WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GERALD PADDIO, *Applicant*

vs.

CLEVELAND CAVALIERS, TIG INSURANCE COMPANY, administered by ZENITH INSURANCE COMPANY; SEATTLE SUPERSONICS, TIG INSURANCE, COMPANY, administered by ZENITH INSURANCE COMPANY; INDIANA PACERS, possibly insured by TIG INSURANCE COMPANY, administered by ZENITH INSURANCE COMPANY; NEW YORK KNICKS, self-insured; WASHINGTON BULLETS aka WASHINGTON WIZARDS, TIG INSURANCE COMPANY, administered by ZENITH INSURANCE COMPANY; CHICAGO ROCKERS, insurance coverage unknown; LAS VEGAS SLAM, TRAVELERS INDEMNITY COMPANY, *Defendants*

Adjudication Number: ADJ7041227
Santa Ana District Office

OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION

Applicant seeks reconsideration[1] of the April 22, 2022 Findings & Awards & Orders (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional basketball player from 1990 to 2004, sustained industrial injury to the neck, spine, shoulders, chest, wrists, hands, knees, ankles and feet. The WCJ found in relevant part that the date of injury pursuant to Labor Code section 5412 was November 21, 2007, and that applicant sustained 57 percent permanent disability. (F&A, Findings of Fact Nos. 2, 5.)

Applicant contends that the record requires development pursuant to the findings of the regular physician, that the report of the regular physician should be stricken, and that the date of injury is in 2019.

[1] Commissioner Lowe, who was on prior panels in this case, is no longer a member of the Workers' Compensation Appeals Board. Commissioner Dodd has been substituted in her place.

We have received an answer from Travelers Indemnity Company for Sports Group of Nevada, LLC, dba Las Vegas Slam (defendant). The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted, and the apportionment and resulting permanent disability and attorney fees be adjusted, but that the balance of the petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record and for the reasons below, we will grant reconsideration, amend the WCJ's decision as recommended in the report, amend the date of injury, and otherwise affirm the decision of April 22, 2022.

FACTS

Applicant claimed injury to the neck, spine, shoulders, chest, wrists, hands, knees, ankles and feet, while employed as a professional athlete by various teams/employers, including defendant Las Vegas Slam, then insured by Travelers Indemnity Company from 1990 to 2004. Dr. Thomas Kim provided applicant with orthopedic medical treatment in 2004, including an arthroscopic surgery to the left knee on April 26, 2004. (Ex. K, records of Thomas Kim M.D., dated April 26, 2004, at p. 23.) Following surgery, Dr. Kim provided applicant with a series of knee injections in 2004, an again in 2007. (*Id.* at p. 35, 48.) Following his retirement from basketball, applicant performed "security work" until the demands for extended sitting and standing became too much. (Minutes of Hearing and Summary of Evidence (Minutes), dated December 14, 2015, at 15:21.) Applicant first learned that he might have workers' compensation rights when he spoke with another former player in October, 2009. (*Id*. at 17:11.)

Applicant filed an application for adjudication and a California claim form on November 12, 2009. On February 15, 2010, Thomas J. Phillips, M.D. evaluated applicant, and following a review of applicant's vocational history and a clinical examination, concluded "this applicant's current condition was caused by the continuous trauma he sustained during the course of his career as a professional basketball player." (Ex. 4, Report of Dr. Thomas Phillips dated February 15, 2010, at p. 21.) Dr. Phillips identified both permanent disability and the need for future medical care. (*Id*. at p. 22.)

On February 16, 2010, Harry Marinow, M.D. evaluated applicant, and also took a vocational history and a clinical examination of applicant. Dr. Marinow concluded that applicant's injuries arose out of various cumulative traumas sustained while playing for the National Basketball Association (NBA), the Continental Basketball Association, and various international basketball leagues. (Ex. C, report of Harry Marinow, M.D., dated February 16, 2010, at p. 20.)

The parties proceeded to trial on issues of jurisdiction and liability, injury arising out of and in the course of employment (AOE/COE), and the nature and extent of the claimed injury. On April 30, 2018, the WCJ issued a Findings and Award and Order (F&A) determining, in relevant part, that applicant had sustained injury AOE/COE with resulting permanent disability, and that the date of injury pursuant to Labor Code section 5412 was "approximately 2009." (April 30, 2018 F&A, Findings of Fact Nos. 5, 8 and 13.) Both applicant and defendant sought reconsideration of the decision, and on July 10, 2018, we granted reconsideration on applicant's petition. (July 10, 2018 Opinion and Order Denying Defendant's Petition for Reconsideration, Granting Applicant's Petition for Reconsideration and Decision after Reconsideration.) Specifically, we found that neither the reporting of Dr. Phillips nor that of Dr. Marinow constituted substantial medical evidence for want of a complete medical history, and with respect to Dr. Marinow, because the physician applied an improper apportionment analysis. (*Id*., at 5:14.) We returned the matter to trial level for development of the record on issues of permanent disability, apportionment, and attorney fees. (*Id*. at 8:15.) We further instructed the parties to select an Agreed Medical Examiner (AME), if possible, and in the absence of an agreement, that the WCJ appoint a regular physician pursuant to Labor Code section 5701.[2] (*Id*. at 3:2.)

On January 25, 2019, the WCJ appointed Laura Wertheimer Hatch, M.D. as the Independent Medical Examiner (IME) (i.e. a regular physician), after the parties reported an inability to reach an accord on an AME. (January 25, 2019 IME Appointment Letter.)

On March 20, 2019, Dr. Hatch issued a comprehensive medical-legal examination of applicant that included a detailed vocational and medical history, and the results of a clinical examination. (Ex. X, report of Laura Wertheimer Hatch, M.D., dated March 20, 2019, p. 50.) The regular physician identified applicant's claimed cumulative trauma between 1990 and 2004 as a factor of causation, permanent disability and the need for future medical treatment. (*Id*. at p. 63.)

[2] All further statutory references are to the Labor Code unless otherwise stated.

The parties again proceeded to trial, and on April 22, 2022, the WCJ issued the F&A. The WCJ determined that applicant sustained injury to the neck, spine, shoulders, chest, wrists, hands, knees, ankles and feet while employed as a professional basketball player by the Las Vegas Slam. (April 22, 2022 F&A, Findings of Fact No. 1.) The date of injury under section 5412 was found to be November 21, 2007. (April 22, 2022 F&A, Findings of Fact No. 2.) The WCJ found permanent disability in accordance with the reporting of the regular physician Dr. Hatch, identified apportionment to the various body parts, and awarded attorney fees. (*Id.,* Findings of Fact Nos. 3, 5, and 7.)

On May 17, 2022, applicant sought reconsideration, averring the regular physician had identified areas outside her specialty that required development of the record. (May 17, 2022 Applicant's Petition for Reconsideration, at 11:6.) Applicant further contended the apportionment analysis of the regular physician was legally incorrect as it apportioned to applicant's time spent playing basketball in high school and college. (*Id*. at 17:20.) Finally, applicant avers that his date of injury is the date of the regular physician reporting in 2019. (*Id*. at 19:4.)

Defendant's answer responded that the issue of development of the record was resolved when applicant failed to seek reconsideration of the 2018 F&A which identified injured body parts. (Answer, at 2:7.) Defendant also noted that following the 2018 order for development of the record, it was applicant who sought to have the matter resubmitted for decision without deposing Dr. Hatch, and that any issue with the reporting of the regular physician should have been raised in deposition. (*Id*. at 6:1.) Defendant also contends that date of injury is April 2, 2004, the date when treating orthopedist Dr. Kim diagnosed applicant with "medial and lateral meniscus tears," and applicant told Dr. Kim he experienced "left knee symptoms including pain and swell [sic] since October while playing pro basketball." (*Id*. at 8:1.)

The WCJ's Report noted the date of injury corresponded to applicant's pain, swelling and work stoppage as documented by Dr. Kim on November 21, 2007. (Report, at p. 4.) The WCJ also agreed with applicant that the apportionment described by the regular physician was inadequately explained. The WCJ recommended that the Findings of Fact be amended to reflect 30% nonindustrial apportionment to the left knee only. (*Id*. at p. 4.) After applying the recommended changes to the apportionment analysis, the WCJ recommended an award of 67% permanent disability, after apportionment, with corresponding indemnity and attorney fees. (*Id*. at p. 5.) However, the WCJ also found that applicant's complaints regarding migraines, headaches,

memory, depression, seizures and erectile dysfunction all existed prior to the close of discovery, and that the failure to exercise due diligence prior to the closure of discovery foreclosed the requested development of the record. (*Id*. at pp. 5-6.)

DISCUSSION

Applicant contends that it was an abuse of discretion for the WCJ not to order additional development of the record regarding applicant's alleged seizure disorder. Applicant contends that regular physician Dr. Hatch reported on the neurological and psychological evidence but failed to order additional testing or referrals to other specialties. (Petition, at 12:6.) Applicant asserts that our order for development of the record on July 10, 2018 was not limited to orthopedic injuries, but encompassed all aspects of the alleged injury, including "neurological, seizure disorder, and associated mental, cognitive and behavior disorder that are prominent in applicant's medical records and specifically identified by IME Hatch." (*Id*. at 12:15.) Applicant's Petition makes reference to various medical references in support of the link between contact sports and brain injury, and notes that a video electroencephalogram taken in September 2018 was not in existence at the time of the previous trial.

The WCJ's Report observes:

> Applicant testified he had been treating with Dr. Karim since 2012 for migraines, headaches, dizziness and seizures. (03/15/2021 Transcript of Proceedings, pages 16-19). Applicant further testified he had injuries to his head due not taking charges, setting picks, shooting, driving to the goal, rebounding and being slammed to the ground. (3/15/2021 MOH/SOE page 4, lines 14-16). The medical reporting of Thomas Phillips, M.D., dated February 15, 2010, indicates that "applicant complains of headaches occurring twice a week. He has a knot on the right side of his forehead, which arose the last couple of months. He also has blurred vision associated with headaches." (Applicant Exhibit 4, page 4). Regarding psyche, Dr. Phillips noted that "the applicant has some difficulty with depression." (Applicant Exhibit 4, page 5). Dr. Phillips recommended that applicant be seen by a neurologist for his headaches, and ophthalmologist for light flashes of the left eye and vision issues, a psychologist, and sleep specialist in his February 15, 2010 report. (Applicant Exhibit 4, pages 22-23). Moreover, applicant stated his headaches and migraines began since 1991 where his head was stomped to the ground, being thrown to the ground, elbowed, shouldered and hit in the head with hands. (3/15/2021 MOH/SOE page 4, lines 16-21). Additionally, applicant testified he stopped driving in 2011 because of blackouts. (3/15/2021 MOH/SOE page 5, lines 1-4). Applicant testified his wife has been assisting him since 2012 because of his memory and seizure since 2012.

> (3/15/2021 MOH/SOE page 5, lines 8-10). Applicant also testified of having stomach problems on and off while playing basketball. (3/15/2021 MOH/SOE page 5, lines 14-17). Applicant testified his erectile dysfunction began in 2011. (3/15/2021 MOH/SOE page 5, lines 17-18).
>
> Thus, applicant's complaints to migraines, headaches, dizziness, memory, depression, seizures and erectile dysfunction all existed prior to the close of discovery. Applicant failed to do any due diligence prior to the close of discovery in obtaining adequate medicals. Thus, this court is of the opinion that development of the record for these conditions should be disallowed pursuant to section 5502(d)(3). (Report, at pp. 6-7.)

Additionally, following receipt of the March 20, 2019 report of regular physician Dr. Hatch, applicant and defendant submitted a joint letter to the court advising that applicant was declining further discovery, including the cross-examination of the regular physician, and jointly requested the matter be submitted for decision. (November 14, 2019 Joint Letter to the Court.) The parties appeared for trial on January 15, 2020, which was continued for the purpose of allowing applicant to testify. (January 15, 2020 Minutes, at 3:18.) It was not until continued trial proceedings held on March 15, 2021 that applicant offered a motion for the first time for additional discovery relevant to the alleged neurological and psychiatric injuries, and offered into evidence additional medical records in support of that motion. Defendant objected to the admissibility of these records on the grounds that they exceeded the scope of trial as set forth in January 15, 2020 minutes, and because "all but two exhibits offered by applicant were not served on the defendant until last Friday afternoon." (March 15, 2021 Minutes, at 3:16.)

Section 5502(d)(3) provides that when a "claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute, each party's proposed permanent disability rating, and listing the exhibits, and disclosing witnesses." Parties are thus required to list all issues at the MSC or at the "very latest when the issues were placed on the record at trial." (*Cuevas v. Workers' Comp. Appeals Bd.* (2005) 70 Cal.Comp.Cases 479, 484 [2005 Cal. Wrk. Comp. LEXIS 31] (writ. den.).) The courts have also held that evidence not disclosed at the MSC is inadmissible unless the proponent of the evidence shows that it was unavailable or could not have been discovered by due diligence. Absent a showing of due diligence, the Workers' Compensation Appeals Board lacks discretion to keep the record open to receive evidence after the close of the MSC. (*County of Sacramento v. Workers' Comp. Appeals Bd. (Estrada)* (1999) 68 Cal.App.4th 1429 [64 Cal.Comp.Cases 26].) Furthermore,

when counsel makes a tactical decision not to disclose certain records at the MSC or to introduce them at trial, it is error for the Appeals Board to return the case to the trial level to admit the records into evidence. (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (Zuniga) (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].)

Here, applicant has testified to the onset of neurological and psychiatric symptoms as early as 2011, and the record further discloses medical reporting from Dr. Phillips in 2010 addressing the need for additional evaluations in this regard. (March 15, 2021 Minutes, at 4:22.) Following the issuance of the regular physician reporting on March 20, 2019, applicant declined to cross-examine the regular physician, and did not seek additional QMEs in other specialties, or offer medical reports of applicant's private treating physicians. Applicant did not raise the issue of neurological or psychiatric injury until the continued trial proceedings held on March 15, 2021. Accordingly, we agree with the analysis of the WCJ, and concur in the determination that further development of the record was not substantiated in the record.

Next, applicant contends the date of injury pursuant to Labor Code section 5412 is an unspecified date in 2020, when applicant first read the report of regular physician Dr. Hatch, which applicant contends is the first date he was advised of the existence of a cumulative trauma. (Petition, at 20:23; March 15, 2021 Minutes, at 4:10.) The WCJ's Report avers the correct date of injury to be November 21, 2007, based on the records of applicant's private treating orthopedist, Dr. Kim, whose chart notes at the time indicate that applicant had stopped playing basketball and was having pain and swelling. (Report, at p. 3.) Defendant's Answer contends the correct date of injury is April 2, 2004, "when applicant was diagnosed with medial and lateral meniscus tears by Dr. Kim." (Answer, at 7:25.)

We observe, however, that the issue has been previously adjudicated. In the Findings, Award and Order of April 30, 2018, the WCJ entered Findings of Fact No. 13:

> The Trial Court finds that the applicant's cumulative trauma injury claim is not time barred by the Labor Code section 5405(a) one year statute of limitations regarding the filing of his injury claim, since the applicant has established that he is entitled to have his date of injury, for the purposes of the statute of limitations, calculated with reference to Labor Code section 5412, which when applied, demonstrates that his Labor Code section 5412 date of injury is approximately 2009. Therefore, the applicant's November 12, 2009 Application for Adjudication of Claim was timely filed, within the one year statutory filing period, which is allowed for in Labor Code section 5405(a).

The Opinion on Decision goes on to state that the date of injury of "approximately 2009" was based on applicant learning of his potential workers' compensation rights in 2009, and his subsequent filing of a claimed cumulative trauma later that same year. (April 30, 2018, Opinion on Decision, at p. 32.) Defendant sought reconsideration of the April 30, 2018 F&A, but did not challenge the section 5412 date of injury.[3] (Defendant's Petition for Reconsideration, dated May 15, 2018.) Given the multiplicity of overlapping issues present in the 2018 petitions for reconsideration, which dealt with the legal implications of the date of injury, rather than the underlying section 5412 finding itself, the parties' apparent confusion in this regard is understandable.

However, Labor Code section 5950 provides that a party "affected by an order, decision, or award" of the WCAB may, within the prescribed time period, apply to the Court of Appeal for a writ of review "for the purpose of inquiring into and determining the lawfulness" of the order, decision, or award. "[A]ppellate review ... is limited to 'final' orders that determine a substantial right or liability of a party." (*Duncan v. Workers' Comp. Appeals Bd.* (2008) 166 Cal.App.4th 294, 299.) An order of the WCAB is final for the purpose of seeking judicial review when it "settles, for purposes of the compensation proceeding, an issue critical to the claim for benefits, whether or not it resolves all the issues in the proceeding or represents a decision on the right to benefits." (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1075-1076, 1078.) The failure of an aggrieved party to seek judicial review of a final order of the WCAB bars later challenge to the propriety of the order or decision before either the WCAB or the Court of Appeal. (*Maranian, supra*, at 1076.) No party challenged the April 30, 2018 determination of the section 5412 date of injury, and that determination is now final and no longer subject to dispute. (Cal. Lab. Code §§ 5900, 5950.)

Applicant next contends that the apportionment analysis described by the regular physician is unsupported in the record. Applicant asserts that the regular physician failed to explain the relationship between applicant's "pre-professional basketball" activities and his present disability. (Petition, at 18:14.) The WCJ's Report observes, "Dr. Hatch provides an inadequate explanation

[3] We acknowledge that following the issuance of our July 10, 2018 Opinion and Order Denying Defendant's Petition for Reconsideration, defendant sought reconsideration of the Appeals Board's decision. Therein, the defendant raised issues related to the date of injury under section 5412, but only insofar as the Board had instructed that indemnity rates and the Labor Code section 4658(d) adjustment be set in accordance with the date of injury, rather than the first date of compensable disability. (Defendant's Petition for Reconsideration, dated July 31, 2018.)

for apportionment except for the 30% attributed to an October 2003 date of injury for applicant's left knee." (Report, at p. 4.) We concur in this assessment, noting that the regular physician must explain how and why the disability is causally related to the industrial injury, but also how and why the injury is caused by the identified factors of apportionment, including "pre-professional basketball" activities. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc).) Because the regular physician's conclusions regarding apportionment are not sufficiently explained in the record, we will amend Findings of Fact Nos. 3 (apportionment), 5 (permanent disability) and 7 (attorney fees) as recommended by the WCJ in the Report.

In summary, we concur with the WCJ's assessment that there is insufficient basis in the record to support further development of the record with respect to additional claimed body parts. We observe the date of injury has previously been determined, and we agree that the apportionment described by the regular physician is not adequately explained except as it pertains to the left knee.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of February 14, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of February 14, 2022 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

2. [Deleted.]
3. Applicant has legal apportionment of:
    a. 30% to his left knee.

…

5. Applicant is entitled to a permanent disability award of 67 percent, equivalent to 407.25 weeks of indemnity payable at the rate of $200 per week, in the total sum of $93,410.40 (includes section 4658(d) increase after 60 days) less attorney fees of 15% ($14,011.56).

…

7. Based on the Title 8, Cal. Code of Regs., § 10844 and the guidelines for awarding attorney fees found in Policy and Procedural Manual Index No. 1.140, it is found that a reasonable attorney fee is $14,011.56. Attorney's fees are ordered to be held in trust by defendant pending agreement between applicant's prior and current counsels.

AWARD

AWARD IS MADE in favor of **GERALD PADDIO** against the **LAS VEGAS SLAM, TRAVELERS INDEMNITY COMPANY** of:

a. Applicant is entitled to a permanent disability award of 67 percent, equivalent to 407.25 weeks of indemnity payable at the rate of $200 per week, in the total sum of $93,410.40 (includes section 4658(d) increase after 60 days) less attorney fees of 15% ($14,011.56).

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 18, 2022

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

GERALD PADDIO
GLENN STUCKEY & PARTNERS
DIMACULANGAN & ASSOCIATES
MIX & NAMANNY
PRESETTLEMENT SOLUTIONS

SAR/abs

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