly authorized to consider "[r]eports of attending or examining physicians." (§ 5703, subd. (a).) These provisions do not suggest an overarching legislative intent to limit the Board's consideration of medical evidence.
> (*Valdez v. Workers' Comp. Appeals Bd.* (2013) 57 Cal.4th 1231, 1239 [78 Cal.Comp.Cases 1209].)

As to the issue of the admissibility of reports privately obtained from doctors by the employee pursuant to section 4605, the Court stated:

> …[W]hen we consider the reforms enacted by Senate Bill 863…[t]he Legislature did not…narrow employees' right to seek treatment from doctors of their choice at their own expense, or bar those doctors' report admissibility in disability hearings. Rather, it provided that privately retained doctors' reports "shall not be the sole basis of an award of compensation." (§ 4605.) The clear import of this language is that such reports may provide some basis for an award, but not standing alone.
> (*Id*. at 1239.)

The 2nd District Court of Appeal subsequently held:

> The Board noted that section 4605 is contained in article 2 of chapter 2 of part 2 of division 4 of the Labor Code, which is titled "Medical and Hospital Treatment." Considering this context, the Board concluded that the term "consulting physician" in section 4605 means "a doctor who is consulted for the purposes of discussing proper medical treatment, not one who is consulted for determining medical-legal issues in rebuttal to a panel QME." We agree with the Board. Section 4605 provides that an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." When an employee consults with a doctor at his or her own expense, in the course of seeking medical treatment, the resulting report is admissible.
> (*Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009, 1016 [80 Cal.Comp.Cases 1256].)

The Court further explained:

> Section 4605 permits the admission of a report by a consulting or attending physician, and section 4061, subdivision (i) permits the admission of an evaluation prepared by a treating physician. Neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.
> (*Id*. at 1016.)

Here, by correspondence dated July 29, 2011, applicant designated Dr. Styner to be his treating physician (App. Exh. 5) and Dr. Styner referred applicant to Dr. Leynes and Dr. Nudelman for consultations. As attending and consulting physicians, the reports from each of the doctors are admissible. (*Batten v. Workers' Comp. Appeals Bd., supra* at 1016.) Also, all of the reports from Dr. Leynes, Dr. Nudelman, and Dr. Styner were issued prior to the reports from QME Dr. McQuinn and QME Dr. Takla. Further, except for Dr. Styner's November 27, 2013 report and Dr. Leynes, January 6, 2014 report, all of their reports were issued prior to the reports from Dr. O'Meara. Clearly, the attending and consulting physicians, Drs. Styner, Leynes, and Nudelman were not retained solely for the purpose of rebutting the opinions of the QMEs. Thus, we agree with the WCJ that there is no legal basis for "denying their admissibility." (Opinion on Decision, p. 6.)

Regarding whether the Summary of Evidence is "insufficient," having read the transcript in its entirety, we see no relevant inconsistencies between the Summary of Evidence and the transcript. In turn, we see no evidence supporting defendant's arguments that applicant's testimony and the doctors' reports are not credible.

Defendant argues that applicant's cumulative injury claim violates sections 3208.2 and 5303. Review of the trial record indicates that although the parties identified several code sections as "issues" (MOH/SOE, p. 3) defendant did not raise any issues as to sections 3208.2 and 5303. Applicant's cumulative injury claim was denied and at no time did defendant object to any of the body parts being included in the cumulative injury claim. Also, defendant refers to Dr. Styner's review of medical records, but did not submit any evidence identifying the dates of injury or cause of injury as to any specific injuries that it is asserting. It has long been the law that an issue that could have been raised at trial cannot be raised for the first time in a petition for reconsideration. (*Davis v. Interim Health Care* (2000) 65 Cal.Comp.Cases 1039, 1044 (Appeals Board en banc); *City of Anaheim v. Workers' Comp. Appeals Bd. (Evans)* (2005 W/D) 70 Cal.Comp.Cases 237,

238; *Los Angeles Unified School District v. Workers' Comp. Appeals Bd. (Henry)* (2001 W/D) 66 Cal.Comp.Cases 1220.) The "merger" issue has been waived and will not be further addressed.

Finally, an injured worker's disability rating does not require that a rating be issued by a DEU rater. (See *Blackledge v. Bank of America* (2010) 75 Cal. Comp. Cases 613 (Appeals Board en banc).) "[A] WCJ may elect to independently rate an employee's permanent disability." (*Ibid,* at 616.) It must be noted that although defendant argues it is "preferable" for a WCJ to issue formal rating instructions, defendant did not identify any errors in the WCJ's rating of applicant's disability. Nor do we see any errors in the rating. Defendant's arguments do not constitute a basis for rescinding the WCJ's rating of applicant's disability.

Accordingly, we affirm the F&O.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the June 13, 2019 Findings of Fact, Award and Order, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 12, 2022

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

RAONALL SMITH
LEVITON, DIAZ & GINOCCHIO
PEARLMAN, BROWN & WAX

TLH/*pc*

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