

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

LADYLYN CORDERO, *Applicant*

vs.

**DOLLAR THRIFTY AUTOMOTIVE GROUP (HERTZ CORPORATION);
ACE AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ10451056
Marina Del Rey District Office**

**OPINION AND ORDER GRANTING RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Defendant Dollar Thrifty Automotive Group, insured by ACE American Insurance Company, administered by Sedgwick Claims Management Services, Inc. (defendant) seeks reconsideration of the April 12, 2022 Findings of Fact and Award (F&A) wherein, the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a sales representative on May 12, 2016, sustained industrial injury to right upper extremity, right arm and migraines. The WCJ found that applicant was permanently and totally disabled.

Defendant contends that the WCJ erred in excluding various exhibits, applicant is not yet permanent and stationary, and that the reporting of the orthopedic Qualified Medical Evaluator (QME) and applicant's vocational expert are not substantial evidence. Defendant further asserts entitlement to a reduction in permanent disability pursuant to Labor Code section 4056, and that the WCJ erred in the calculation of average weekly wages.

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the petition for reconsideration to amend the award of attorney fees, but otherwise affirm the F&A.

FACTS

Applicant claimed injury to the left elbow, left leg, left arm, lumbar spine, right upper extremity, migraine, “neurology,” and right arm while employed as a sales representative by defendant Dollar Thrifty Automotive Group (Hertz Corporation) on May 12, 2016. Applicant alleged injury arising out of a slip and fall at work. Defendant admitted injury to the left elbow, left leg, left arm and lumbar spine, but disputed injury to the right upper extremity, migraine, “neurology,” and right arm.

Following the injury, applicant received industrial medical treatment, and was diagnosed with a “fracture at the radial head of the left arm with intraarticular extension and about 2 mm of impaction of the broken end in her left elbow.” (Ex. BB, report of PQME Rosabel Young, M.D., dated February 18, 2020, p. 4.) Applicant filed an application for adjudication on June 13, 2016, and began treatment with Jonathan Nassos, M.D. Applicant reported to Dr. Nassos that she had received little or no medical treatment immediately following her injury. (Ex. UU, reports of Jonathan Nassos, M.D., dated September 30, 2016, p. 173.) Dr. Nassos requested authorization for a variety of conservative treatment modalities including physical therapy and medication. (*Id.* at p. 176.) On December 2, 2016, Dr. Nassos diagnosed Complex Regional Pain Syndrome (CRPS) in the left arm, and requested authority for referral to pain management. (*Id.* at 157.) Dr. Nassos continued to request various treatment modalities, but also reported that the requests for authorization were denied. (*Id.* at 134.)

The parties selected Daniel Kaplan, M.D. as the orthopedic QME, who evaluated applicant on November 29, 2016. Dr. Kaplan reported his findings on clinical examination, and discussed applicant’s medical history, which the QME asserted was notable for a lack of treatment authorization. (Ex. RR, report of Daniel Kaplan, M.D., dated November 29, 2016, p. 12)

The QME reevaluated applicant on June 20, 2017, but noted that authorization for recommended treatment had been dilatory and intermittent:

Unfortunately the examinee's condition has worsened since last being seen. While she has received 12 sessions of physical therapy and five sessions of occupational therapy, this has not been adequate. In discussion with her, it sounds like there has been quite a bit of delay in the therapy and no continuity of care provided. She indicates that each time further therapy is requested there would be a long delay before utilization review would process it. She has a very serious problem and it is not getting any better.

...

Let me emphasize that appropriate timely continuous therapy needs to be administered to have any chance of success. Delays in utilization review will only worsen her condition. While I understand that she has reached the maximum as dictated under Med/UR guidelines, she is nowhere near maximum medical improvement and provision for therapy must be available to her. Even with appropriate therapy and injections, her prognosis is guarded. As noted above, serious consideration may have to be given to an inpatient program. (Ex. ZZ, report of Daniel Kaplan, M.D., dated June 20, 2017, pp. 7-8.)

The QME reevaluated applicant approximately one year later, on May 21, 2018. Dr. Kaplan noted applicant's condition to have worsened, and that an in-patient hospitalization would be necessary. Dr. Kaplan wrote, "[b]ecause of the lack of appropriate care, her relatively mild condition of adhesive capsulitis has worsened to the point where her left upper extremity is completely worthless. Had she received timely appropriate care, I do not think she would be suffering from nearly this extent of impairment or disability." (Ex. FF, Report of Daniel Kaplan, M.D., dated May 21, 2018, p. 10.)

Applicant's secondary treating physician Jonathan Kohan, M.D. declared her permanent and stationary on March 6, 2019. Dr. Kohan noted a total loss of function of the left arm, and assessed corresponding whole person impairment for the left arm and also to the lumbar spine. (Ex. 3, reports of Jonathan Kohan, M.D., dated May 22, 2017 to August 11, 2020, p. 7.)

On May 21, 2019, vocational evaluator Paul Broadus, M.A., issued a report determining that applicant "is not able to compete, or to be retrained for any suitable gainful employment, and is not amenable to vocational rehabilitation." (Ex. 4, report of Broadus & Assoc., dated May 21, 2019, p. 15.)

On October 1, 2019, QME Dr. Kaplan reevaluated applicant, and following his clinical examination, issued a report that observed that applicant had lost all "functional use of the left upper extremity," and that applicant had further developed adhesive capsulitis of the right shoulder and de Quervain's tendinitis of the right wrist. Dr. Kaplan concluded that applicant was "totally disabled," and that the QME had "reviewed the Loboef [sic] Analysis provided by Broadus and agree with its conclusions." (Ex. DD, report of Daniel Kaplan, M.D., dated October 1, 2019, p. 4.)

The parties selected QME Rosabel Young, M.D. to report on applicant's alleged neurological complaints. Dr. Young evaluated applicant on February 18, 2020, and diagnosed hyperesthesia of the left arm, rather than Complex Regional Pain Syndrome. (Ex. BB, report of PQME Rosabel Young, M.D., dated February 18, 2020.) The QME identified neurological

impairment to the left arm and headaches with industrial causation, and deemed applicant permanent and stationary. (*Id.* at p. 36.)

On April 2, 2020, the parties undertook the deposition of orthopedic QME Dr. Kaplan. The QME reiterated his opinion that the lack of timely and proper medical treatment affected the applicant's outcome. (Ex. AA, transcript of the deposition of Daniel Kaplan, dated April 24, 2020, at 14:22.) When asked to expand on his diagnosis of CRPS, Dr. Kaplan responded that his assessment arose out of findings of "markedly decreased range of motion of the shoulder and elbow, excessive tenderness to palpations, paraspinous spasm, changes in the appearance of her skin, [and] limited range of motion in her fingers." Dr. Kaplan reiterated his opinion that applicant was permanent and totally disabled, explaining that applicant's disability arose out of the "absence of any use of her left upper extremity due to the reflex dystrophy and then she is markedly limited in use of her right upper extremity due to the tendinitis of her right shoulder, adhesive capsulitis of her right shoulder, and tendinitis of the right wrist." (*Id.* at 23:20.) The QME was also asked whether additional treatment would alter applicant's status as permanent and stationary:

If she got treatment and improved. If she got treatment and there was no change in her condition, then she would still be P&S. So if treatment afforded her improvement, then she might be considered to no longer be P&S. (*Id.* at 30:14).

On April 28, 2020, neurology QME Dr. Young issued a supplemental report, noting again that she felt applicant did not meet the diagnostic criteria for CRPS, that applicant had paresthesia and allodynia, but not vascular color changes or persistent swelling. (Ex. CC, report of PQME Rosabel Young, M.D., dated April 28, 2020, p. 14.) After a review of additional records, Dr. Young made no changes to her prior opinions or reporting. (*Id.* at p. 15.)

Trial commenced on April 28, 2021 and continued on June 17, 2021, with the parties framing issues relevant to the nature and extent of the injury. Following submission of the matter for decision, the WCJ issued rating instructions, which were served along with the formal ratings determination on the parties on January 18, 2022.

In the April 12, 2022 F&A, the WCJ excluded multiple defense exhibits for failure of service prior to the closure of discovery at the Mandatory Settlement Conference. (F&A, Findings of Fact No. 1.) Based on the reporting of QMEs Dr. Kaplan and Dr. Young, the reporting of vocational expert Mr. Broadus, applicant's treating physicians, and applicant's credible testimony, the WCJ found applicant to be permanent and stationary, and to have sustained permanent and

total disability. (F&A, Findings of Fact Nos. 6, 7.) The WCJ awarded 100% disability, and further awarded out-of-pocket expenses and mileage subject to proof. Finally, attorney fees were awarded in the amount of \$1,489. (F&A, Findings of Fact No. 12.)

DISCUSSION

Defendant's Petition for Reconsideration (Petition) asserts that defense exhibits A, B, C, D, G, I, J, K, and M should have been admitted into evidence, because they were reviewed by treating and evaluating physicians, because applicant did not object to the documents' admissibility at mandatory settlement conference, and because the records were offered to impeach applicant's testimony. (Petition, at 4:20.) However, the WCJ excluded these reports for failure of service prior to the closure of discovery at Mandatory Settlement Conference, and on the record before us, we agree with the WCJ that the review of these records by reporting physicians does not overcome the bar to admission of section 5502. (Report, at p. 10; Lab. Code § 5502(d), § 5313.) We also agree that the admissibility of evidence is a triable issue to be addressed by the trial judge. (*Ibid.*)

Defendant contends that applicant's condition has improved, as evidenced by her trial testimony to decreased medication usage. (Petition, at 7:12.) Defendant asserts that as a result, applicant is not permanent and stationary. (Petition, at 6:20.) However, applicant also testified at trial that she could not remember the names of some of her medications or dosages. (Minutes, at 10:4.) Applicant testified that she is in constant pain, that her medication usage is dependent on her pain levels, and that the medication makes her sleepy. (Minutes, at 4:1, 9:21.) Defendant puts forward no medical opinion or evidence from any treating or evaluating physician that documents a material change in applicant's condition. Nor does the record reveal any significant alteration in applicant's physical abilities, activities of daily living, significant interim medical treatment, or other indicia of changed condition. Accordingly, we agree with the WCJ that applicant remains permanent and stationary.

Defendant contends that the reporting of applicant's vocational expert Mr. Broadus is not substantial evidence. (Petition, at 8:16.) However, the formal ratings instructions issued by the WCJ yielded 100% permanent disability without reliance on vocational evidence. (January 14, 2022 Formal Rating Instructions and Report of Permanent Disability.) In addition, the record

reflects no objection lodged by any party to the ratings instructions or the resulting Report of Permanent Disability.

Defendant asserts that the record does not support the diagnosis of CRPS, because orthopedic QME Dr. Kaplan identified seven rather than eight objective criteria necessary to the diagnosis, as set forth in the AMA Guides, Fifth Edition, and that neurology QME Dr. Young diagnosed hyperesthesia, rather than CRPS. (Petition, at 15:3, 16:5; Ex. BB, report of PQME Rosabel Young, M.D., dated February 18, 2020, p. 32.) In deposition, Dr. Kaplan responded to the differences in diagnosis as follows:

Well, CRPS is a very frustrating problem in the medical/legal world because, as I testified earlier, there's no test to make the call. It's a clinical diagnosis. So you could have two clinicians who are both experts in the field and they may disagree on the diagnosis of CRPS in a given individual because the diagnosis is made based on clinical suspicion and clinical findings rather than a black-and-white test. So your characterization of the neurologist's report doesn't surprise me. I think you could find other examiners who would say she has CRPS, other examiners who would say she has a frozen shoulder. You can have both. She can have a frozen shoulder and CRPS. So I think it's going to be difficult to get a consensus from multiple different examiners of what's going on because each person can provide the factual basis to support their diagnosis and it doesn't mean I'm right and he's wrong or vice versa unfortunately. (Ex. AA, transcript of the deposition of Daniel Kaplan, M.D., dated April 24, 2020, at 25:12.)

Irrespective of the specific diagnosis reached, there is broad agreement among the treating physicians and medical-legal evaluators with regard to the severity of applicant's injury. Dr. Kaplan observes that applicant "has absence of any use of her left upper extremity due to the reflex dystrophy and then she is markedly limited in use of her right upper extremity due to the tendinitis of her right shoulder, adhesive capsulitis of her right shoulder, and tendinitis of the right wrist." (*Id.*, at 23:20.) Pain management physician Dr. Kohan notes applicant "cannot and does not use the [left upper] extremity at all for self-care and daily activities," and that applicant cannot "ever compete in the open job market and should be considered totally and permanently disabled." (Ex. 3, reports of Jonathan Kohan, M.D., dated May 8, 2020, at p. 12.) Primary treating physician Dr. Nassos finds applicant "completely disabled with regard to the left upper extremity," notes applicant "has developed compensable consequence [injuries] of the right upper extremity," that applicant "is also on narcotic pain medication on a daily basis," and considers applicant totally disabled. (Ex. UU, reports of Jonathan Nassos, M.D., dated July 31, 2019, p. 17.)

We also observe that this reporting is generally consonant with applicant’s trial testimony that she cannot “function or take care of herself most days,” which the WCJ found to be forthright and fully credible. (Minutes, at 6:2; Report, at p. 11.) We accord to the WCJ’s credibility determination the great weight to which it is entitled. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500].) Additionally, and despite a different diagnosis, QME Dr. Young reviewed the reporting of the orthopedic and pain management physicians, and determined that the neurologically mediated disability should be *added* to that of the orthopedic disability identified elsewhere in the record. (Ex. BB, report of PQME Rosabel Young, M.D., dated February 18, 2020, p. 38.) The WCJ’s rating instructions were premised on the reporting of QMEs Dr. Kaplan and Dr. Young, and reflected the consistent assessment of severe compromise of applicant’s functional abilities across a range of medical specialties. Because the aggregate disability as described in the QME reporting rates to 100% disability, we need not reach the issue of whether the vocational reporting of non-feasibility for retraining constitutes substantial evidence. (*Ogilvie v. Workers’ Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp. Cases 624]; *Contra Costa County v. Workers’ Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119]; *LeBoeuf v. Workers’ Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].) Accordingly, we affirm the WCJ’s findings of permanent and total disability. (January 14, 2022 Formal Rating Instructions and Report of Permanent Disability.)

Defendant also contends that applicant’s failure to “fully participate” in physical therapy due to pain-related complaints was unreasonable, and entitles defendant to a reduction in disability. (Petition, at 17:1.) However, “the question as to whether the employee has acted reasonably or not in refusing treatment is a question of fact upon which the opinion of the commission, based upon expert medical or surgical advice, is final...[t]he commission’s power is, of course, not arbitrary, and its determination must be based upon competent expert evidence, unless the issue pertains to a problem properly falling within the scope of judicial knowledge. (*Southern Cal. Edison Co. v. Industrial Acc. Com.* (1945) 75 Cal.App. 709 [10 Cal. Comp. Cases 162].) Here, defendant puts forward no competent expert evidence that speaks to the issue of alleged failure to fully participate, and further relies on evidence that has been excluded from the record. (Petition, at 17:17; Exhibit M, Physical therapy notes from Sherry Simsuangco, DPT, dated April 24, 2017.) Accordingly, we find no merit in this argument.

Defendant also contends the award of out of pocket expenses and mileage was unwarranted, and abrogated defendant's right to due process. (Petition, 18:3.) However, we note that the Award does not specify the amount to be reimbursed, and that the expenses and mileage are subject to adjustment among the parties with jurisdiction reserved to the WCAB. Accordingly, we discern no prejudice to defendant in this finding.

Based on the foregoing, we find the WCJ's determination of permanent and total disability substantiated in the record.

However, we note apparent typographical error in the Award. The attorney fee commutation calculations attached to the F&A, as well as the Opinion on Decision both note fees of \$163,271.55 payable to applicant's counsel Ayk Dikijian for Work Injury Law Group, LLP. However, the Award provides for \$1,489, which appears to be typographical error. Accordingly, we will grant reconsideration to amend the F&A to reflect the correct attorney fees, and to specify that the fees are to be commuted from the side of the award.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the April 12, 2022 Findings of Fact and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 12, 2022 Findings of Fact and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

12. Pursuant to the WCAB Rules of Practice and Procedure § 10844 and the guidelines for awarding an attorney fee set forth in the Policy and Procedure Manual § 1.140, it is found that a reasonable attorney's fee is \$163,271.55, payable to Ayk Dikijian and Work Injury Law Group, LLP, which shall be commuted off the side of the award to the extent necessary to pay as one lump sum.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 30, 2022

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

**LADYLYN CORDERO
WORK INJURY LAW GROUP
MICHAEL SULLIVAN & ASSOCIATES**

SAR/abs

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