WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DAVID MITCHELL BAILEY, *Applicant*

vs.

FEDERAL EXPRESS CORPORATION,
permissibly self-insured, adjusted by
SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ8171800
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion and Decision After Reconsideration.

Applicant, in pro per, filed a Petition for Removal on December 28, 2020, an "Amended Petition to Remove Findings and Award on Opinion and Decision" (Petition for Removal) on January 5, 2021, a Petition for Reconsideration on January 7, 2021, and an Amended Petition for Reconsideration on March 1, 2022, all regarding the November 30, 2020 Findings and Award issued by the workers' compensation administrative law judge (WCJ). For the reasons stated below, we will treat the Petition for Removal filed on December 28, 2020 as a timely Petition for Reconsideration. We will treat the subsequent Petition for Removal and Petitions for Reconsideration and all the subsequent correspondence filed by applicant as supplemental filings, which we accept pursuant to our authority. (Cal. Code Regs., tit. 8, § 10964.)

We first address the type of relief applicant is seeking. If a decision includes resolution of a "threshold" issue, then it is a "final" decision. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd*. (*Gaona*) (2016) 5 Cal.App.5th

658, 662 [81 Cal.Comp.Cases 1122].) In this case, the November 30, 2020 Findings and Award contained final findings on threshold issues, including employment, injury arising out of and occurring in the course of employment (AOE/COE), the finding of no entitlement to temporary disability, a finding of 24% permanent disability, and a finding of need for further medical treatment. Because of these final findings, the November 30, 2020 Findings and Award is subject to reconsideration and not removal. Therefore, we will treat the petition filed by applicant on December 28, 2020 as a Petition for Reconsideration.

We next address the issue of timeliness. There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).) In this case, the WCJ's decision was issued on November 30, 2020. The 25th day following issuance of the WCJ's decision was Friday, December 25, 2020, Christmas Day, which is a holiday observed by the Workers' Compensation Appeals Board. Therefore, based on the authority cited above, applicant's petition filed on Monday, December 28, 2020 is timely.

Next, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice …." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on applicant's petition within 60 days of its filing on December 28, 2020, through no fault of applicant. Therefore, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act on the Petition for Reconsideration was tolled.

We next address the merits of applicant's contentions. Based on our review of the record, the Petition for Reconsideration, and applicant's supplemental filings, we will affirm the November 30, 2020 Findings and Award for the reasons stated by the WCJ in the Report and the Opinion on Decision, which we adopt and incorporate herein.

To the extent that applicant raises multiple issues that were not raised at trial, those issues were waived. Issues not raised at the first opportunity that they may properly be raised are waived. (Lab. Code, § 5502(e)(3), see also *Gould v. Workers' Comp. Appeals Bd*. (1992) 4 Cal.App.4th 1059 [57 Cal.Comp.Cases 157], *Griffith v. Workers' Comp. Appeals Bd*. (1989) 209 Cal.App.3d 1260 [54 Cal.Comp.Cases 145].) It was also inappropriate for applicant to refer to evidence not in the record. (Cal. Code Regs., tit. 8, § 10945(b).)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 30, 2020 Findings and Award is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 18, 2022

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

DAVID MITCHELL BAILEY, IN PRO PER
TESTAN LAW

PAG/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION AND PETITION FOR REMOVAL

I. INTRODUCTION

Date of Injury/Body Parts:	CT through 6-6-2011/low back
Occupation:	package handler
Petitioner:	Applicant in pro per
Timeliness:	Applicant's petitions are untimely
Verification:	The petitions are not verified

Petitioner's Contention: Applicant appeals the Findings and Award and Opinion on Decision dated 11-30-2020 wherein applicant was awarded 24% based on the AME report by Dr. Pang. In his Petition for Reconsideration, Applicant challenges Dr. Pang as the AME. Applicant disagrees with a finding on his earnings capacity to calculate his temporary disability rate. In a Petition for Removal, applicant disagrees with the ratings method employed by AME Dr. Pang.

II. BACKGROUND

Applicant David Bailey was employed by defendant Federal Express as a package handler in Oakland, California. Applicant was represented by Attorney James Latimer who filed an Application for Adjudication on 01-28-2010 alleging that applicant suffered a cumulative trauma injury to his back for the period of employment through 06-06-2011.

When applicant was represented, the parties agreed that David K. Pang, M.D. as the Agreed Medical Evaluator (AME). Applicant was evaluated by Dr. Pang on 12-12-2012 and an AME report issued on the same day, with details and measurements from the evaluation but it was not a final report as the AME had not received medical records. (Ex. 1.)

On 12-26-2012, after applicant's medical records were received, the AME issued a second report opining that applicant had permanent disability and provided ratings for applicant's back at either 14% WPI or 24% WPI utilizing the "Almaraz-Guzman II analysis." The ratings were less apportionment as applicant's low back MRI demonstrated preexisting degenerative disease and applicant also had a previous work injury. Dr. Pang opined that applicant would not be able to return to his position with the employer and provided that future medical treatment for the back was indicated. (Ex. 2.)

On 1-24-2013, Dr. Pang issued another report wherein he reviewed additional medical records and surveillance video from 1-11-2012 showing applicant walking and sitting outside CVS, McDonald's, and a library, and also riding away on his bicycle. Dr. Pang did not change his prior opinion. (Ex. 3.)

On 12-18-2014, applicant dismissed Mr. Latimer and became unrepresented. Mr. Latimer and Pacific Workers Oakland have filed liens for attorney fees.

Since the time applicant became unrepresented, he has filed Declarations of Readiness to request multiple hearings on the same issues: entitlement to temporary disability and temporary disability rate and removal of Dr. Pang as the AME. There have been no less than fifteen (15) hearings on the matter before three judges at the Oakland District Board. To date, applicant has sought dismissal and removal of Dr. Pang as the AME. (Minutes of Hearing/Summary of Evidence of Trial dated 09-11-2020 at p. 3 "Other issues.") Applicant did not attend any reevaluation with Dr. Pang despite the Order Compelling Applicant's Attendance dated 05-18-2017 by Presiding Judge Lam. In his Petition for Reconsideration, applicant takes issue with Judge Lam's order. An appeal of Judge Lam's order should have been filed when Judge Lam was still assigned to this case in 2017. Based on Labor Code section 5903 (discussed below), that issue is untimely as not filed within 20 days of Judge Lam's order and will not be addressed herein.

As the result of the trial, it was found that Dr. Pang must remain as the AME in this case and there shall be no further discovery. Based on Dr. Pang's reporting, applicant was awarded 24% permanent disability after apportionment and future medical treatment to cure or relieve the injury to the lumbar spine. It was found that applicant has been fully compensated for temporary disability and no further temporary disability was awarded.

No Answers has been filed.

III. DISCUSSION

Labor Code section 5903 allows twenty (20) days after service of a final order, decision, or award to file a petition for reconsideration, and Board Rule 10605(a) provides that the time for filing may be extended five (5) days for mailing. (Lab. C. §5903; Code Civ. Proc. § 1013; Cal. Code Regs., tit. 8, § 10605(a).) A petition for reconsideration is deemed filed on the day it was actually received at the appropriate district office and not on the date it was deposited in the mail. (*Valle v. Workers' Comp. Appeals Bd.* (1973) 38 Cal.Comp.Cases 596 (Appeals Board panel opinion); *County of Lake v. Workers' Comp. Appeals Bd. (Helbush)* (1984) 49 Cal.Comp.Cases 627 (writ denied).)

The Findings and Award and Opinion on Decision dated 11-30-2020 was served with a proof of service on 11-30-3030 and the proof of service shows that applicant was served by U.S. mail. To be timely, the Petition for Reconsideration should have been filed and received by the Workers' Compensation Appeals Board within 25 days after 11-30-2020. Applicant's Petition for Reconsideration dated 01-05-2021 was filed on 01-07-2021 as shown by the date stamp of the DWC/WCAB Oakland District Office. The filing date was 38 days after service of the Findings and Award and Opinion on Decision. Therefore, the Petition for Reconsideration is untimely and must be dismissed.

Board Rule 10955(a) provides that a petition for removal may be filed "[a]t any time within 20 days after the service of the order or decision, or of the occurrence of the action at issue." The time limits for filing a petition for removal are extended by five calendar days for service by mail to an address within California. (Cal. Code Regs., tit. 8, §10605). The failure to timely file a petition for removal constitutes valid ground for dismissal (Cal. Code Regs., tit. 8, §10955(a)).

Applicant's Petition for Removal of Finding and Award to Judge T. Da Silva is dated 12-23-2020 but was received on 12-28-2020 as shown by the date stamp of the DWC/WCAB Oakland District Office. The filing date was 28 days after filing and service of the Findings and Award and Opinion on Decision dated 11-30-2020. Therefore, the Petition for Removal is thus untimely and must be dismissed.

Even if the Petitions for Reconsideration and Removal were timely, the Findings and Award should not be disturbed as it is supported by substantial medical evidence.

Regarding the issue of temporary disability, Labor Code section 4653 requires temporary total disability to be calculated as "two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market." For applicant's date of injury, the total temporary disability weekly rate must be paid at two thirds of applicant's average weekly wage, a minimum of $148.00 per week. The wage statements from the employer (Ex. 7) and wage statement calculations by the claims adjuster (Ex. O) show that applicant was earning $15.56 per hour and thirteen weekly paychecks ending March 12, 2011. At trial, applicant testified that he was working two day per week in 2011. (MOH/SOE p. 7: lines 18-19.) On cross-examination, applicant confirmed that he was hired in 2003 and was working 15 hours a week. (MOH/SOE p.8: lines 25-35.) Based on applicant's actual earnings, the average weekly wages are $208.47 and this results in a temporary disability rate at the minimum allowed $148.00 per week.

Applicant claims that he should be entitled to a greater temporary disability rate based on his earnings capacity. Applicant cites Social Security earnings statement through 2013. (Ex. Q.) Applicant contends that he had earnings from the City of Los Angeles up to $49,656 per year for the period of 1987 to 1998. (Id. at page 1.) The statement shows no earnings in 2000. (Id.) Then, 2001 and 2012 is the period applicant worked for Fed Ex during which time applicant's highest year of earnings was 2004 at $14,040.00. (Id.) Earnings are based on earnings at the time of injury. (Lab.C. §4453(c).) Applicant was a long term, 10 year part time employee for the employer and as such the actual work history for this employer is the best estimate of applicant's earnings capacity.

The Labor Code does not allow for removal of the AME based on the facts of this case. Applicant's situation in this case is addressed directly in section 4062.2(e) which states: "If an employee received a comprehensive medical-legal evaluation under this section and he or she later ceases to be represented, he or she shall not be entitled to an additional evaluation." (Lab. C. §4062.2(e), emphasis added.) The parties stipulated to use Dr. Pang as AME. Stipulations between parties are enforceable and will not be vacated absent good cause to vacate them. *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 65 Cal.Comp.Cases 1; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 419; *Huston v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 78. In fact, applicant was evaluate by Dr. Pang who issued a report on 12-12-2012 and a ratable report on 12-26-2012. As set forth in the decision, Dr. Pang's reporting constitutes substantial medical evidence and rates to 24% after apportionment.

IV. RECOMMENDATION

Based on the foregoing, it is respectfully requested that Applicant's Petition for Reconsideration and Petition for Removal be **DENIED**.

DATE: 01-19-2021

Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

Procedural History

In case number ADJ8171800, Applicant David Bailey was represented by Attorney James Latimer who filed an Application for Adjudication on 1-28-2010 alleging that applicant suffered a cumulative trauma injury to his back for the period of employment through 6-6-2011 while employed by defendant Federal Express as a package handler in Oakland, California. When applicant was represented, the parties agreed that David K. Pang, M.D. was the Agreed Medical Evaluator (AME). Applicant was evaluated by Dr. Pang on 12-12-2012 and an AME report issued on the same day, with details and measurements from the evaluation but noting that he had not received medical records. (Applicant's Exhibit I and Defendant's Exhibit 1.)

On 12-26-2012, after applicant's medical records were received, the AME issued a second report opining that applicant had permanent disability and rating applicant's back at either 14% WPI or 24% WPI utilizing the "Almaraz-Guzman II analysis." The ratings were less apportionment as applicant's low back MRI demonstrated preexisting degenerative disease and applicant also had a previous work injury. Dr. Pang opined that applicant would not be able to return to his position with the employer and that future medical treatment for the back was indicated. (Applicant's Exhibit H and Defendant's Exhibit 2.)

On 1-24-2013, Dr. Pang issued another report wherein he reviewed additional medical records and surveillance video from 1-11-2012 showing applicant walking and sitting outside CVS, McDonald's, and a library, and also riding away on his bicycle. Dr. Pang did not change his prior opinions. (Defendant's Exhibit 3.)

On 3-13-2013, applicant's attorney filed an Amended Application for Adjudication alleging compensable consequence injury to additional body parts including psyche, GERD, sex dysfunction, weight gain, headaches, and sleep dysfunction. On 12-18-2014, applicant dismissed Mr. Latimer and became unrepresented. On 4-24-2015, applicant in pro per filed an Amended Application for Adjudication listing multiple body part codes: 330, 420, 440, 548, 810, and 840 which stand for 330: hand, 420: back, 440: hips, 810: digestive system-stomach, and 840: nervous system-not specified. There is no body part corresponding to number 548. (Also, on 7-21-2015, applicant filed a new Application for Adjudication which was assigned case number ADJ10044425 alleging a cumulative injury to his wrists and hands against the same employer.)

Expedited Hearings took place and applicant appeared with defense counsel. Defendant never wavered from its position that Dr. Pang was the AME. Appointments were set for Dr. Pang to reevaluate applicant, to no avail (see section 2 below). After applicant failed to attend the appointment on 6-8-2020, a trial on all issues took place on 9-11-2020 at which time applicant testified on his behalf. The Minutes of Hearing/Summary of Evidence (MOH/SOE), served with this decision, contain a summary of applicant's testimony as well as the exhibits upon which this decision is based. Applicant has filed additional documents subsequent to the trial date, however, the record was closed on the date of trial and additional exhibits are not part of the record.

1. Earnings and Temporary Disability Rate

The employer claims that applicant's average weekly earnings are $208.47 based on a wage statement marked as Defendant's Exhibit 7. Applicant claims that he is entitled to the maximum temporary disability rate for his date of injury based on his earnings capacity. Labor Code section 4653 requires temporary total disability to be calculated as "two-thirds of the average weekly earnings during the period of such disability, consideration being given to the ability of the injured employee to compete in an open labor market." For applicant's date of injury, the total temporary disability weekly rate must be paid at two thirds of applicant's average weekly wage, a minimum of $148.00 per week. The wage statements from the employer (Defendant's Exhibit 7) and wage statement calculations by the claims adjuster (Applicant's Exhibit O) show that applicant was earning $15.56 per hour and thirteen weekly paychecks ending March 12, 2011. At trial, applicant testified that he was working two day per week in 2011. (MOH/SOE p. 7: lines 18-19.) On cross-examination, applicant confirmed that he was hired in 2003 and was working 15 hours a week. (MOH/SOE p.8: lines 25-35.) Based on applicant's actual earnings, the average weekly wages are $208.47 and this results in a temporary disability rate at the minimum allowed $148.00 per week.

Applicant claims that he should be entitled to a greater temporary disability rate based on his earnings capacity. Applicant cites Social Security earnings statement through 2013. (Applicant's Exhibit Q.) Applicant contends that he had earnings from the City of Los Angeles up to $49,656 per year for the period of 1987 to 1998. (Id. at page 1.) The statement shows no earnings in 2000. (Id.) Then, 2001 and 2012 is the period applicant worked for Fed Ex during which time applicant's highest year of earnings was 2004 at $14,040.00. (Id.)

Labor Code section 4453(c) sets forth the criteria for calculating average weekly earnings in order to determine the appropriate temporary disability rate. Section 4453(c) (4) provides that when the employment is for less than 30 hours per week, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments. In California workers' compensation cases, the date of injury is a pivotal factor for determining benefits. Applicant sustained a cumulative trauma ending 6-6-2011. For liability purposes, under Labor Code section 5500.5(a), the employer/defendant defines the cumulative trauma period as one year from the last date the employee was exposed to the hazards of the employer's work. In this case, the liability period is 6-6-2010 to 6-6-2011. For calculating temporary disability, it is also common practice to look to the last year of earnings before the date of injury. Labor Code section 4453(c) specifically states that earnings from all employers **"at the time of injury"** can be considered. Applicant was a long term part time employee for defendant Fed Ex from 2001 to 2011 and the Social Security statements show other evidence of earnings for ten years. Over ten years is considered long term and an accurate period for determining earnings potential in this case. As such, it is not appropriate to consider earnings from prior employers in this case. Accordingly, it is determined that applicant's average weekly earnings are $208.47 based on a wage statement marked as Defendant's Exhibit 7 and the temporary disability rate is $148.00 per week.

2. Dr. Pang's Status as AME in This Case

Applicant seeks dismissal and removal of Dr. Pang as the AME in this case. Applicant contends that when he became an unrepresented worker, he became entitled to a new QME. In the alternative, applicant claims that Dr. Pang's reporting is not substantial medical evidence.

At the beginning of this claim, applicant was represented by attorney James Latimer who filed the application in this case. Therefore, Labor Code section 4062.2 governs the medical-legal process, including the agreement to use Dr. Pang as the AME. Section 4062.2 states:

> (a) Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section.
>
> (b) No earlier than the first working day that is at least 10 days after the date of mailing of a request for a medical evaluation pursuant to Section 4060 or the first working day that is at least 10 days after the date of mailing of an objection pursuant to Sections 4061 or 4062, either party may request the assignment of a three- member panel of qualified medical evaluators to conduct a comprehensive medical evaluation. The party submitting the request shall designate the specialty of the medical evaluator, the specialty of the medical evaluator requested by the other party if it has been made known to the party submitting the request, and the specialty of the treating physician. The party submitting the request form shall serve a copy of the request form on the other party.
>
> (c) Within 10 days of assignment of the panel by the administrative director, each party may strike one name from the panel. The remaining qualified medical evaluator shall serve as the medical evaluator. If a party fails to exercise the right to strike a name from the panel within 10 days of assignment of the panel by the administrative director, the other party may select any physician who remains on the panel to serve as the medical evaluator. The administrative director may prescribe the form, the manner, or both, by which the parties shall conduct the selection process.
>
> (d) The represented employee shall be responsible for arranging the appointment for the examination, but upon his or her failure to inform the employer of the appointment within 10 days after the medical evaluator has been selected, the employer may arrange the appointment and notify the employee of the arrangements. The employee shall not unreasonably refuse to participate in the evaluation.
>
> **(e) If an employee has received a comprehensive medical-legal evaluation under this section, and he or she later ceases to be represented, he or she shall not be entitled to an additional evaluation.**

> (f) The parties may agree to an agreed medical evaluator at any time, except as to issues subject to the independent medical review process established pursuant to Section 4610.5. A panel shall not be requested pursuant to subdivision (b) on any issue that has been agreed to be submitted to or has been submitted to an agreed medical evaluator unless the agreement has been canceled by mutual written consent.

(Lab. C. § 4062.2, emphasis added.)

Pursuant to Labor Code section 4062.2(f) above, once there is an agreement for an AME or if an issue has been submitted to the AME, the Medical Unit cannot issue a QME panel unless there is mutual agreement by the parties. Defendant objects to applicant's attempts to escape the AME agreement. Applicant's situation in this case is addressed directly in section 4062.2(e) which states: "If an employee received a comprehensive medical-legal evaluation under this section and later ceased to be represented, the employee is not entitled to an additional evaluation." (Lab. C. §4062.2(e), emphasis added.) Stipulations between parties are enforceable and will not be vacated absent good cause to vacate them. *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 65 Cal.Comp.Cases 1; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 52 Cal.Comp.Cases 419; *Huston v. Workers' Comp. Appeals Bd.* (1979) 44 Cal.Comp.Cases 78. Applicant was evaluate by Dr. Pang and he issued a report on 12-12-2012 and a ratable report on 12-26-2012. Defendant objects to removal of the AME. As such, the Medical Unit should not have issued another QME panel.

After applicant became unrepresented, applicant requested multiple hearings on to remove and disqualify Dr. Pang as the AME. Applicant has objected to the reporting of AME Dr. Pang as biased or lacking due diligence because the reporting omitted body parts. There have been no less than fifteen (15) expedited hearings on the matter for which the undersigned has served as the assigned trial judge. During the course of these hearings, a reevaluation was set with Dr. Pang on 2-1-2017. Defendant contends that applicant had to attend a reevaluation in order to give the AME an opportunity to address and answer applicant's questions and concerns. However, applicant did not attend the evaluation on 2-1-2017 and instead petitioned the Medical Unit for a QME Replacement Panel.

When applicant did not attend the appointment, defendant filed a motion and judicial notice is taken of the Motion to Compel Applicant's Attendance at Agreed Medical Evaluation dated 5-4-2017. Judicial notice is also taken of an Order Compelling Applicant's Attendance at Medical Examination by Dr. Pang dated 5-18-2017 issued by Presiding Judge Lam in Oakland. By this order, the Presiding Judge affirmed that applicant was ordered to attend the evaluation to allow the AME to attempt to answer applicant's questions and address applicant's concerns. The evaluation with the AME was re-set to 12-13-2017. Again, applicant did not attend.

As a result, another appointment for reevaluation with AME Dr. Pang was set for 6-8-2020. Applicant filed a Declaration of Readiness for Expedited Hearing and as a result, an Order of Continuance of Expedited Hearing was issued by the undersigned on 4-23-2020 which again directed applicant to attend the appointment with Dr. Pang on 6-8-2020. Applicant filed a Petition for Reconsideration and he did not attend the AME appointment on 6-8-2020. On 6-24-2020, the

Appeals Board determined that there was no final order or decision in this case and the matter was returned to the trial level for further proceedings.

Applicant's failure to attend a reevaluation with Dr. Pang is without justification. It appears that applicant did not attend because he did not want to. However, this is in violation of the orders of 5-18-2017 and 4-23-2020. Labor Code section 4054 provides that "If the employee fails or refuses to submit to examination after direction by the appeals board, or a referee thereof, or in any way obstructs the examination, his right to the disability payments which accrue during the period of such failure, refusal or obstruction, shall be barred." The language in Labor Code section 4054 is mandatory. Applicant has failed to cooperate with the discovery process by disregarding the orders of 5-18-2017 and 4-23-2020. As such, the record is therefore closed. Applicant is not entitled to further discovery in this case.

The AME agreement is hereby affirmed and the parties are bound to the AME reports admitted at this trial. Applicant's Exhibit C, the QME report by Dr. Andrew Burt dated 11-21-2017 is not admitted based on the foregoing, as it was obtained after Dr. Pang had issued his ratable reports.

3. Permanent Disability Rating

The AME report dated 12-26-2012 is a permanent and stationary report. Applicant's medical records were received and reviewed in detail. (Applicant's Ex. H /Defendant's Ex. 2 at p. 2-3.) The AME determined applicant was permanent and stationary on the date of the report 12-26-2012. (Id. at 3.) The AME opined that applicant has permanent disability and provided various ratings. On page 3 of the AME report of 12-26-2012, ased on the *AMA Guides, 5th Edition,* the AME provides a rating of 14% WPI based on Range of Motion for the low back and rates as follows:

15.03.03.00 – 14% - [5]18 – 460H – 22 – 28% before apportionment

Applicant's arguments that Dr. Pang's reporting does not constitute substantial medical evidence are rejected. The rating is based on MRI scans for the back of 11-12-2008 and 10-13-2011 for which a rating for Range of Motion is ratable under the AMA Guides, 5th Edition. (Id. at 3.) Applicant disagrees with the rating, however, as the AME, Dr. Pang is considered the expert in analysis of the MRI scans, medical records, and history of the case and within his reporting, and there is no evident bias, inaccuracy, or impropriety against applicant. Dr. Pang's reports might not be what applicant desires, but they are adequate to address the issues of permanent and stationary date, permanent disability and apportionment, work restrictions, and need for future medical treatment. Nothing more is needed to make an award in this case. That is, there is no need for further discovery.

The AME provides an alternative rating based on an "Almaraz-Guzman II analysis" at page 3 of the 12-26-2012 report. In *Almaraz v. State Comp. Ins. Fund and Guzman v. Milpitas Unified School Dist.* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), (*Almaraz/Guzman II),* the Appeals Board held that the permanent impairment aspect of the rating may be rebutted by use of other aspects of the AMA Guides than that most directly applicable. *Guzman* was upheld by the Court of Appeal, *sub nom. Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010)

187 Cal.App.4th 808 [75 Cal.Comp.Cases 837]. There are situations where the "strict" AMA Guides WPI does not provide the most accurate impairment when considering the pathology and the objective medical findings. If, the AME's opinion, the strict WPI does not adequately address legitimate objective medical factors or pathology, may look to other chapters within the AMA Guides, 5th Edition for an alternative rating. In order to constitute substantial medical evidence, the AME must put forth an explanation to justify deviation from the standard rating.

Here, Dr. Pang provides an add on rating for loss of lifting capacity states that the objective evidence in form of the CT scan, x-ray findings, and loss of motion do not take into account all of applicant's functional deficits, such as a loss of lifting capacity, loss of motion, and paralumbar spasms which affect his activities of daily living (ADLs), non-work-related activities and future work-related activities. (Id. at 3.) In order to deviate from the schedule, the physician must address the ADLs with specificity and compare the injured worker's actual deficits with what should be expected from the objective findings. The AME's opinion attempts to add 12% WPI for loss of lifting capacity, but states "however, a major portion of Mr. Bailey's loss of lifting capacity has *already been taken into consideration* using the diagnosis related estimate and his loss of motion." (Id., emphasis added.) This is internally inconsistent double dipping: if one factor has already been taking into consideration any additional impairment is not the most accurate measure of permanent disability. Therefore, any increased rating is rejected.

At page 4 of the 12-26-2012 report, Dr. Pang provides apportionment against the permanent disability rating. There is no doubt that applicant suffers from other conditions that may affect his ability to work at this time. For example, applicant's exhibit D is a lung scan and CT scan of the abdomen showing abnormalities taken in 2016 but because of the late date, many years after the last date of employment, there is nothing to connect these conditions to work performed at Fed Ex. As far as medical evidence is concerned, there are two theories of apportionment addressed by the AME. First, there is 15% apportionment based on applicant's low back MRI demonstrated preexisting degenerative disease. Dr. Pang opined that applicant would not be able to return to his position with the employer and that future medical treatment for the back was indicated. (Id. at 4.) Dr. Pang is considered the expert on interpreting the studies, including the MRI and as such, his opinion is substantial medical evidence. Second, Dr. Pang apportions 30% to the effects of a prior injury in 2003/2004, however, this is based on applicant's verbal history as Dr. Pang did not have a copy of any records for the 2003/2004 injury. Without records, the apportionment opinion to the prior injury is guesswork only, and cannot constitute substantial medical evidence, in applicant's favor. As such, there is 15% apportionment only. The final rating is 28% less 15% equals 23.8% which rounds up to 24% permanent disability. For applicant's date of injury and 24% permanent disability rating, applicant is entitled to payments of $160.00 per week for 95.50 weeks for a total of $15,280.00.

4. Future Medical Treatment

The AME provides that applicant should be entitled to reasonable medical treatment. (Id. at 4.)

5. Liens

Because all issues are decided in this case, liens must be considered even though they were not listed on the MOH/SOE. On 12-16-2014, applicant's former attorney James Latimer filed a lien for reasonable attorney fees. Mr. Latimer's office appears to have provided valuable services including but not limited to filing the Application for Adjudication and attending hearings. For this case, a maximum of 15% of amounts awarded herein could be awarded for attorney fees. The actual amount is to be determined. In the interim, defendant is ordered to withhold 15% of applicant's permanent disability indemnity or $2,292.00.

On 1-20-2015, Boehm and Associates filed a lien in the amount of $3,184.46 for expense incurred under Labor Code section 4600. It appears that this is a lien for medical treatment for which only defendant is liable. However, if defendant believes applicant is liable for any or all of the lien amount, they should petition to withhold the amount from applicant's award.

On 10-18-2017, Farber Oakland, now known as Pacific Workers Oakland, a law firm representing injured workers, filed a lien for reasonable attorney fees in an unspecified amount. Any lien to this law firm would be included in the 15% being withheld for attorney fees.

DATE: 11-30-2020

Therese Da Silva
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE