

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

CASEY COWLES, *Applicant*

vs.

BIMBO BAKERIES; ACE AMERICAN INSURANCE COMPANY, *Defendants*

**Adjudication Number: ADJ12463997
Oakland District Office**

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

Defendant seeks reconsideration of a workers' compensation administrative law judge (WCJ) Findings and Award of July 9, 2021, wherein it was found that, while employed on June 11, 2019 as a route sales driver, applicant sustained admitted industrial injury to the right knee causing temporary disability from June 11, 2019 to March 15, 2021 and permanent disability of 8% after Labor Code section 4663 apportionment to prior industrial injuries. Although the WCJ applied Labor Code section 4663 apportionment to prior industrial injuries, she declined to apply Labor Code section 4664 apportionment to a stipulated Award of April 22, 2015 which found that a cumulative injury ending on May 1, 2010 (ADJ7774734) and specific injury of October 23, 2010 (ADJ7774769) combined to cause 30% permanent disability.

Defendant contends that the WCJ erred in (1) finding temporary disability from June 11, 2019 to August 2, 2019, arguing that applicant was working modified duty with no wage loss during that period, in (2) finding temporary disability from December 3, 2020 to March 15, 2021, arguing that agreed medical evaluator physiatrist James B. Stark, M.D. declared applicant permanent and stationary in a December 2, 2020 report, and in (3) not applying Labor Code section 4664 apportionment to the stipulated Award of April 22, 2015 in cases ADJ7774734 and ADJ7774769. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will grant reconsideration to reflect that applicant's injury caused temporary disability from August 3, 2019 to December 2, 2020, and defer the issue of temporary disability from

December 3, 2020 to March 15, 2021 pending further development of the evidentiary record. We will affirm the WCJ's finding regarding permanent disability, including her decision to not apply Labor Code section 4664 for the reasons stated by the WCJ in the Report, which we incorporate and quote below.

We reverse the finding of temporary disability from June 11, 2019 to August 2, 2019 because applicant did not claim this period of temporary disability (Minutes of Hearing and Summary of Evidence of May 27, 2021 trial at p. 2), and testified that he continued to work until August 3, 2019 (Minutes of Hearing and Summary of Evidence of May 27, 2021 trial at p. 2), and payroll documents (Exhibit D) show that applicant was paid full wages until a check dated August 9, 2019.¹

With regard to the period of temporary disability from December 2, 2020 to March 15, 2021, "temporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status." (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798].) The use of the disjunctive "or" means that temporary disability is no longer payable once an injured worker's condition is permanent and stationary regardless of whether or not they have returned to work. "An injured employee cannot be temporarily and permanently disabled at the same time; thus, permanent disability payments do not begin until temporary disability payments cease." (*Department of Rehabilitation v. Workers' Comp. Appeals Bd. (Lauher)* (2003) 30 Cal.4th 1281, 1292 [68 Cal.Comp.Cases 831].)

In his December 11, 2020 report (of a December 2, 2020 examination), Dr. Stark did not expressly declare applicant permanent and stationary. Dr. Stark noted that applicant's maximum flexion at the time of examination was 115 degrees, but that Dr. Stark anticipated that "he will probably pick up another 10 degrees." At 125 degrees, he would be able to kneel, but not fully squat, but with the ability to kneel he would be able to return to his customary duties. Despite not explicitly saying that applicant was permanent and stationary, Dr. Stark provided applicant's

¹ Although the payroll records reference the date of the check, it is unclear if it covers wages from August 3 to August 9.

permanent impairment ratings “because future improvement will not be great, if any.” (December 11, 2020 report at p. 4.)²

The record must be clarified regarding when applicant was permanent and stationary. “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.” (Administrative Director Rule 10152, Cal. Code Regs., tit. 8, § 10152.) Since it is unclear when applicant became permanent and stationary, which would terminate his period of temporary disability, we will defer the issue of temporary disability from December 2, 2020 to March 15, 2021 pending further development of the record.

We note that in the Award issued by the WCJ, the WCJ gave defendant “credit” toward its temporary disability indemnity liability for “any wages applicant earned while working for Uber” during his period of temporary disability. However, in cases of temporary partial disability, the payment is two-thirds of the wage loss during the disability. (Lab. Code, § 4654.) In cases, such as this one, where applicant is entitled to a maximum temporary disability indemnity benefit, wage loss is calculated by subtracting wages earned during the period of temporary partial disability from the maximum statutory average weekly wage. (Lab. Code § 4657; *Gamble v. Workers’ Comp. Appeals Bd.* (2006) 143 Cal.App.4th 71, 91, fn. 8 [71 Cal.Comp.Cases 1015].) Thus, to the extent that the WCJ awards further temporary disability indemnity during the period that applicant earned money working for Uber Eats, defendant’s liability should only be reduced by two-thirds of the monies earned by the applicant.

With regard to the issue of permanent disability and Labor Code section 4664 apportionment, we affirm the WCJ’s finding for the reasons stated in the WCJ’s Report quoted below:

Finally, defendant’s claim that I should have found Labor Code section 4664 apportionment, rather than apportionment per Labor Code section 4663, is without merit. Defendant has the burden of proving overlap between applicant’s

² We note that while applicant’s anticipated improvement in flexion may have improved his ability to return to his customary duties, it would not impact his permanent impairment under the AMA Guides. The impairment rating after total knee replacement surgery is based on whether an injured worker had a good result after the surgery (15% WPI), a fair result (20% WPI) or a poor result (30% WPI). (AMA Guides, Table 17-33, p. 547.) Whether an injured worker had a good, fair or poor result is determined under a 100-point scale, with the factors listed in Table 17-35 (AMA Guides, p. 549), with a good result being an 85-point score or better. Even without the added flexion, Dr. Stark explains in his report that applicant achieved 90 points on the scale. (December 11, 2020 report at p. 4.) Under Table 17-35, one point is added for every 5 degrees of range of motion, so the anticipated ten-degree increase in range of motion would have upped applicant’s score to 92, but not changed his permanent impairment.

current disability and his previous disability to establish its right to apportionment under Labor Code section 4664. Defendant did not satisfy that burden in this matter.

Dr. Stark reviewed medical records and reports, including the reports of Joel Renbaum, M.D., and the prior Stipulations with Request for Award, and evaluated applicant on 06/24/2020. In his report dated 06/27/2020, Dr. Stark noted applicant has sustained a right knee injury working for defendant in 2010, had been diagnosed with arthritis, and had undergone multiple surgical procedures including a unicompartmental arthroplasty in October 2013. Dr. Stark also noted applicant had been off work for several years before returning to his usual and customary job without any restrictions. He further noted applicant felt a “pop” when he twisted his right knee in June 2019, sought further treatment, and had a right total knee arthroplasty in November 2019 and followed up with physical therapy. Dr. Stark further stated that it remains to be seen whether there will be an increase in the overall level of impairment as compared to Dr. Renbaum’s 08/27/2014 report because the unicompartmental arthroplasty had failed leading to the total knee arthroplasty, and that apportionment will be an interesting issue because impairment is related to arthroplasty while apportionment is to disability. (Joint Exhibit 101 at pages 1, 4) After reviewing additional medical records, Dr. Stark authored a supplemental report dated 09/16/2020 in which he noted that applicant’s right knee has not been normal since 2010 when there was the onset of progressive right knee pain due to repetitive bending and squatting activities, and jumping off vehicles at work. Applicant had an arthroscopic subtotal medial meniscectomy and chondroplasty in July 2010, a May 2013 subtotal medial meniscectomy for a recurrent tear, and a unicompartmental arthroplasty in October 2013 and was off work for over three years before returning to full duty in June 2014. Diagnostics in July 2019 revealed a new abnormality in the trochlea. Dr. Stark opined applicant sustained a new injury in May 2019 and that there was progressive worsening of the right knee following that incident leading to the total knee arthroplasty. He further opined that sooner or later applicant was going to require a total knee arthroplasty because of natural progression of osteoarthritis following the 2010 injury and the May 2019 injury accelerated the need for the arthroplasty. (Joint Exhibit 103 at pages 1, 2) After re-evaluating applicant on 12/03/2020 and reviewing additional medical records, Dr. Stark, in his final report dated 12/11/2020, provided 15 whole person impairment and opined as to apportionment as follows:

Apportionment is complex in a case such as this. It is complex because of the prior permanent partial disability award based on Dr. Renbaum’s report after the partial knee replacement of October 1, 2010. Knee flexion at that time was to 120 degrees with full extension. The “fair result” was based upon “continuing discomfort and ligamentous laxity.” Dr. Renbaum apportioned 10% to cumulative trauma preceding December 21, 2120. His

apportionment is a little confusing to my reading, but seems to be 90% related to cumulative trauma through December 21, 2010. Dr. Renbaum opined that the periods of cumulative trauma were inextricably intertwined.” Getting back to apportionment, at this time, range of motion is less in that there is an extensor lag of 3 degrees and flexion is only 115 degrees, these are measures of worsening. On the other hand, all impairment at this time is based upon the current knee arthroplasty. In my judgement, 75% of the current disability is apportionable to prior cumulative trauma and the unicompartmental arthroplasty, with 25% being apportioned to the specific injury in June 2019. (Joint Exhibit 104 at pages 1, 4 – 5)

Given Dr. Stark’s opinion as to impairment, I did find substantial medical evidence to support Labor Code section 4663 apportionment of 75% to the previous disability. I did not find defendant established its burden to prove overlap between the current disability and the previous disability under Labor Code section 4664 apportionment resulting in no current disability.

(Report at pp. 7-8.)

For the foregoing reasons,

IT IS ORDERED that Defendant’s Petition for Reconsideration of the Findings and Award of July 9, 2021 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board that the Findings and Award of July 9, 2021 is **AMENDED** as follows:

FINDINGS OF FACT

1. The stipulations as set forth in the Minutes of Hearing on 05/27/2021 are adopted and incorporated herein as findings of fact.

2. Applicant, Casey Cowles, while employed on 06/11/2019 as a route sales driver at Contra Costa County, California by Bimbo Bakeries USA, Inc., insured by Ace American Insurance Company, sustained injury arising out of and in the course of his employment to his right knee.

3. Applicant’s Occupational Group Number is 460.

4. Applicant’s injury to his right knee caused permanent partial disability of eight percent after Labor Code section 4663 apportionment.

5. Applicant is entitled to total temporary disability indemnity

corresponding to the period from 08/03/2019 through 12/02/2020 at the weekly rate of \$1,251.38.

6. The issue of temporary disability from 12/03/2020 to 03/15/2021 is deferred, with jurisdiction reserved.

7. Applicant's attorney is entitled to a reasonable attorney's fee of 15 percent of the permanent disability recovery. Attorney's fees on any recovery of temporary disability after corresponding to any period after 12/02/2020 is deferred, with jurisdiction reserved.

AWARD

AWARD IS MADE in favor of **CASEY COWLES** against **ACE AMERICAN INSURANCE COMPANY** of:

(a) Temporary disability indemnity as set forth in Finding of Fact No. 5 in the accrued amount of \$87,239.08, less credit for any temporary disability indemnity advanced heretofore on account thereof, less two-thirds credit for any wages paid to applicant during any period of temporary disability, to be informally resolved between the parties with jurisdiction reserved to the WCJ in the event of a dispute.

(b) Permanent partial disability indemnity in the accrued amount of \$6,960.00, less credit for any permanent partial disability indemnity advanced heretofore, subject to proof, less an attorney's fee of \$1,044.00, payable to Boxer & Gerson.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 4, 2021

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

**CASEY COWLES
BOXER & GERSON
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY**

DW/oo

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