WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BENJAMIN NKWONTA, *Applicant*

vs.

COUNTY OF KERN;
permissibly self-insured, *Defendants*

Adjudication Numbers: ADJ10320494; ADJ10528386
Bakersfield District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision 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 and Opinion on Decision, both of which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

The WCJ's report cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313. (*City of San Diego v. Workers' Comp. Appeals Bd.* (*Rutherford*) (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd*. (1980) 45 Cal.Comp.Cases 1026 (writ den.).)

Next, we note that these claims were consolidated on April 10, 2018. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 4/10/18, at p. 2:3-6.) Therefore, documentary evidence received in one case is part of the record in both cases. (Cal. Code Regs., tit. 8, § 10396(e).) Moreover, we agree with the WCJ that the opinion of panel qualified medical examiner (PQME) Edward O'Neill, M.D., is substantial medical evidence upon which the WCJ properly relied regarding the specific injury in Case No. ADJ10320494. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) [a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its

conclusions].) Defendant does not challenge the substantiality of Dr. O'Neill's medical opinion or argue that the opinion of PQME Mark Lensky, M.D., is more substantial with any specific references to the record as required by WCAB Rule 10945(b). (Cal. Code Regs., tit. 8, § 10945(b).) We observe, moreover, 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].)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 24, 2023

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

BENJAMIN NKWONTA
CHAIN COHN CLARK
OFFICE OF THE CITY COUNSEL

PAG/*cs*

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

ON PETITION FOR RECONSIDERATION

INTRODUCTION:

Petitioner Defendant County of Kern (Petitioner County of Kern) seeks relief from the April 28, 2023, Ruling Admitting Evidence, Findings of Fact, Orders, Awards and Opinion on Decision (Findings and Award) by filing a timely, verified, Petition for Reconsideration dated May 23, 2023 (Petition).

In ADJ10320494, Applicant Benjamin Nkwonta, age 53, while employed as an attorney on September 16, 2015, sustained injury arising out of and in the course of employment to the heart, left shoulder, and in the form of deep vein thrombosis.

Applicant Benjamin Nkwonta, age 53, while employed as an attorney during the cumulative trauma period from March 10, 2003, through September 16, 2015, sustained injury arising out of and in the course of employment to the heart.

The Petition's listing of statutory authority for filing is consistent with Labor Code §4903, sections (a), (c), and (e) since it recites those provisions.

Specifically, the Petition claims:

I. that WCALJ erred by finding that Applicant sustained 78% permanent disability as a result of the specific injury dated September 16, 2015;[1]
   a. that the WCALJ erred by ignoring the Panel QME for the specific injury;[2]
   b. that the WCALJ erred by following the Panel QME for the cumulative injury;[3]
   c. that the WCALJ erred by awarding impairment for cardiomyopathy twice;[4]
   d. that the WCALJ erred by allowing 18% WPI for grip loss;[5]
   e. that the WCALJ erred by allowing 9% for coronary artery disease;[6]
   f. that the WCALJ erred by not allowing apportionment for the arrhythmia;[7] and,

[1] Petition, p. 3, lines 2-3. This is Petitioner's overall contention for the specific injury and subsections (a) through (f) below are under this.
[2] Petition, p. 3, line 6.
[3] Petition, p. 4, line 5.
[4] Petition, p. p. 4, line 19.
[5] Petition, p. 5, line 18.
[6] Petition, p. 7, line 1.
[7] Petition, p. 7, line 22.

II. that the WCALJ erred by finding that Applicant sustained 26% permanent disability as a result of the cumulative injury ending September 16, 2015.[8]

FACTS:

Applicant suffered two injuries while working for Petitioner County of Kern. According to Applicant Nkwonta, on September 16, 2015 he was on the ninth day of cross-examining a combative detective witness when Applicant Nkwonta blacked out after suffering a cardiac arrest. The court had installed a defibrillator two weeks prior which was used while the detective administered CPR and of three nurses who were serving on the jury assisted. Applicant was hospitalized for five days. Later, an angiogram was performed, and Applicant was put on a pacer/defibrillator/AICD (ICD).[9] As a result of the ICD in the chest wall, Applicant Nkwonta sustained injury to the left shoulder.[10]

Applicant Nkwonta sustained a cumulative trauma injury to the heart dated from March 10, 2003, through September 16, 2015.[11]

Petitioner County of Kern denied the two claims of injury that resulted in the first trial in these cases on April 10, 2018. The sole issue for that trial was injury arising out of and in the course of employment.[12] The two cases were ordered consolidated for trial, and the evidence in one to be received in the other insofar as it is relevant and material.[13] Findings of Fact and Opinion on Decision issued June 19, 2018 wherein it was found Applicant Nkwonta sustained two injuries, one dated September 16, 2015 and the other dated CT from March 10, 2003 through September 15, 2016 (Findings of Fact 1).[14]

The parties obtained two QME's for the heart, one for each injury. One was Dr. Edward O'Neill and the other Dr. Mark Lensky. Applicant Nkwonta was also evaluated by an orthopedic QME, Dr. Donald Schengel.

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[8] Petition, p. 8, lines 15-16.
[9] Applicant's Exhibit 1, medical report from Dr. Edward O'Neill, dated March 1, 2017, p. 2.
[10] Court Exhibit X, medical report from Dr. Donald Schengel, dated August 24, 2022, p. 12.
[11] Findings of Fact and Opinion on Decision dated June 19, 2018, p. 1, Finding of Fact 2 based in part on Applicant's Exhibit 2, deposition of Dr. Edward O'Neill dated August 16, 2017, p. 21, lines 24-25 and p. 22, lines 1-2.
[12] Minutes of Hearing and Summary of Evidence dated April 10, 2018 (MOH/SOE 1), p. 3, lines 1-3.
[13] MOH/SOE 1, p. 2, lines 1-6.
[14] Findings of Fact and Opinion on Decision dated June 19, 2018, p. 1, Findings of Fact 1 and 2.

The parties appeared numerous times for Mandatory Settlement Conferences, an Expedited Hearing and a January 8, 2021, Trial that was ordered off calendar and discovery reopened.[15]

On April 8, 2022, the parties reappeared for Trial, and the matter was submitted to the undersigned judge for decision on May 17, 2022. On May 19, 2022, the first Formal Disability Evaluation Unit Rating issued. On July 14, 2022, Order Rescinding Submission issued for orthopedic QME Dr. Donald Schengel to reevaluate Applicant Nkwonta since the doctor's prior evaluation was fairly remote in time, the doctor had not taken his own measurements of Applicant Nkwonta, and Applicant Nkwonta's condition had changed.[16]

On January 24, 2023, the parties reappeared for Trial, and the cases submitted for decision on February 22, 2023.[17] The matter was referred to the Disability Evaluation Unit for an Amended Formal Rating that issued February 10, 2023.[18]

At no time did Petitioner County of Kern object to the rating and request cross-examination of the disability evaluator.

On April 28, 2023, Ruling Admitting Evidence, Findings of Fact, Orders, Awards and Opinion on Decision issued. In part, it was found Applicant Nkwonta sustained 78% permanent disability as a result of the specific injury dated September 16, 2015[19] and 26% permanent disability as a result of the cumulative trauma injury dated from March 10, 2003, through September 16, 2015.[20]

On May 23, 2023, Petitioner filed a timely, verified Petition for Reconsideration.

As of the composition of this Report and Recommendation, Applicant's attorney has not filed an Answer.

[15] Minutes of Hearing dated January 8, 2021.
[16] Order Rescinding Submission dated July 14, 2022.
[17] Minutes of Hearing and Summary of Evidence dated January 24, 2023, p. 1, lines 42.
[18] Court Exhibit Z, 2nd Amended Formal Disability Evaluation Unit Rating dated February 10, 2023.
[19] Findings of Fact dated April 28, 2023, p. 2, Finding of Fact 13.
[20] Findings of Fact dated April 28, 2023, p. 2, Finding of Fact 15.

DISCUSSION:

Ignoring Dr. Lensky

Petitioner County of Kern first argues that it is aggrieved by the refusal of the WCALJ to acknowledge Dr. Lensky as the QME assigned to resolve issues involving the specific injury dated September 16, 2015.[21]

It is Petitioner's burden to prove by a preponderance of the evidence that the award made and filed by the workers' compensation judge acted without or in excess of its powers, that the evidence does not justify the findings of fact, and/or the findings of fact do not support the order, decision, or award.[22]

The first problem is that the standard is not one wherein a petitioner must prove it was aggrieved because it has to face a 78% permanent disability finding.[23]

The second problem with this argument is that it is well settled that a workers' compensation judge may choose one physician over another that disagrees with the first, as long as the reports of the physician chosen constitute substantial evidence.[24] Where a physician's report is well reasoned, is based on an adequate history and examination, and discloses a solid underlying basis for the opinion, the report is substantial evidence.[25] Therefore, it is not sufficient to argue that another physician's reports are better; it must be shown that the reports of the physician relied upon do not constitute substantial evidence.

In this instance, Dr. O'Neill evaluated Applicant Nkwonta twice and was deposed once in connection with these cases. The first evaluation was on January 30, 2017 with two hours of face-to-face time with Applicant Nkwonta and 13.5 hours for in-depth review of the extensive medical records that culminated in Dr. O'Neill's March 1, 2017 report that he prepared in these cases.[26]

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[21] Petition, p. 3, lines 24-26.

[22] Labor Code §5903(a),(c), and (e). Subsections (b) and (d) were not cited because they are not relevant to the discussion herein.

[23] Petition, p. 3, line 27, and p. 4, line 1.

[24] *Place v. WCAB*, 3 Cal. 3d 372, 378, 475 P.2d 656, 90 Cal. Rptr. 424, 35 CCC 525, 529 (1970): "The board initially calls our attention to two principles of appellate review, neither of which we question: . . . (2) that 'factual determinations of the board must be upheld if there is substantial evidence in their support and the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence.'" (*citing Smith v. WCAB*, 71 Cal. 2d 588, 592, 455 P.2d 822, 78 Cal. Rptr. 718, 34 CCC 424, 427 (1969)) [Note: the *Place* Court slightly mis-quotes the *Smith* decision; the *Smith* Court had used 'any substantial evidence' rather than the 'substantial evidence' used in the *Place* quotation from *Smith*.]

[25] *AT&T v. WCAB (Bigel),* 71 Cal. Comp. Cases 1146 (*writ den'd* 2006.)

[26] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 1.

In compliance with section 10682 of the California Code of Regulations, Dr. O'Neill's March 1, 2017 report provides a detailed description of the injury,[27] Applicant's Nkwonta's complaints,[28] a listing of 26 pages of records reviewed,[29] a summary of the past medical history,[30] findings on examination,[31] diagnoses,[32] duration of temporary disability with a return to work,[33] cause of disability,[34] treatment indicated,[35] opinion that Applicant Nkwonta is permanent and stationary and has sustained impairment with a description of the impairment,[36] opinions on apportionment,[37] reasons for his opinions,[38] and a signature.[39]

On August 16, 2017, Dr. O'Neill was deposed by the parties wherein Dr. O'Neill testified he is certified to act as a qualified medical evaluator for workers' compensation cases in the state of California.[40]

Dr. O'Neill prepared a second report dated June 25, 2021 after review of Dr. Lensky's reports.[41] Dr. O'Neill explained his opinions on apportionment of the three conditions in these cases of hypertension, coronary artery disease, and arrhythmia. The doctor stated he did not change his opinions.[42]

Dr. O'Neill provided bases and detailed explanations for his opinions. The doctor's reports and testimony constitute substantial medical evidence upon which the Findings of Fact were made. The quality of Dr. Lensky's reporting need not be discussed as it is not required to discuss evidence not relied upon to make the findings in these cases.

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[27] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill, dated March 1, 2017, p. 1-3.
[28] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill, dated March 1, 2017, p. 3.
[29] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill, Attachment Review of Medical Records pgs. 1-26.
[30] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill, dated March 1, 2017, p. 3.
[31] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, pgs. 4-5.
[32] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 6.
[33] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 7.
[34] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 7-8.
[35] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 8.
[36] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 7.
[37] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, pgs. 7-8
[38] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, pgs. 6-9.
[39] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 10.
[40] Applicant's Exhibit 2, deposition transcript of Dr. Edward O'Neill dated August 16, 2017, p. 4, lines 20-24.
[41] Applicant's Exhibit 3, medical report of Dr. Edward O'Neill dated June 25, 2021.
[42] Applicant's Exhibit 3, medical report of Dr. Edward O'Neill dated June 25, 2021, pgs. 2-3.

Following Dr. O'Neill the Internist

Petitioner County of Kern's second contention is almost the same as the first. The only difference is the concentration on the doctor's specialty.[43]

The discussion above is adopted and incorporated herein for reliance on Dr. O'Neill with the only added points that:

(1) Dr. O'Neill is a Qualified Medical Evaluator; and,

(2) Had Petitioner County of Kern believed Dr. O'Neill was not qualified to evaluate the heart conditions, it could have petitioned to replace Dr. O'Neill as the QME.

The first additional problem further explained is that a Qualified Medical Evaluator is, by definition, qualified to medically evaluate applicants in California workers' compensation. Had Dr. O'Neill believed he was incapable of providing services related to the heart in these cases, he could have deferred to another specialist. Dr. O'Neill, the internist, does in fact defer, but not as it relates to evaluation of the heart. Instead, the doctor deferred to an orthopedist when he wrote Applicant Nkwonta requires orthopedic evaluation for the left upper extremity.[44]

The second additional problem with this argument is that Petitioner County of Kern never petitioned to replace Dr. O'Neill as the QME. Therefore, Petitioner's argument that it was "aggrieved" by Dr. O'Neil's services is not persuasive as Petitioner County of Kern never acted upon that grievance prior to the filing of the Petition for Reconsideration.

Cardiomyopathy Impairment was Used Once

Petitioner County of Kern's next contention is that the undersigned erred in, ". . . using the cardiomyopathy as the foundation for permanent impairment in both the 78% award for the specific injury and the 26% award for the cumulative injury."[45]

The first problem with this argument is that Petitioner County of Kern is incorrect. A reading of the Amended Formal Disability Evaluation Unit Rating will show that the 9% whole person impairment for the cardiomyopathy was included in the rating for the specific injury dated

[43] Petition, p. 4, lines 8-9.
[44] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 9 and Applicant's Exhibit 2, Deposition transcript of Dr. Edward O'Neill dated August 16, 2017, p. 14, lines 7-9.
[45] Petition, p. 4, lines 20-22.

September 16, 2015 and not in the cumulative trauma injury dated from March 10, 2003 through September 16, 2015.[46]

The second problem with this argument is that the doctor did not give the 9 percent impairment for cardiomyopathy twice. A careful reading of Dr. O'Neill's testimony shows that the doctor bumped up the hypertension from 30 percent to 40 percent because Applicant Nkwonta has evidence of cardiomyopathy.[47] As a result of that, the doctor testified that, ". . . you only get one bite at the apple or - - you don't get two bites. So either we forget about the 40 percent, class III hypertension and call it . . . 30 percent or we add in the cardiomyopathy at 9 percent. So instead of 40%, you'd get 39 percent . . ."[48]

Grip Loss

Petitioner County of Kern's next argument is that it was error to rate the grip loss.[49]

The problem with this argument is that the orthopedic QME, Dr. Donald Schengel, opines that using grip strength in this case is justified. Specifically, Dr. Schengel explains as follows:

> I realize that strength cannot be used as an impairment factor when there is stiffness in an extremity. In this case his grip strength is related to disuse of the hand, which results from his shoulder pain, but is not a function of his shoulder stiffness. Additionally, the left wrist displays a loss of dorsiflexion and that loss has been provided an impairment. In order for a grip test to be performed, one needs at least 20º of wrist dorsiflexion. Mr. Nkwonta has 30º of wrist dorsiflexion on the left and I found no evidence that he went more than 20º of dorsiflexion during grip testing. If he lacked the 20º of dorsiflexion, then grip strength would not be a valid measurement. In section 16.8 and page 207 of the *Guides* states that "if the examiner believes the individual's loss of strength that has not been considered adequately by other methods in the *Guides*, the loss of strength may be rated separately." I believe his case represents such a rare case and using grip strength is justified in the *Guides*. In this respect, I suppose one could also invoke

[46] Court Exhibit Z, Amended Formal Disability Evaluation Rating dated February 13, 2023, p. 2-3.
[47] Applicant's Exhibit 2, deposition transcript of Dr. Edward O'Neill, p. 8, lines 8-10 and p. 12, lines 2-3.
[48] Applicant's Exhibit 2, deposition transcript of Dr. Edward O'Neill, p. 12, lines 2-9.
[49] Petition, p. 5, line 18.

Almaraz-Guzman (italics added) to factor in the grip strength, but do not think it is needed.[50]

Petitioner appears to have overlooked Dr. Schengel's discussion entirely. Therefore, it was appropriate to rate the grip loss in this case.

Nine Percent for Coronary Artery Disease

Petitioner County of Kern next argues that the coronary artery disease is entirely non-industrial and it was error to find it to be industrial and related to the specific injury. However, if it is industrial, it should be related to the cumulative trauma injury.[51]

The problem with this argument is that Dr. O'Neill explains that the cardiac arrest and the subsequent damage to the heart with the impairment levels are a result of that event.[52]

Apportionment for the Arrhythmia

Petitioner County of Kern's next argues that it was error to not apportion any of the arrhythmia.[53]

The problem with this argument is that Dr. O'Neill cogently explains that the sudden cardiac death was a specific and immediate event that occurred at a moment in time with no prodrome and no subsequent recorded arrhythmia.[54] The doctor explains that there is no mention in the medical records of any significant complaints of occupational stress during the time Applicant Nkwonta was being followed by Dr. Baker, leading up to the event of the cardiac arrest.[55] Dr. O'Neill considered and supported his opinions in both his subsequent reporting and in his deposition testimony.

Twenty-Six Percent Permanent Disability due to CT Injury

Petitioner County of Kern's next contention is that it was error to rely on Dr. O'Neill for the finding that the cumulative trauma injury produced 26% permanent

[50] Court Exhibit X, medical report of Dr. Donald Schengel dated August 24, 2022, pgs. 12-13.
[51] Petition, p. 7, lines 10-16.
[52] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 8.
[53] Petition, p. 7, lines 22-24.
[54] Applicant's Exhibit 3, medical report of Dr. Edward O'Neill dated June 25, 2021, p. 3.
[55] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 8.

disability.[56] Petitioner argues that Dr. O'Neill failed to address AOE/COE and simply jumped to apportionment, suggesting that 60% of the hypertensive heart disease is non-industrial and 40% is industrial, without explaining how any of it arises out of employment.[57]

The first problem with Petitioner's argument is that this misstates the evidence. Dr. O'Neill details the actual cardiac event by stating that Applicant Nkwonta was involved in defense of a man accused of murder. The trial had been going on for two months and Applicant was the sole attorney for the defense, noting the district attorney and detectives and assistants opposing him. Applicant had been working 15 hours a day since this was a death penalty case. At the time of the cardiac event, the detective Applicant had been questioning had been on the stand for eight days in a 9-5 daily time frame. The detective had been combative. Applicant blacked out in the middle of questioning.[58] While this is only a description of the specific injury and the two months leading up to it, Applicant Nkwonta had been working for Petitioner County of Kern since March 2003 and the injury was on September 16, 2015.[59]

Dr. O'Neill further writes that accepting Applicant Nkwonta's version of the events that occurred leading up to the cardiac arrest, it is the doctor's opinion that the event itself was occupationally related, as was the subsequent damage to the heart.[60]

Dr. O'Neill opines that there was pre-existing hypertension. The doctor notes Applicant Nkwonta was first diagnosed with hypertension in 2003, four months after he started with Petitioner County of Kern. Applicant Nkwonta has been on medications for his blood pressure continuously since 2003.[61] Therefore, because the hypertension existed prior to the time of the event, he apportions 60 percent of the disability to nonindustrial factors.[62]

The second problem with this argument is that Defendant has the affirmative of the issue of apportionment. If Dr. O'Neill's opinions regarding apportionment are not valid,

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[56] Petition, p. 8, lines 17-18.
[57] Petition, p. 9, lines 4-7.
[58] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill, dated March 1, 2017, p. 1.
[59] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 1.
[60] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 8.
[61] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 3.
[62] Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 8.

then none of the disability for the hypertension should be apportioned to non-industrial causes.

The third problem with this argument is that Dr. O'Neill details his reasoning for assigning 40% whole person impairment for the hypertension. He opines Applicant Nkwonta is a class III which requires evidence of end stage organ disease. Class III starts at 30 percent. The doctor increased it from 30 to 40 because Applicant Nkwonta also has evidence of a cardiomyopathy.[63]

RECOMMENDATION:

Based on the foregoing, it is recommended that the Petition for Reconsideration should be denied.

June 1, 2023

MARILEN ZINNER
Workers' Compensation Judge

[63] Applicant's Exhibit 2, deposition transcript of Dr. Edward O'Neill dated August 16, 2017, p. 7, lines 22-25 and p. 8, lines 1-15.

OPINION ON DECISION

Temporary Disability

Dr. Edward O'Neill opined Applicant Benjamin Nkwonta was temporarily totally disabled from September 16, 2015 to when he returned to work in February 2016. (Applicant's Exhibit 1, medical report of Dr. Edward O'Neill dated March 1, 2017, page 7) The issue presented was temporary disability with Applicant Benjamin Nkwonta claiming the period of September 16, 2015 to March 6, 2016. (Minutes of Hearing dated April 8, 2022, p. 2, lines 38-39) There has not been a stipulation as to when Applicant Benjamin Nkwonta returned to work and there is not sufficient information upon which to make a finding on the end date. Therefore, further development of the record is needed on this issue.

Sanctions

The workers' compensation judge may order a party to pay any reasonable expenses, including attorney's fees and costs, incurred by another party as a result of bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay. In addition, a workers' compensation judge, in its sole discretion, may order additional sanctions not to exceed $2,500.00 to be transmitted to the General Fund. (Labor Code § 5813)

Applicant's attorney has filed a June 5, 2020 Petition for Sanctions to Labor Code Section 5813. The basis for the Petition is that Defendant's attorney represented to Presiding Judge Robert Norton at a May 13, 2020 MSC that Defendant would be refiling a Petition to Compel the Applicant Benjamin Nkwonta to attend a re-examination. That MSC was ordered off calendar for Defendant to file the Petition. Applicant's attorney sent two letters to Defendant's attorney inquiring after the Petition. Applicant's attorney argues that Defendant's "failure to follow through on a promise to Judge Norton at the Mandatory Settlement Conference constitutes bad faith actions or tactics that are solely intended to cause unnecessary delay within the meaning of Labor Code Section 5813." (Applicant's Exhibit 12, Petition for Sanctions, p. 2, lines 17-21)

It appears Defendant decided against filing a petition to compel after the May 13, 2020 MSC. While it is not good form to neglect to contact opposing counsel of a change of plan, the evidence is insufficient to support a finding of frivolity or intentional delay. Therefore, the June 5, 2020 Petition for Sanctions has been denied.

Liability for Self-Procured Treatment

Applicant Benjamin Nkwonta seeks reimbursement for what is claimed to be "out-of-pocket expense[s]." (Applicant's Exhibits 10 and 11, letters with over 80 pages attached to each from Applicant's attorney dated July 30, 2018 and August 28, 2018 respectively) These demands are without the benefit of an itemization. Therefore, Applicant Benjamin Nkwonta has been ordered to itemize the demands for reimbursement and serve that itemization on Defendant. Upon receipt, if Defendant disputes any of the charges, the parties shall meet and confer. If the parties do not reach an agreement after good faith efforts, either party may file a Declaration of Readiness to Proceed.

Specific Injury dated September 16, 2015 (ADJ10320494)
Maximum Medical Improvement, Future Medical Treatment, Parts of Body

Applicant Benjamin Nkwonta was found to have reached maximum medical improvement based on the opinions of Dr. Donald Schengel. (Court Exhibit X, medical report of Dr. Donald Schengel dated August 24, 2022, page 11)

The reports of Drs. Donald Schengel and Edward O'Neill are relied upon for the finding that Applicant Benjamin Nkwonta is in need of further medical treatment to cure or relieve from the effects of the industrial injury. (Court Exhibit X, medical report of Donald Schengel dated August 24, 2022, p. 14; Applicant's Exhibit 1, medical report of Edward O'Neill, dated March 1, 2017, p. 8)

The expert opinions of Dr. Donald Schengel are relied upon for the finding that the left shoulder is a compensable consequence of the specific injury dated September 16, 2015. (Court Exhibit X, medical report of Dr. Donald Schengel dated August 24, 2022, p. 12; Applicant's Exhibit 13, deposition transcript of Dr. Donald Schengel dated December 4, 2019, p. 13, lines 5-18.)

The expert opinions of Dr. Edward O'Neill are relied on for the finding the deep vein thrombosis (DVT) is a compensable consequence of the specific injury dated September 16, 2015. (Applicant's Exhibit 2, deposition transcript of Dr. Edward O'Neill dated August 16, 2017, p. 13, lines 1-4; Applicant's 1, medical report of Dr. Edward O'Neill dated March 1, 2017, p. 6)

Permanent Disability/Apportionment

The Formal Disability Evaluation Unit Rating and the expert opinions of Dr. Edward O'Neill and Dr. Donald Schengel are relied upon for the finding Applicant Benjamin Nkwonta sustained 78% permanent disability after applicable adjustments and apportionment as a result of the specific injury on September 16, 2015. (Court Exhibit Z, 2nd Amended Formal Disability Evaluation Unit Rating dated February 10, 2023. Applicant's Exhibit 2, deposition transcript of Edward O'Neill, M.D. dated August 16, 2017, pp 9-12 and p. 27 for whole person impairments and p. 23, lines 3-5 for apportionment; and, Court Exhibit X, medical report of Donald Schengel, M.D. dated August 24, 2022, pp 12-13 for whole person impairments, and p. 13 for apportionment)

Attorneys' Fees

Considering the responsibilities assumed, the care taken, the time involved, and the results obtained, attorneys' fees in the amount of 15% have been earned and awarded. There is an attorneys' fee lien filed by Leviton, Diaz & Ginocchio (now associated with Ghitterman, Ghitterman & Feld in this case). Jurisdiction on the split in the fees between Chain, Cohn, Clark and Ghitterman, Ghitterman & Feld is reserved in the event the attorneys are unable to reach a written agreement to split the fees.

Cumulative Trauma Injury dated from March 10, 2003 through September 16, 2015
(ADJ10528386)
Maximum Medical Improvement, Future Medical Care, Parts of Body

Applicant Benjamin is found to have reached maximum medical improvement based on the expert opinions of Dr. Edward O'Neill. (Applicant's Exhibit 1, medical report of Edward O'Neill, M.D. dated March 1, 2017, p. 7)

Applicant Benjamin Nkwonta is in need of further medical care to cure or relieve from the effects of the cumulative trauma dated from March 10, 2003 through September 6, 2015. (Applicant's Exhibit 2, deposition transcript of Edward O'Neill, M.D. dated August 16, 2017, p. 22, lines 21-22)

The medical record does not support a finding of injuries to the left shoulder or in the form of deep vein thrombosis as a result of the cumulative trauma injury.

Permanent Disability/Apportionment

The Formal Disability Evaluation Unit Rating and the expert opinions of Dr. Edward O'Neill are relied upon for the finding Applicant Benjamin Nkwonta sustained 26% permanent disability after applicable adjustments and apportionment as a result of the cumulative trauma injury dated from March 10, 2003 through September 16, 2015. (Court Exhibit Z, 2nd Amended Formal Disability Evaluation Unit Rating dated February 10, 2023; Applicant's Exhibit 2, deposition transcript of Edward O'Neill, M.D. dated August 16, 2017, p. 7, lines 22-25; p. 8, lines 1-15 for whole person impairment; Applicant's Exhibit 1, medical report of Edward O'Neill, M.D. dated March 1, 2017, p. 8 for apportionment)

Attorneys' Fees

Considering the responsibilities assumed, the care taken, the time involved, and the results obtained, attorneys' fees in the amount of 15% have been earned and awarded. There is an attorneys' fee lien filed by Leviton, Diaz & Ginocchio (now associated with Ghitterman, Ghitterman & Feld in this case). Jurisdiction on the split in fees between Chain, Cohn, Clark and Ghitterman, Ghitterman & Feld is reserved in the event the attorneys are unable to reach a written agreement to split the fees.

April 28, 2023

MARILEN E. ZINNER
WORKERS' COMPENSATION JUDGE