WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

VICTOR VALDEZ, *Applicant*

vs.

LOS ANGELES COUNTY PROBATION DEPARTMENT, permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ8566293
Van Nuys District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted defendant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Defendant seeks reconsideration of the Findings, Award and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 2, 2020, wherein the WCJ found in pertinent part that as a result of applicant's injury, he is permanently totally (100%) disabled and that defendant's liability for payment of the permanent total disability indemnity commenced as of October 21, 2015.

Defendant contends that the medical reports in the trial record "which all seem [*sic*] to indicate that the applicant is capable of continuing to work" were not properly considered; that applicant's symptoms caused by the medical treatment he is receiving from providers "outside the Workers Compensation system" are non-industrial and unrelated to his July 6, 2011 injury; that defendant's vocational consultant, Howard Goldfarb identified three areas of employment for which applicant has the necessary transferrable skills and education; and that if applicant is 100% disabled, the 100% permanent disability indemnity payments should be awarded as of January 29, 2018.

We received a Report and Recommendation on Petition for Reconsideration (Report) from

[1]Commissioner Lowe was a member of the panel that issued the February 17, 2021 Opinion and Order. Commissioner Lowe has since retired and another panel member has been assigned in her place.

the WCJ recommending the Petition be dismissed. We did not receive an Answer from applicant.

We have considered the allegations in the Petition, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A, except that we will amend Finding of Fact 5 to clarify that the amount of applicant's attorneys' fees of $210,175.51 is less the previous fees of $15,771.00 from the previous award for a sum of $194,404.51.

BACKGROUND

Applicant claimed injury to his cervical spine, thoracic spine, right shoulder, right hand, and psyche, and in the form of dyspepsia, headaches, and the aggravation of pre-existing hypertension and diabetes, while employed by defendant as a group supervisor on July 6, 2011.

On April 23, 2012, applicant was evaluated by orthopedic agreed medical examiner (AME) Roger S. Sohn, M.D. Regarding the history of applicant's injury and treatment, Dr. Sohn noted:

> The patient was referred to Sierra Medical Group, where he consulted with the company physician. An examination was performed, and x-rays were obtained. The patient was released to return to work to perform his usual and customary work duties. ¶ At this point, Mr. Valdez decided to pursue legal counsel. He came under the direction of orthopaedic surgeon Dr. Stokes. Dr. Stokes evaluated the patient and provided him with prescriptions for Vicodin and Soma. (Court Exh. Y1, Roger S. Sohn, M.D., April 23, 2012, p. 3.)

Dr. Sohn later stated:

> The patient complains of numbness and tingling in the right hand. He is scheduled for electrodiagnostic studies, [EMG] and we really have to see the electrodiagnostic studies. Furthermore, the patient has had an MRI scan of the cervical spine, which unfortunately was not sent.
> (Court Exh. Y1, p. 12.)

Dr. Sohn re-evaluated applicant on June 25, 2012. After re-examining applicant, reviewing the left arm/wrist EMG/NCV [nerve conduction study], and the lumbar MRI, he diagnosed applicant as having a cervical strain, a thoracic strain, and mild right carpal tunnel syndrome. (Court Exh. Y2, Roger S. Sohn, M.D., June 25, 2012, p. 9.) Dr. Sohn concluded that applicant's condition had reached maximum medical improvement/permanent and stationary status. He assigned 5% whole person impairment (WPI) for both the cervical and thoracic spine, and 6% WPI for applicant's right hand/upper extremity. (Court Exh. Y2, p. 10.) Dr. Sohn concluded that:

> At the present time, [carpal tunnel] surgery should be reserved as part of future medical benefits. ¶ With respect to the cervical spine and thoracic spine, he has mild limitation of motion. I do not see the need for spinal surgery in this patient. This appears to be more of a soft tissue type injury. ¶ At the present time, the applicant may return to work.
> (Court Exh. Y2, p. 10.)

On June 10, 2013, psychiatry AME David E. Sones, M.D., evaluated applicant. After conducting several psychological tests, Dr. Sones stated that a Global Assessment of Function (GAF) score of 64 best described "applicant's psychiatric condition." (Court Exh. Z1, David E. Sones, M.D., June 10, 2013, p. 38.) As to the cause of the psychiatric condition, Dr. Sones explained:

> … [T]he applicant's psychiatric injury arose as a compensable consequence through an indirect mechanism, specifically the stress associated with his work-related orthopedic injury and the consequences of this injury. Similarly, there is no evidence that there is a direct mechanism of injury leading to the applicant's permanent psychiatric disability. Instead, his permanent psychiatric disability has been caused indirectly by this injury.
> (Court Exh. Z1, p. 39.)

Internal medicine QME Darrell H. Burstein, M.D., evaluated applicant on November 5, 2013. Having examined applicant, taken a history, and reviewed the medical record, Dr. Burstein concluded:

> …[I]t is my opinion, based on reasonable medical probability, that nonsteroidal anti-inflammatory medication prescribed to treat the effects of the applicant's 7/6/11 orthopedic injury, which is an accepted physical matter, aggravated and accelerated his dyspeptic symptoms. Dyspepsia is preexisting. Prior to the injury, his dyspepsia was controlled with famotidine or Pepcid. Subsequent to the injury, he has required much more potent antacid medication, omeprazole, to control his symptoms. ¶ At this time, there is no evidence of industrial aggravation of the applicant's preexisting hypertension. His diabetes control now is better than it was prior to the injury with no additional medication.
> (Joint Exh. 3, Darrell H. Burstein, M.D., November 5, 2013, p. 11.)

Dr. Burstein re-evaluated applicant on February 10, 2015. Based on his re-examination of applicant, Dr. Burstein stated his opinion that:

> [The] chronic pain emanating from the applicant's industrial injury aggravated and accelerated his preexisting diabetes and hypertension. ¶ From an internal medicine point of view, the applicant is capable of performing his usual and

> customary work as a group supervisor for the County of Los Angeles. ¶ From an internal medicine point of view, he is permanent and stationary for rating purposes. ¶ With respect to the applicant's dyspepsia, he remains permanent and stationary at the level of my prior report.
> (Joint Exh. 6, Darrell H. Burstein, M.D., February 10, 2015, pp. 7 – 8.)

Pain medicine QME, Ezekiel Fink, M.D., evaluated applicant on, August 26, 2015. The diagnoses included occipital neuralgia [a type of headache]. (Joint Exh. 5, Ezekiel Fink, M.D., August 26, 2015, p. 9.) Dr. Fink stated that applicant sustained extensive musculoskeletal injuries and he developed highly disabling occipital neuralgia. (Joint Exh. 5, p. 12.) He assigned 8% headache WPI and regarding causation, he stated, "The headache complaint is determined as a direct consequence of the specific industrial injury on July 6, 2011…" (Joint Exh. 5, p. 14.)

Subsequently, the parties entered into Stipulations with Request for Award, including 66% permanent disability and an award of future medical treatment. The stipulations state that permanent disability indemnity was payable beginning October 21, 2015, and that the settlement was based on the reports of Drs. Sohn, Sones, Fink, and Burstein. (See Stipulations with Request for Award, p. 6, paragraph 3 and p. 7, paragraph 9D.) The WCJ issued the Award on February 16, 2016. Applicant filed a Petition to Reopen for New and Further Disability on March 18, 2016, and again on April 11, 2016. Applicant requested a commutation, and following a trial on the issue, the WCJ ordered on July 12, 2017 that the remainder of the permanent disability indemnity awarded on February 16, 2016, be commuted.

Internal medicine QME Dr. Burstein, re-evaluated applicant on July 18, 2017. Dr. Burstein found that applicant's type 2 diabetes impairment had increased from 6% WPI to 10% WPI. (Joint Exh. 8, Darrell H. Burstein, M.D., July 18, 2017, p. 18.) However, he stated:

> I would like to review the recent records from Kaiser as they become available to confirm my impressions. I would like to see the records from 2015 to the present. The previous records have been reviewed. (Joint Exh. 8, p. 18.)

Psychiatry AME Dr. Sones re-evaluated applicant on August 4, 2017. Dr. Sones concluded that, "The applicant's psychiatric condition has remained well stabilized and there is no evidence of any new or further psychiatric disability since he was last examined." (Court Exh. Z4, David E. Sones, M.D., August 4, 2017, p. 28, underlining omitted.) Earlier in his report, Dr. Sones stated:

> Additional records of importance include records of psychiatric treatment and evaluation from Hamlin Psyche Center and the Department of Psychiatry at the

> Lancaster facility of Kaiser Permanente. Once these additional records have been received, they will be thoroughly reviewed and a Supplemental Psychiatric report will be issued.
> (Court Exh. Z4, p. 6.)

On January 29, 2018, orthopedic AME Dr. Sohn re-evaluated applicant. Dr. Sohn stated that, "Presently, he [applicant] is now almost six months from the time of surgery. His shoulder is certainly weaker than when I initially saw." Dr. Sohn noted that, "He [applicant] is now medically retired," and the doctor increased the right shoulder impairment from 10% WPI to 16% WPI. (Court Exh. Y9, Roger S. Sohn, M.D., January 29, 2018, pp. 8 – 9.) The doctor also noted that, "No medical records were provided for review at this time." (Court Exh. Y9, p. 8.)

Applicant was re-evaluated by pain medicine QME, Dr. Fink on March 13, 2018. Dr. Fink determined that applicant's headache WPI had increased from 8% to 11%, but he stated:

> [Applicant] has other orthopedic issues that remain problematic as well. I did not receive updated records from 2015-2018 which are critical for me to review. … ¶ … Please provide me updated records from 2015-2018. (Joint Exh. 4, Ezekiel Fink, M.D., March 13, 2018, pp. 14 and 15.)

The parties proceeded to trial on September 14, 2020. (Minutes of Hearing and Summary of Evidence (MOH/SOE), September 14, 2020.) The matter was continued and applicant testified at the November 2, 2020 trial. The WCJ's summary of applicant's testimony includes the following:

> Both the treatment and prescriptions for medication were done by Kaiser because workers' compensation would not approve the treatment or medication. The Oxycodone is prescribed for two or three times a day. The prescription says every six hours as needed. … Applicant has been taking Oxycodone for a few years now.
> (MOH/SOE, November 2, 2020, p. 4.)

The issues submitted for decision included permanent disability/apportionment and applicant's Petition to Reopen. (MOH/SOE, September 14, 2020, p. 2.)

DISCUSSION

Regarding defendant's arguments: we first note that defendant fails to cite any reports in the trial record which "indicate that the applicant is capable of continuing to work." (Petition, p. 3.) In his Report, the WCJ explained:

> [T]he subsequent reports increased Applicant's PD to 74%. The work restrictions in the medical reports were considered by the vocational expert who's reporting the undersigned WCJ ultimately relied upon. ¶ Post award Applicant had revision surgery that left him worse off, he was medically retired. (Exhibit Y7 [sic] at page 8.)
> (Report, p. 2.)

Clearly, defendant's argument does not constitute evidence, and the WCJ properly stated the basis for his conclusion that applicant is permanently totally (100%) disabled.

Defendant next argues that:

> [I]f the applicant is treating outside the Workers Compensation system despite his stipulated future medical treatment, then it should be presumed that this treatment is for non-industrial injuries. Therefore, since the Applicant testified that all of his difficulties with concentration and focus stem from his pain medications which are provided by his private health insurance provider, these difficulties that allegedly preclude him from working should be considered non-industrial and unrelated to the injuries at issue.
> (Petition, p. 5.)

It must be noted that there is no factual or legal basis for defendant's "presumption" and pursuant to Labor Code section 4605 an employee may "provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires." (Lab. Code, § 4605.)

The Appeals Board has long followed a principle commonly known as the "compensable consequences" doctrine. An injury is a "compensable consequence" when the subsequent injury is a direct consequence of an original industrial injury. The subsequent injury is considered to relate back to the original injury and it is not treated as a new or independent injury. (*Southern California Rapid Transit District, Inc. v. Workers' Comp. Appeals Bd. (Weitzman)* (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107]; *Rodgers v. Workers' Comp. Appeals Bd.* (1985) 168 Cal.App.3d 567 [50 Cal.Comp.Cases 299]; *Beaty v. Workers' Comp. Appeals Bd*. (1978) 80 Cal.App.3d 397 [43 Cal.Comp.Cases 444].) It has also long been the law that "the aggravation of an industrial injury or the infliction of a new injury resulting from its treatment or examination are compensable under the [Workers' Compensation Act]…" (*Fitzpatrick v. Fidelity & Casualty Co*. (1936) 7 Cal.2d 230, 232 [1936 Cal. LEXIS 622].) For example, an injured worker's adverse reaction to drugs that were required to be taken for her continued employment was deemed an industrial injury. (*Maher v. Workers' Comp. Appeals Bd*. (1983) 33 Cal.3d 729, 735-738 [48 Cal.Comp.Cases 326].) The Second District Court of Appeals has also determined that the aggravation of an industrial injury

by medical treatment is considered a foreseeable consequence of the original injury, and is compensable within the workers' compensation legal system. (*Hikida v. Workers' Comp. Appeals Bd.* (2017) *(Hikida)* 12 Cal.App.5th 1249, 1261 [82 Cal.Comp.Cases 679].) An injured worker is entitled to compensation for a new or aggravated injury that results from the medical treatment of an industrial injury, whether the doctor was furnished by the employer, the insurance carrier, or was selected by the employee. (*Hikida* at 1262.) Further, the Court explained that:

> [E]mployers are responsible for all medical treatment necessitated in any part by an industrial injury, including new injuries resulting from that medical treatment … Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment.
> (*Hikida* at 1263.)

We agree with the WCJ that:

> In this case, it is the contention of Defendant that the additional permanent disability was caused by treatment for the industrial injury provided by Kaiser, Applicant's private insurance, therefore, they are not liable for the additional permanent disability. The ruling in *Hikida* … states otherwise. Defendant offered no authority to support its contention.
> (Report, p.2.)

Defendant contends that its vocational consultant, Howard Goldfarb identified three areas of employment for which applicant has the necessary transferrable skills and education. In his initial report, Mr. Goldfarb stated that, "It is noted that this counselor did not provide vocational aptitude and interest testing for Mr. Valdez as Mr. Valdez is a college graduate and skilled employee." (Def. Exh. C, Howard Goldfarb, April 11, 2019, p. 46.) In response to Mr. Goldfarb's report, applicant's vocational consultant Enrique N. Vega, explained:

> The primary difference in my and Mr. Goldfarb's opinions seems to be rooted in our consideration of vocational aptitudes and the results of vocational testing. Mr. Goldfarb stated in his report that he believed that it was unnecessary to administer any vocational tests because Mr. Valdez has a college education and a history of skilled work (p. 46); that is inaccurate. Injury and disability can impact vocational aptitudes and abilities for individuals at all levels of education and work backgrounds; issues with pain, poor concentration, and slowed work pace do not limit themselves to people with low education or with unskilled work histories. Mr. Goldfarb's comment contradicts all major surveys (e.g. American Community Survey and Current Population Survey) which show that, on average, impairment and disability negatively affects employment rates and

> earnings for individuals at all education levels and across all occupations. Mr. Goldfarb's mischaracterization of the impact of disability on work is what allowed him to conclude inaccurately that Mr. Valdez is employable; such an opinion is only possible when ignoring Mr. Valdez's performance on vocational testing.
> (App. Exh. 11, Enrique N. Vega, November 11, 2019, pp. 2 – 3.)

In his report, Mr. Goldfarb also stated:

> It is noted that Mr. Valdez has not worked for a period of almost eight years. Certainly, having been out of work for almost eight years, Mr. Valdez has incurred significant deconditioning. It is therefore this counselor's professional opinion, as a trained vocational counselor and not a medical expert, Mr. Valdez can engage in work activity on a full-time basis, initially working on a part-time basis so Mr. Valdez can build up his work tolerances and stamina leading to full-time work activity.
> (Def. Exh. C, Howard Goldfarb, April 11, 2019, p. 46.)

However, as explained by the WCJ:

> There is case law that someone that can only work part time or needs a sheltered work environment cannot compete in the open labor market. Mr. Goldfarb, in his report dated January 31, 2020, conceited that only one of the three jobs he recommended was feasible considering the Applicant's poor fingering and handling found during vocational testing. Applicant would not just have to find employment as information clerk, he would have to find part-time work as an information clerk as a pre-condition of finding full time work. (Exhibit E at page 4.) This is much less than the open labor market.
> (Opinion on Decision, p. 2.)

When considered in the context of the medical record admitted into evidence, we agree with the WCJ that Mr. Vega's report, and his opinions stated therein, are "more persuasive than those of Howard Goldfarb, M.A." (Report, p. 4, original in uppercase.)

Finally, regarding the issue of whether the payment of the permanent total disability indemnity should commence as of October 21, 2015, or January 29, 2018, the Appeals Board has held that:

> Construing sections 4650 and 4661 together, if a defendant paid permanent partial disability payments to an applicant who becomes permanently totally disabled, the defendant must retroactively adjust the permanent disability payments to the correct rate. … ¶ … [U]pon an award of permanent disability, 'the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee's disability became

permanent and stationary, whichever is earlier.' (§ 4650(b)(2).)

(*Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550, 562 - 563 (Appeals Board en banc).)

The Appeals Board had previously agreed with a WCJ's conclusion that if an applicant files a petition to reopen after receiving an award of permanent partial disability and permanent disability is found to be total, the award of permanent total disability is retroactive to the applicant's original permanent and stationary date. (*Villagio Inn & Spa, Vintage Inn* v. *Workers' Comp, Appeals Bd. (Soto)* (2009) 74 Cal. Comp. Cases 987 [writ denied].)[2]

Here, the parties previously stipulated that the payment of permanent disability indemnity benefits commenced as of October 21, 2015. (See Stipulations with Request for Award, p. 6, paragraph 3.) Clearly, the indemnity payments made to applicant at $230.00 per week did not adequately compensate applicant for the permanent total disability he ultimately sustained as a result of his July 6, 2011 industrial injury. (*Brower v. David Jones Construction, supra,* at 562.) Based on our review of the record and the applicable case law, we agree with the WCJ that an award of permanent total disability indemnity would be made retroactively to October 21, 2015, with defendant to receive credit for permanent disability benefits and attorney's fees paid pursuant to the February 16, 2016 Stipulations with Request for Award. Therefore, the WCJ correctly found that payment of the award of permanent total disability indemnity will commence as of October 21, 2015.

Accordingly, we affirm the F&A, except that we amend Finding of Fact 5 to clarify that the amount of applicant's attorneys' fees of $210,175.51 is less the previous fees of $15,771.00 from the previous award for a sum of $194,404.51.

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[2] Various Appeals Board panel decision have been consistent with the *Soto* decision. (See e.g. *Robert Flickinger v. City of El Segundo* PSI, administered by Sedgwick CMS, 2020 Cal. Wrk. Comp. P.D. LEXIS 54 - ADJ8627969, ADJ9506151; *Kenneth Morris v. County of Riverside* PSI, 2019 Cal. Wrk. Comp. P.D. LEXIS 59 - ADJ8386503; *Wallace Garietz v. Vertis Communications* ACE American Insurance Company, administered by ESIS, 2018 Cal. Wrk. Comp. P.D. LEXIS 552 - ADJ3394569, ADJ1459791.) Although panel decisions are not binding precedent and have no stare decisis effect, they may be considered by subsequent panels of the Appeals Board to the extent they find their reasoning persuasive. (*Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board En Banc).)

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order, of December 2, 2020, is **AFFIRMED** except that Finding of Fact 5 is **AMENDED** as follows:

> 5. Applicant's attorneys have performed reasonable services relating to applicant's award of permanent disability and life pension benefits in the amount of $210,175.51, less the February 16, 2016 award of attorney's fees of $15,771.00, for a sum of $194,404.51.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 28, 2022

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

VICTOR VALDEZ
DANIEL DONAHUE
WILLIAM TOPPI

TLH/*pc*

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