WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

COBY DIETRICK, *Applicant*

vs.

SAN ANTONIO SPURS/CHICAGO BULLS and INSURANCE COMPANY OF NORTH AMERICA, administered by ESIS; FIREMAN'S FUND INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ8301583
Santa Ana District Office

OPINION AND DECISION
AFTER RECONSIDERATION

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

Applicant seeks reconsideration of the Findings, Award, and Order (F&O) issued by the workers' compensation administrative law judge (WCJ) on August 12, 2019, wherein the WCJ found in pertinent part that applicant sustained a cumulative injury arising out of and occurring in the course of employment (AOE/COE) to his cervical spine, lumbar spine, left knee, and bilateral hips; that applicant did not sustain injury AOE/COE to his shoulders, wrists, hands, fingers, hamstrings, right knee, ankles, feet, and toes; that applicant's condition reached maximum medical improvement on April 12, 2018; that the injury caused 48% permanent disability; and that the opinions of regular physician (orthopedist) Laura W. Hatch M.D., are substantial evidence regarding the issue of apportionment; also, the WCJ awarded applicant's attorney a fee in the amount of $8,865.50 which is equal to 15% of the permanent disability indemnity awarded to applicant.

Applicant contends that the correct permanent and stationary date is in August of 1985, that applicant should be evaluated by physicians specializing in various body parts/systems for injuries as claimed, that the reports from Dr. Hatch are not substantial evidence on the issues of body parts injured and apportionment, that the reports from David S. Kim, M.D., are substantial

evidence, and the reports of Edward Green, III, M.D., are not substantial evidence,[1] and applicant's counsel asserts that an attorney fee equal to 18% of the permanent disability award is appropriate.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that Board Exhibits X, Y, and Z be admitted into evidence and that the Petition otherwise be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will affirm the F&O except that we will amend the F&O to find that applicant did not sustain injury to his neurological system (Finding of Fact 2); and to admit Board Exhibits X, Y, and Z into evidence. (Finding of Fact 11); based thereon we will amend the Orders.

BACKGROUND

Applicant claimed injury to his head, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes, and his neurological system, while employed as a professional basketball player by the San Antonio Spurs for the period from July 31, 1973, through August 2, 1979; by the Chicago Bulls for the period from August 2, 1979, to January 18, 1983; and again by the San Antonio Spurs from January 18, 1983, to February 8, 1983.

The matter was initially tried on September 15, 2016. The issues identified by the parties included parts of body injured, permanent and stationary date, permanent disability, and whether the reports from orthopedic physician Dr. Kim, and neurologist Dr. Nudleman, were substantial evidence. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 15, 2016, pp. 3 – 4.) The matter was continued and at the March 8, 2017 trial, it was ordered submitted as of April 19, 2017. (MOH/SOE, March 8, 2017.) The WCJ issued a Findings and Award on July 21, 2017, and on August 25, 2017, an Order Rescinding Findings and Award was issued. The WCJ retired and at the December 18, 2017 conference the newly appointed WCJ noted that based on the August 25, 2017 Order Rescinding Findings and Award, he would appoint an orthopedic IME (i.e. regular physician, see Lab. Code, §5701). By correspondence dated March 12, 2018, Dr. Hatch was selected as the orthopedic regular physician to evaluate applicant.

[1] The arguments as to Dr. Kim and Dr. Green appear to refer to the July 21, 2017 decision of the previous WCJ. That decision is not at issue herein, and the record does not contain any evidence that either party objected to Dr. Hatch being appointed as a regular physician. (See e.g. MOH October 12, 2017, and December 19, 2017.)

On April 12, 2018, Dr. Hatch evaluated applicant. (Board Exh. X, Dr. Hatch, April 12, 2018.) Dr. Hatch took a history, reviewed the medical record including numerous x-rays, and conducted an extensive orthopedic examination. (See Board Exh X, pp. 22 – 29.) She described applicant's orthopedic complaints at the time of the examination as follows:

1. Neck pain and stiffness.
2. Bilateral shoulder pain and stiffness.
3. Bilateral elbow and stiffness.
4. Aching, numbness and stiffness involving the wrists, hands and fingers.
5. Upper back pain and stiffness.
6. Lower back pain and stiffness.
7. Bilateral hip pain and stiffness.
8. Bilateral knee pain and stiffness, left worse than right.
9. Bilateral ankle pain and stiffness.
10. Numbness and decreased sensation of the feet and toes.

(Board Exh X, p. 2.)

The diagnoses were:

1. Chronic cervicothoracic musculoligamentous strain with mild diffuse degenerative disc disease.
2. Chronic lumbosacral musculoskeletal strain with moderate degenerative disc disease.
3. Left greater than right patellofemoral pain syndrome/mild knee osteoarthritis.
4. Bilateral greater trochanteric syndrome. [chronic hip pain]
5. Mild right greater than left ankle osteoarthritis.
6. Severe peripheral neuropathy - defer to neurology.

(Board Exh X, p. 31.)

Dr. Hatch described work restrictions (based on the 1997 Permanent Disability Rating Schedule (PDRS)) for applicant's cervical spine, lumbar spine, and left knee, and stated there were no work restrictions for applicant's hip conditions. (Board Exh X, p. 39.)

In her supplemental report, Dr. Hatch stated, "It is reasonable that he was permanent and stationary six months after he retired from playing professional basketball." She later stated, "He has reached maximum medical improvement." (Board Exh. Y, Dr. Hatch, July 12, 2018, p. 2.) Dr. Hatch then assigned 16% whole person impairment (WPI) (2005 PDRS) for applicant's cervical spine; 14% WPI for his lumbar spine; 2% WPI for his left knee; and 2% WPI for each hip. (Board Exh. Y, pp. 3 – 4.)

On October 24, 2018, Dr. Hatch's deposition was taken. (Board Exh. Z, Dr. Hatch, October 24, 2018, deposition transcript.) Near the end of the deposition Dr. Hatch testified that her

opinions, as stated in her two reports, had not changed. (Board Exh. Z, p. 24.)

At the January 22, 2019 Mandatory Settlement Conference (MSC) the matter was "resubmitted for decision." (MOH/MSC, January 22, 2019.)

DISCUSSION

We first note that a portion of the record relevant to the issues raised in the Petition is not in the trial record, but is in the Electronic Adjudication Management System (EAMS) ADJ file. (Cal. Code Regs., tit. 8, §§ 10205(p), 10205(q), 10305(i), 10803 and 10807(c).) As noted previously, the WCJ has recommended that we admit exhibits X, Y and Z into evidence, and we have accepted the recommendation.

On the issue of the correct permanent and stationary date, the WCJ explained that:

> None of the examining doctors had the benefit of examining the applicant shortly after he ceased his involvement in professional basketball in 1985. A finding that applicant was permanent and stationary at a date in 1985 would appear speculative and the undersigned based his opinion on the date Dr. Hatch examined the applicant at which time she found him to have reached maximum medical improvement.
> (Report, p. 3.)

Also, at the September 15, 2016 trial the parties stipulated that applicant had been adequately compensated for all periods of temporary disability. (MOH/SOE, September 15, 2016, p. 3.) In the Petition applicant does not assert that he is aggrieved by the Finding that the maximum medical improvement/permanent and stationary date was April 12, 2018. We see no factual or legal basis for changing the date determined by the WCJ.

Regarding whether discovery should be reopened to have applicant evaluated by an internist for cardiac/deconditioning issues, an ENT physician for dental and hearing problems, an endocrinologist for hormonal issues, and a psychiatrist, the WCJ stated:

> None of these body parts were alleged to have been injured on any application, nor were raised as an issue according to the Minutes of Hearing and Summary of Evidence dated September 15, 2016. It was not until the deposition of Dr. Hatch on October 24, 2018 when the issues first appear to have been presented to any examining doctor with an allegation that they were the result of industrial causation.
> (Report, p. 3.)

Further, the August 25, 2017 Order Rescinding Submission states:

> As the Opinion on Decision actually mentioned, the Court had itself considered further development of the orthopedic record. ¶ … Accordingly, this case is set for a Status Conference at 1:30 p.m. on October 12, 2017 before Presiding Judge Pulley. The parties may utilize that Conference as an opportunity to possibly settle this case, but failing that, they shall advise the Court whom they wish to use as an Orthopedic Agreed Medical Examiner. If they are unable to agree, the Court will appoint a regular physician in the field of orthopedics pursuant to Labor Code Section 5701.

Clearly the reopening of discovery was limited to having applicant evaluated by an orthopedic physician to address the orthopedic injury claims. Applicant's arguments are not evidence to support a further reopening of discovery.

Applicant also argues that the reports from Dr. Hatch are not substantial evidence because she did not evaluate or address all of the orthopedic body parts claimed. However, review of the April 12, 2018 report from Dr. Hatch indicates that she did examine all of the alleged body parts. (Board Exh X, pp. 22 – 29.) It appears that applicant's argument is actually based on the fact that Dr. Hatch did not assign impairment and/or disability to each of the claimed body parts. We agree with the WCJ that:

> Dr. Hatch performed a physical examination of applicant's alleged orthopedic body parts and noted in her reporting that her findings of range of motion for applicant's shoulders, elbows, and wrists were all normal. (Board Exhibit X, page 24). Examination of applicant's knees also produced normal findings to the right knee with slight findings to the left knee. (Board Exhibit X, page 27). Physical examination of applicant's ankles and feet were also normal with the exception of decreased bilateral sensation.
> (Report, p. 4.)

It is also important to note that Dr. Hatch explained:

> This severe peripheral neuropathy has substantially impacted his function. He clearly has peripheral neuropathy on physical examination. … His peripheral neuropathy which has substantially impacted his function and which appears to be his primary complaint is a neurological condition, and is outside my area of expertise. His overall function is most substantially limited by this peripheral neuropathy. His orthopaedic conditions are much less salient of an issue. ¶ … [H]e no longer has symptoms associated with the fasciitis and tendinitis of his lower extremities, which he attributes to his diminished sensation in his distal lower extremities due to his severe peripheral neuropathy. Therefore, the symptoms that he describes now in his feet and ankles are unrelated to any orthopaedic conditions as they have become overshadowed by his symptoms related to his peripheral neuropathy.
> (Board Exh X, p. 34.)

In the context of Dr. Hatch's opinions as to applicant's peripheral neuropathy, it must be noted that neurology qualified medical examiner (QME) Kenneth L. Nudleman, M.D., diagnosed applicant as having "peripheral neuropathy, nonindustrial" (App. Exh. 6, Dr. Nudleman, May 1, 2013, p. 3) and neurology QME Ezekiel Fink stated:

> Mr. Dietick presents to clinic with a myriad of complaints, He is reporting neurological symptoms that I feel are most consistent with polyneuropathy. It is worth noting that he was diagnosed with severe polyneuropathy in 2010 when electrodiagnostic studies were done on his feet. ¶ Polyneuropathy is a specific term that refers to a generalized process affecting many peripheral nerves, with the distal nerves usually affected most prominently. Thus it [sic] typically affects the feet first. Polyneuropathy has a wide variety of causes including diabetes mellitus, alcohol abuse, and infections. Continuous trauma/repetitive injury is not a known cause/aggravator of peripheral neuropathy.
> (Def. Exh. E, Ezekiel Fink, M.D., May 1, 2013, pp. 10 – 11; see also Def. Exh. F, Ezekiel Fink, M.D., May 8, 2014, pp. 7 – 8.)

Addressing the issue of apportionment, the WCJ, "… found Dr. Hatch's apportionment determination to be sufficiently explained as to the causes of applicant's non-industrial apportionment and not based on speculation." (Report, pp. 7 – 9.) Having reviewed Dr. Hatch's report and deposition testimony we agree with the WCJ that the doctor's opinions are substantial evidence. (See (Board Exh. X, p. 40, and Board Exh. Z, p. 25.)

Regarding the issue of an increased attorney fee, having reviewed the entire litigation record (EAMS ADJ file), we agree with the WCJ that applicant's counsel did not show good cause for increasing the fee awarded by the WCJ. Also, the correspondence and Proof of Service attached to the Petition as Exhibit A, which contains the provisions of AD Rule 10842 (previously 10778) shows that it was served on applicant on the same day (September 6, 2019) that the Petition was served and filed. It is not clear that this constitutes appropriate notice to applicant of counsel's adverse interests or applicant's right to seek independent counsel.

Finally, although the F&A does not include a specific finding as to the claimed neurological system injury, pursuant to Labor Code section 5815, any issue raised at trial and not ruled upon is deemed decided "adversely as to the party in whose interest such issue was raised." (Lab. Code §5815.) Also, as noted above, the reports from neurology QMEs Dr. Nudleman, Dr. Fink clearly state that applicant's neurological condition is not a result of his employment with defendants.

Accordingly, we affirm the F&O except that we amend the F&O to find that applicant did not sustain injury to his neurological system (Finding of Fact 2); and to admit Board Exhibits X, Y, and Z into evidence. (Finding of Fact 11); based thereon we amend the Orders.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 12, 2019 Findings, Award, and Order, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. Applicant did not sustain injury arising out of and occurring in the course of employment to shoulders, wrists, hands, fingers, hamstrings, right knee, ankles, feet, toes, and neurological system.

* * *

11: Good cause exists to admit Board Exhibits X, Y, and Z into evidence.

ORDERS

* * *

IT IS FURTHER ORDERED THAT: Board Exhibit X, the April 12, 2018 report from Laura W. Hatch M.D.; Board Exhibit Y, the July 12, 2018 report from Laura W. Hatch M.D.; and Board Exhibit Z, the transcript of Laura W. Hatch M.D.'s October 24, 2018 deposition, are **HEREBY** admitted into evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ DEIDRA E. LOWE, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 29, 2022

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

GLENN STUCKEY
COLANTONI COLLINS
COBY DIETRICK

TLH/*pc*

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Applicant was a former professional athlete who alleges that he sustained an industrial injury in the form of a cumulative trauma during the period 1970 through 1983 to his head, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes, and neurological system. During his career, applicant was employed by six different professional basketball teams from 1970 through 1985.

This matter was initially tried by WCJ Barnes who issued a Findings & Award and Opinion on Decision on July 21, 2017 finding applicant sustained industrial injury and issued an award of permanent disability of 52% against defendant Insurance Company of North America administered by ESIS who was the insurer who provided coverage during applicant's last year of employment where California could assert jurisdiction.

Applicant was aggrieved of WCJ's Barnes decision and filed a Petition for Reconsideration alleging multiple issues. WCJ Barnes issued an Order Rescinding her Findings and Award indicating that she now believed the record should be developed as to applicant's orthopedic injury and instructed the parties to agree to an Agreed Medical Examiner or in the alternative a Regular Physician would be ordered. She retired shortly after this and the matter was reassigned to the undersigned WCJ.

The parties met for a conference with no agreement to an AME at which time the undersigned appointed Dr. Laura Hatch as the Regular Physician in the matter. Dr. Hatch examined applicant and thereafter issued two reports and was deposed by the parties. This WCJ issued a Findings and Award finding applicant sustained permanent disability of 48% on an orthopedic basis, with his neurological condition being found non-industrial.[1]

Applicant is aggrieved of this WCJ's Findings and Award and filed a timely and verified Petition for Reconsideration alleging that the undersigned utilized the incorrect permanent and stationary date, that the Court erred in appointing a Regular Physician and not finding in favor of applicant's PQME in orthopedics Dr. Jay, that the reporting of the IME fails to address all orthopedic issues, that the record should be reopened for discovery on newly alleged issues, and that applicant's counsel is entitled to a greater attorney's fee than that which was awarded by the Court.

[1] The reporting of Dr. Hatch was inadvertently not moved into evidence when this WCJ issued the Findings, Award and Opinion. As such, the WCJ would ask the Appeals Board designate as Board Exhibit X the report of Dr. Hatch dated April 12, 2018, Board Exhibit Y her report of July 12, 2018, Board Exhibit Z the transcript of her deposition testimony dated October 24, 2018 and Order said reports moved into evidence. The reports have been designated as such in EAMS at the time of the filing of this Report and Recommendation.

PERMANENT AND STATIONARY DATE

Applicant contends that his correct permanent and stationary date is some point in August of 1985. At trial this WCJ found applicant to have reached maximum medical improvement on April 12, 2018, the date that applicant was first examined by the Regular Physician, Dr. Hatch.

Dr. Hatch addressed applicant's date stating, "It is reasonable that he was permanent and stationary six months after he retired from playing professional basketball. Since then, he has developed gradually increasing symptoms in the aforementioned body parts, in part due to the degenerative changes which have become evident on x-rays." She then indicates that "He has reached maximum medical improvement." (Board Exhibit Y, page 2).

8 CCR Reg. 10152 reads that "A disability is considered permanent and stationary when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized and unlikely to change substantially in the next year with or without medical treatment." This WCJ utilized the first date applicant was examined by Dr. Hatch as this contained her opinion as to when applicant had reached maximum medical improvement.

This WCJ disagrees with applicant's argument that the permanent and stationary date is in August of 1985. Dr. Hatch and applicant's orthopedic QME Dr. Kim find applicant to have been permanent and stationary several months after the conclusion of his career. (Exhibit 3, page 17). Defendant's orthopedic QME found applicant permanent and stationary on the date of his exam. (Exhibit C, page 14). None of the examining doctors had the benefit of examining the applicant shortly after he ceased his involvement in professional basketball in 1985. A finding that applicant was permanent and stationary at a date in 1985 would appear speculative and the undersigned based his opinion on the date Dr. Hatch examined the applicant at which time she found him to have reached maximum medical improvement.

DEVELOPMENT OF THE RECORD AS TO THE RECOMMENDATIONS OF THE REGULAR PHYSICIAN / SUBSTANTIALITY OF MEDICAL REPORTING

Applicant's second contention in the Petition for Reconsideration argues that the undersigned failed to follow the IME's recommendation for development of the record as to multiple newly alleged body parts. Applicant's petition also raises as their third grounds for reconsideration that the IME's report should be disregarded as not constituting substantial medical evidence as it is alleged the IME failed to address body parts appropriate to her specialty. Both issues will be addressed in a joint discussion due to the related nature of the issues.

Applicant attorney's Petition for Reconsideration as to the development of the record requests that discovery be reopened so applicant can be evaluated for cardiac/deconditioning issues, an ENT for dental and hearing problems, a psychiatrist, and an endocrinologist for hormonal issues.[2] None of these body parts were alleged to have been injured on any application, nor were raised as an issue according to the Minutes of Hearing and Summary of Evidence dated September 15, 2016. It was not until the deposition of Dr. Hatch on October 24, 2018 when the issues first appear to have been presented to any examining doctor with an allegation that they were the result of industrial causation.

When applicant was examined by Dr. Kim on May 10, 2013, all of applicant's complaints were of an orthopedic or neurological nature with the exception of a generalized complaint of "…anxiety which he attributes to the orthopedic injuries sustained as a professional basketball player." (Exhibit 3, page 6). The reporting of defendant's PQME Dr. Green also took a history of complaints that only included orthopedic issues, and none of the newly alleged issues. (Exhibit B, page 2). Dr. Hatch's history again reflects only complaints of both an orthopedic and neurological nature. (Board Exhibit X, page 2, 3). At trial applicant testified to issues stemming from an orthopedic and neurological injury. No mention of the additional body parts is contained in the testimonial record and the medical reporting does not support a need for the development of these issues.

Applicant's third contention of the substantiality of Dr. Hatch's medical reporting alleging she failed to address or evaluate applicant's body parts that are within her specialty is an inaccurate summation of Dr. Hatch's reporting. Applicant's petition lists specifically the right knee, bilateral hands, fingers, feet, and ankles; however, these were addressed by Dr. Hatch. This is simply a veiled attempt to supplement the neurological record after it was found to be non-industrial.

Dr. Hatch performed a physical examination of applicant's alleged orthopedic body parts and noted in her reporting that her findings of range of motion for applicant's shoulders, elbows, and wrists were all normal. (Board Exhibit X, page 24). Examination of applicant's knees also produced normal findings to the right knee with slight findings to the left knee. (Board Exhibit X, page 27). Physical examination of applicant's ankles and feet were also normal with the exception of decreased bilateral sensation.

Dr. Hatch commented on this, stating applicant's "… peripheral neuropathy which has substantially impacted his function and which appears to be his primary complaint is a neurological condition…" She continues that "His overall function is most substantially limited by his peripheral neuropathy. His

[2] Dr. Fink's report of May 1, 2013 takes a history of applicant where he stated "Several years ago, he saw an endocrinologist who did some blood work which came back negative." (Exhibit E, page 4). The history of cardiac issues was attributed to deconditioning, and not due to applicant's employment. (Exhibit E, page 4).

orthopedic conditions are much less salient of an issue." (Board Exhibit X, page 34).

"…he no longer has symptoms associated with the fasciitis and tendinitis of his lower extremities, which he attributes to his diminished sensation in his lower extremities due to his severe peripheral neuropathy. Therefore, the symptoms that he describes now in his feet and ankles are unrelated to any orthopedic conditions as they have become overshadowed by his symptoms related to his peripheral neuropathy." (Board Exhibit X, page 34).

"He describes a lack of strength in his legs which can be considered due to his peripheral neuropathy, and not necessarily due to knee pain per se." (Exhibit X, page 36). She also indicates that applicant only reported pain complaints to his left knee on physical examination, and therefore only addressed such." (Board Exhibit X, Page 36).

Injury to applicant's upper extremities and shoulders were addressed with Dr. Hatch stating, "Although it is likely that he had multiple sprains and strains of his fingers and hands while playing professional basketball, and has resultant mild arthritic x-ray changes of the hands, the cramping and limitations that he describes appears to be due to his severe peripheral neuropathy." (Board Exhibit X, page 36). "He has no significant findings on physical examination of his shoulders…" (Board Exhibit X, page 37).

Dr. Hatch's discussion concludes by stating, "In summary, his overwhelming functional limitations are due to his severe peripheral neuropathy which has resulted in a stocking and glove sensory loss, loss of proprioception, etcetera. I would defer to a neurologist regarding this." (Board Exhibit X, page 37).

Applicant's Petition contends that Dr. Hatch failed to address these various body parts and asks applicant be re-evaluated by the reporting neurologists. Dr. Hatch did in fact address these body parts, found them to be of a neurological nature and not orthopedic, and deferred these issues to a specialist, two of which had already examined applicant and opined that the neurological issues were non-industrial. (Exhibit 6, page 3, Exhibit E, page 11). In her Opinion on Decision and Findings and Award WCJ Barnes found applicant to have no industrial neurological problems, and this WCJ reached the same conclusion based upon the reporting of the doctors addressing these issues.

Applicant's argument that discovery should be reopened for the newly alleged body parts and re-examination by the neurologist is improper. If applicant was complaining of anxiety issues to a doctor in 2013, applicant's counsel had ample time to develop the record to have these issues addressed by an appropriate specialist. Applicant's counsel here simply utilized the opportunity to depose Dr. Hatch as an attempt to engage in further discovery for a "second bite at the apple" when the record was only opened to develop issues

of an orthopedic nature. The medical record does not support complaints of the newly alleged body parts to warrant such discovery in light that there are little to no complaints of these found in the record or prior allegation that they are the result of industrial injury.

PRIOR WCJ'S ORDER VACATING

Applicant also argues that the Board acted in excess of its' powers when it disregarded the applicant's orthopedic QME report of Dr. Jay and ordered the parties to select an Agreed Medical Examiner or the Court would appoint a Regular Physician.

The undersigned inherited this file after the prior WCJ Barnes who conducted the trial proceedings and authored the original Findings and Award and Opinion on Decision retired. WCJ Barnes vacated her Findings and Award and ordered development of the record under Labor Code section 5701 after having received applicant's initial Petition for Reconsideration, indicating that the record was to be developed as to the orthopedic aspect of applicant's claim. Her Opinion on Decision also discussed that this was contemplated prior to her having issued the Award.[3]

Applicant and defense counsel appeared before the undersigned at a hearing on December 9, 2017 and informed the Court that an agreement could not be reached between the parties as to the election of an Agreed Medical Examiner. This WCJ then selected Dr. Hatch as the Regular Physician to examine the applicant. At this hearing, applicant's counsel made a verbal request to have the WCJ reopen discovery for applicant to be examined for neurological issues. The parties were told that this would only occur pending review of the record should the reporting be found insufficient as the Order Vacating only indicated issues with the orthopedic reporting.

It should be noted that after WCJ Barnes' Order Vacating and Notice of Conference was issued, no argument was made at that time from either party that they considered the use of an AME or Regular Physician improper or sought to have the matter returned to their respective doctors to correct the perceived deficiencies in the medical reporting. If applicant's counsel disagreed with the use of an AME or regular Physician, applicant's counsel should have filed a Petition for Removal at that time regarding the WCJ's Order Vacating. At this point, the parties have incurred additional costs in having the applicant re-examined by the Regular Physician, taken her deposition, and procured supplemental reporting. The Court also notes that at the hearing held on December 18, 2017, neither party made any objection to the appointment of such. Failing to timely object, applicant's counsel has waived the objection by proceeding with the examination by the Regular Physician. Applicant's counsel only now makes the argument that such is improper after the parties have

[3] Order Rescinding Findings and Award and Notice of Conference dated August 29, 2017.

expended time, effort, and expense in procuring the reports in addition to deposing Dr. Hatch after receiving a report he believes is unfavorable.

Review of WCJ Barnes' Vacated Opinion on Decision indicates that she found the reporting of both doctors to be insufficient as she considered appointing an AME or Regular Physician. The undersigned only has the benefit of WCJ Barnes' opinion and her Order Vacating in determining her reasoning for ordering development of the record as to an AME or Regular Physician. However, upon review of the medical reporting, this WCJ agrees with WCJ Barnes' determination that the medical record required development. While WCJ Barnes' order does not strictly adhere to the Court's Opinion in *McDuffie v. Los Angeles County Metropolitan Transit Authority* 67 CCC 138, this WCJ believes himself bound by her Order and therefore appointed the Regular Physician.

Applicant's counsel also argues that the Court should now rely on the reporting of AQME Dr. Kim. However, as WCJ Barnes has already dispensed with the reporting of the prior examining doctors and the parties utilized the Regular Physician without objection, it would be improper for the Court to return to the AQME and DQME in this instance. Having already expended the time and expense of utilizing the Regular Physician in this matter, disregarding the reporting and opinion of the Regular Physician will only cause further unnecessary delay in applicant's claim having some form of finality.

Furthermore, applicant's argument is inconsistent, requesting that the Court grant his Petition to develop the record on numerous newly alleged body parts found by the Court appointed Regular Physician while in the same Petition alleging that her opinion is not substantial medical evidence and should be disregarded in lieu of applicant's own QME Dr. Kim. Applicant cannot have it both ways.

APPORTIONMENT BY THE REGULAR PHYSICIAN

Applicant counsel next argues that Dr. Hatch did not properly address or justify her designation of applicant's apportionment to non-industrial causation.

Dr. Hatch indicated in her first report that applicant's orthopedic condition related to his cervical and lumbar spine was apportioned 50% to his sports career with the other 50% apportioned to other non-industrial factors. Dr. Hatch cites to diagnostic studies that show degenerative changes normal to applicant's aging process that developed in the 30 years after applicant ceased playing professional basketball, stating that

> "…he has not played in greater than 30 years and has developed x-ray evidence of degenerative changes in his lumbar greater than cervical spine. This can be considered part of the normal aging process, but in part is due to his 13 years of professional play and its

> impact of the development of these degenerative changes. His subsequent work exposure since his retirement for professional basketball can be considered semi-sedentary work. It is medically probable that 50% of the above enumerated factors of permanent disability as it pertains to this cervical and lumbar spine condition can be considered due to the underlying pathology that developed due to the 30 plus years since he retired; and 50% can be considered due to the continuous trauma sustained between April 1, 1970 and to June 1, 1983 and its impact on the development of the degenerative changes and the symptoms associated with the degenerative changes." (Board Exhibit X, page 40)[4]

Apportionment to applicant's left knee was found to be 90% industrially related, with 10% apportioned to a recent fall applicant suffered.

In her cross-examination, Dr. Hatch further elaborated on her apportionment determination, noting that applicant's prolonged sitting after his professional basketball career ended caused increased issues with applicant's back. (Board Exhibit Z, page 18, 1). Dr. Hatch stated in her deposition that:

> "But, presumable, the same immobility effects the, the immobile position effects both the cervical and lumbar spine. (Exhibit Z, page 19, line 20 depo). She also indicates that Applicant "…had multi-level degenerative changes in his cervical spine, and he's 69 years old, hadn't played since 1983, and then really '85 if you count his European play, et cetera, and presumably those degenerative changes occurred between 1985 and 2018 when I evaluated him. And that helps substantiate the apportionment determination." (Board Exhibit Z, page 25, line 12).

A reporting physician is required to determine what percentage of an injured worker's disability "was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors. . ." (Lab. Code, § 4663(c)). For an opinion to be substantial evidence, a physician must discuss industrial causation and determine the applicant's level of permanent disability and, if appropriate, the existence of apportionment between injuries and between industrial and nonindustrial causes. (See Lab. Code, § 4663(c), 4664(a); *Yeager v. Workers' Comp. Appeals Bd* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (en banc), 70 Cal.Comp.Cases 1506 (writ den.)) Moreover, to qualify as

[4] In *City of Petaluma v Workers Comp. Appeals Bd*. (*Lindh*) (2018) 83 Cal. Comp. Cases 1869 the Court found proper apportionment to underlying pathology. Lindh allows doctors to determine "what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury" as required by §4663(c).

substantial evidence, a physician's report 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. (*Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*), supra 145 Cal.App.4th at p. 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls*, supra 70 Cal.Comp.Cases at p. 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.))

The undersigned found Dr. Hatch's apportionment determination to be sufficiently explained as to the causes of applicant's non-industrial apportionment and not based on speculation.

In support of their argument, applicant's Petition cites to a Court opinion in *Bishop v. Vons Grocery*, ADJ8486083. This is an unpublished opinion and here applicant is attempting to co-relate the facts in a separate proceeding with the facts to the current case, not the legal holding of case cited. Applicant's counsel uses such to base his argument to discredit the doctor by applying a discussion of evidence in an unrelated case that has no bearing on the matter currently before the Court.

APPLICANT'S ATTORNEY'S REQUEST FOR INCREASED FEES

Applicant's counsel's final argument in their Petition is that he is entitled to an award of attorney fees of 18% instead of the 15% awarded by the Court. As a justification for an increased fee, applicant's counsel argues that such is warranted due to the case having jurisdictional issues, preparation for trial, briefs submitted to the Court, cross-examination of the Regular Physician and development of the record after trial, complexity of issues due to the matter being a "sports case", as well as the results obtained which increased applicant's recovery.

An award of attorney fees is informed by Labor Code section 4906(d), 8 CCR 10775, and Section 1.140 of the DWC/WCAB Policy and Procedural Manual.[5] In *Rose v. Workmens Compensation Appeals Bd. of California*, the Court affirmed the principles in the *Bentley* case that guide the Court considers in determining an award of attorney fees, stating:

> "In *Bentley v. Industrial Acc. Com*. [(1946)], 75 Cal. App. 2d 547, 549–550 [11 Cal. Comp. Cases 204, 171 P.2d 532], the applicable law is set forth as follows: "Attorneys appearing in such matters may not contract for fees in excess of those awarded by the commission, and cannot expect such fees to be large. But they are entitled to have the commission carefully appraise the value of the services which are shown to have been rendered. The importance of

[5] Section 1.140 of the DWC/WCAB Policy and Procedural Manual references a fee of 9 to 12 percent of the permanent disability is generally considered appropriate.

> the case to the applicant, the responsibility assumed by the attorney, the care employed by the attorney to bring forth injuries of a nature not readily discernible and not admitted, the time devoted to the case and the results obtained all appear, although perhaps not fully, in the proceedings before the commission. It is the privilege of attorneys to supplement the facts developed in the course of the proceedings by other evidence as to the extent and value of the legal services. If they offer no additional evidence, they are entitled to have their services carefully appraised by the referee in the light of the facts which are known to him. They are entitled to have a fee fixed from a consideration of all the factors which we have mentioned.
> *Rose v. Workmens Compensation Appeals Bd. of California, (1974) 39 Cal. Comp. Cases 771, 772.*

Applicant counsel's argument regarding the complexity of this matter in that it is a "sports case" and the jurisdictional issues involved is without merit. Applicant counsel's practice is limited to representation of injured athletes, and routinely asks for an attorney fee of 18% on all cases. This case does not appear to be any more difficult than other similarly situated cases. Furthermore, the jurisdictional issues in the matter were easily established as applicant's contract of hire was accepted in the State of California. (MOH/SOE dated September 15, 2016, page 7, line 13).

Furthermore, applicant's attorney had ample time to develop the record for body parts that he now claims require development, and the argument for an increased attorney fee is incongruous with the claim that applicant's counsel's work on the case and the results obtained warrant an increased fee. Applicant's Petition at one point indicated, "AQME was never provided with information regarding applicant's diabetes or pre-diabetes status…" (Petition for Reconsideration dated September 6, 2019, page 11, line 10). Applicant's claim was litigated for seven years, but only after an unfavorable trial result are the newly alleged body parts raised.

Applicant's counsel also cites the development of the record post-trial that includes cross-examination of the Regular Physician that was noticed by applicant. The deposition transcript indicates that applicant's counsel did not conduct the deposition, with the deposition having been conducted by another attorney specially appearing for counsel. This is not an appropriate justification for an increased fee.

Finally, the Court is aware that while applicant's counsel is an attorney licensed to practice in the State of Minnesota, he is not licensed in California. The Court's opinion in *99 Cents Only Stores v. Workers' Comp. Appeals Bd*. (2000) 65 Cal.Comp.Cases 456 addressed the issue of non-attorneys representing applicants at a deposition under the umbrella of a Law Firm with licensed attorneys, holding that an award of reduced fees was merited based

upon the non-attorney's qualifications and level of expertise, and that the value of the service should be judged by the same guidelines applicable to attorneys. This case also made citation to the Court's prior holdings in *Simi Unified School District v. Workers' Comp. Appeals Bd*., (1993) 58 Cal.Comp.Cases 235, and *Lee v. Workers' Comp. Appeals Bd*. (1998) 63 Cal.Comp.Cases 1082 which found that without sufficient substantiation, the value of services provided by a non-attorney was less than that of a licensed attorney.

Also bearing upon the issue is the Court's holding in *Knutson v. W.C.A.B.* (1999) 64 Cal.Comp.Cases 1306 (Writ Denied)). In *Knutson*, the hearing representative performed most of the work while under supervision of a California licensed attorney and the Court awarded 8% attorneys' fees. Like the instant case, almost all of the legal work was performed by a non-attorney hearing representative supervised by a California licensed attorney. As in *Knutson*, applicant hired an attorney to perform legal work, but the supervising attorney does not appear to have had any connection with the litigation of the case, make any appearances nor author the trial brief or either Petition for Reconsideration.

Based on the foregoing, this WCJ believes that the 15% attorney fee awarded in this matter is appropriate.

RECOMMENDATION

Based on the foregoing, the undersigned respectfully recommends that applicant's Petition for Reconsideration be denied.

DATE: September 26, 2019
Jeremy Clifft
WORKERS' COMPENSATION JUDGE