WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JESSE WINNEN, *Applicant*

vs.

STATE OF CALIFORNIA, DEPARTMENT OF FORESTRY, Legally Uninsured, Administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ10614987
Redding District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Order of July 13, 2020, the workers' compensation judge ("WCJ") found that on July 6, 2016, applicant, while employed as a paramedic/firefighter by Cal Fire, sustained injury arising out of and in the course of employment in the form of a brain seizure. The WCJ further found that "unbeknownst to applicant, at the time of the industrial injury he suffered from a non-industrial condition in his brain called a cavernous angioma," that the sleep deprivation required by applicant's work interacted with the non-industrial cavernous angioma to cause a seizure at work on July 6, 2016, and that after the seizure "applicant returned to baseline, without aggravating or worsening the non-industrial cavernous angioma or the propensity to suffer seizures from it." In addition, the WCJ found that the treatment provided up to and including the discovery of the source of the seizure disorder - the non-industrial cavernous angioma - was industrial and compensable, that treatment after the discovery of the non-industrial cavernous angioma is not compensable because it was not required to cure or relieve from the effects of the industrial injury, and that there is no evidence to support an award of future medical treatment on an industrial basis. Finally, the WCJ found that on the issue of the existence and amount of permanent disability, the

[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated August 25, 2020. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

medical opinion of Dr. Shalom, the Panel Qualified Medical Evaluator ("PQME"), is speculative and insubstantial evidence, and that Dr. Shalom apportioned "none of the permanent disability that he does think exists" to the industrial seizure of July 6, 2016. Consistent with the above findings, the WCJ issued an order that applicant take nothing further, and the WCJ deferred the issue of defendant's liability for attorney's fees against Industrial Disability Leave ("IDL").

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant contends that he is entitled to an unapportioned award of permanent disability because Dr. Shalom opined that the craniotomy performed on applicant was necessary to prevent further seizures caused by sleep deprivation. Applicant further contends that medical treatment cannot be apportioned, and that the WCJ erred in doing so.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate, we will affirm the Findings and Order of July 13, 2020.

As noted above, applicant alleges he is entitled to permanent disability because Dr. Shalom opined that the craniotomy performed on applicant was necessary to prevent further seizures caused by sleep deprivation. We disagree. The existence of a contributing factor in an industrial injury does not necessarily equate to a finding that the contributing factor likewise is causing permanent disability. The analysis of these two issues may be different, as is the case here. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision], citing *Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com.* (*Gideon*) (1953) 41 Cal.2d 676 (18 Cal.Comp.Cases 286) [employee's head injury resulting from fall caused by non-industrial seizure found compensable].)

In this case, as discussed in detail in the WCJ's Report, it was PQME Shalom's considered medical opinion that the craniotomy performed on applicant to treat his non-industrial cavernous angioma was needed on an entirely non-industrial basis, and none of the permanent disability for which applicant seeks compensation was caused by the industrial injury. We perceive no error in the WCJ's reliance upon Dr. Shalom's opinion to find applicant not entitled to an award of permanent disability. (*Peter Kiewit Sons v. Industrial Acc. Com.* (1965) 234 Cal.App.2d 831, 838-

839 (30 Cal.Comp.Cases 188) [expert opinion required where the truth is occult and can be found only by resorting to the sciences].)

We further note that in alleging the WCJ improperly apportioned medical treatment, applicant relies upon *Rouseyrol v. Workers' Comp. Appeals Bd.* (1991) 234 Cal.App.3d 1476 [56 Cal.Comp.Cases 624]. In *Rouseyrol,* the Court of Appeal determined that the Board erred in denying medical treatment in the form of attendant care, where due to polio the employee began work with limited use of his left upper extremity and an industrial injury further weakened it. The Court held that Labor Code section 4600 mandates treatment where it is established the industrial injury contributed to the need for treatment; the liability imposed by the statute cannot be avoided by apportioning the need for medical care to non-industrial causes on the premise that the natural progression of the pre-existing disease would have resulted in the same level of care even absent the industrial injury. (*Rouseyrol, supra,* 234 Cal.App.3d at 1485.)

However, applicant's reliance upon *Rouseyrol* is misplaced because the case is factually distinguishable. In this case, unlike *Rouseyrol*, applicant's non-industrial condition, i.e., his cavernous angioma, was not manifest and evidently did not limit applicant in the performance of his duties upon entering employment as a paramedic/firefighter. Further, in *Rouseyrol* the need for the injured employee to receive attendant care was caused by both the non-industrial polio and by the industrial injury. By contrast, in this case we agree with the analysis in the WCJ's Report that applicant's need to be protected from future seizures is the same as before the seizure event of July 6, 2016. As discussed in the WCJ's Report, Dr. Shalom opined that the specific, industrial seizure incident did not aggravate applicant's non-industrial cavernous angioma, nor did it make applicant more prone to future seizures. As with the issue of permanent disability, we find no error in the WCJ's reliance upon Dr. Shalom's medical opinion to determine that the need for further medical treatment is non-industrial under the circumstances of this case.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Order of July 13, 2020 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT. (See attached Dissenting Opinion.)

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 18, 2023

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

JESSE WINNEN
LAW OFFICES OF LINDA JOANNE BROWN C/O BROWN DENZELL SAN RAFAEL
STATE COMPENSATION INSURANCE FUND

JTL/*ara*

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

DISSENTING OPINION OF COMMISSIONER SNELLINGS

I respectfully dissent. Dr. Shalom, the PQME, provided an opinion of causation in his deposition of May 22, 2017. (Joint exhibit FF, Shalom deposition of May 22, 2017, pp. 9:10-10:5.) As I understand that opinion, work-related sleep deprivation and the pre-existing, non-industrial cavernous angioma ("hemangioma") in applicant's brain were mutually-dependent contributory factors in the seizure he suffered on July 6, 2016; without one or the other, applicant would not have suffered the seizure. Since medical treatment is not legally apportionable under *Granado v. Workers' Compensation Appeals Board* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647],[2] I am persuaded that Dr. Shalom's attempt to separate out treatment of the hemangioma as caused by a non-industrial condition is legally erroneous and therefore is not substantial evidence. (*Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) The WCJ erred in following Dr. Shalom on this point. For the same reason, I believe the WCJ erred in disallowing permanent disability.[3]

As noted above, it is Dr. Shalom's opinion that the seizure suffered by applicant on July 6, 2016 is industrial, having been caused in part by work-related sleep deprivation. Further, the WCJ notes in his Report and Recommendation that Dr. Shalom also opined that though sleep deprivation caused the seizure, the underlying non-industrial hemangioma was not affected once applicant's condition returned to baseline. In answering deposition questions posed by applicant's attorney, however, Dr. Shalom acknowledged that without the surgical removal of the hemangioma, further incidents of sleep deprivation would "probably" put applicant at a higher risk of seizures, to the point that he would be "foolish" to "worsen that [risk] by undergoing sleep deprivation." (Joint exhibit FF, Shalom deposition of May 22, 2017, p. 16:4-23.)

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[2] Our Supreme Court explained in *Granado*, "[s]o long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself." (69 Cal.2d at 405-406.)

[3] It appears that in uncritically accepting all aspects of PQME Shalom's medical opinion, the WCJ effectively delegated responsibility for ultimate fact-finding to the doctor, which in my view was legal error. (See, e.g., *Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 (54 Cal.Comp.Cases 251); *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792–793 (52 Cal.Comp.Cases 419); *Johns-Manville Products Corp. v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740, 753 (43 Cal.Comp.Cases 1372) [The WCAB, not the Agreed Medical Evaluator, is the ultimate trier-of-fact].)

I further note Dr. Shalom testified that the "investigation" of applicant's hemangioma at the University of California San Francisco ("UCSF"), which revealed the non-industrial, structural brain issue, should be deemed compensable for purposes of industrial medical treatment. (Joint exhibit FF, Shalom deposition of May 22, 2017, p. 14:11-16.) In light of the *Granado* principle that medical treatment is unapportionable, and given that the underlying condition was revealed by "industrial discovery," I am not persuaded it is legally possible to separate applicant's non-industrial hemangioma, which ultimately required surgery, from the industrial injury found compensable, to a limited extent, by the WCJ.

For the reasons stated above, I must conclude that the need for the surgery to remove the non-industrial hemangioma (performed at UCSF), was caused, at least in part, by industrial sleep deprivation and the seizure episode that followed. Given that there is no legal apportionment of medical treatment, it also follows from Dr. Shalom's medical opinion that the three percent Whole Person Impairment found by the doctor, which resulted from scarring occasioned by the craniotomy surgery, is the proper basis for an award of permanent disability.[4] (Joint exhibit BB, Shalom report dated September 12, 2019, pp. 4-5.) As the Decision After Reconsideration, I would rescind and amend the WCJ's decision to the extent necessary to find applicant entitled to reimbursement for the craniotomy and for further treatment necessitated by his hemangioma condition, as well as an award of permanent disability based on Dr. Shalom's determination that applicant has sustained Whole Person Impairment of three percent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
MAY 18, 2023

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

JESSE WINNEN
LAW OFFICES OF LINDA JOANNE BROWN C/O BROWN DENZELL SAN RAFAEL
STATE COMPENSATION INSURANCE FUND

JTL/*ara*

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

[4] Defendant has the burden of proving apportionment under Labor Code section 4663. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [1 Cal.Comp.Cases 1229].) Here, the WCJ seemingly acknowledges in his Report that Dr. Shalom's opinion on permanent disability and/or apportionment does not constitute substantial evidence. In that case, it cannot be said that defendant met its burden of proving apportionment.

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1. Applicant's Occupation: Paramedic/Firefighter (group 490)
   Applicant's Age: 39
   Date of Injury: 7/6/2016
   Parts of Body Injured: Brain Seizure

2. Identity of Petitioner: Applicant
   Timeliness: The Petition was timely
   Verification: The Petition was properly verified.

3. Date of Findings and Order: 7/13/2020

4. Petitioner's Contentions: That applicant is entitled to permanent disability and that applicant is entitled to an award of future medical treatment because the need for medical treatment cannot be apportioned.

II.
FACTS

Applicant was employed by the State Department of Forestry as a Paramedic/Firefighter on 7/6/2016 when he suffered a seizure at work as a result of the combination of an industrially caused lack of sleep and a non-industrial brain abnormality later identified as a cavernous angioma. Defendant accepted the injury.

After the effects of the seizure wore off, the applicant returned to baseline, without aggravating the underlying non-industrial cavernous angioma, or increasing the propensity to suffer seizures from it.

The parties used Dr. Shalom as a PQME. He wrote five reports and was deposed once.

Dr. Shalom was clear that the 7/6/2016 seizure at work did not worsen or aggravate the non-industrial angioma, nor did the single seizure worsen his seizure disorder (Joint Exhibit FF, page 12: 11 – 24; page 13: 12 – 16; page 18: 12 – 19; Joint Exhibit BB, page 4). Thus the PQME found that the applicant returned to baseline soon after the seizure of 7/6/2016 without sequela.

Further testing revealed the non-industrial cavernous angioma, and surgery to remove it ensued. As the cavernous angioma was pre-existing and non-industrial, the surgery was done on a non-industrial basis.

The matter was tried, and a Findings and Order issued on 7/13/20. It is from this F&O that the applicant appeals.

III.
DISCUSSION

Petitioner's argument begins with the contention that the findings improperly apportion the need for treatment.

Labor Code §4600 states, in pertinent part, the following:

"(a) Medical, surgical, chiropractic, acupuncture, and hospital treatment, ... that is reasonably required to cure or relieve the injured worker from the effects of [1] the worker's injury shall be provided by the employer."

Here, the 7/6/2016 seizure was caused by both industrial and non-industrial factors. Soon after the date of injury, the applicant's condition returned to baseline, without effect on the underlying non-industrial cavernous angioma, and without effect on the applicant's propensity to suffer seizures. Stated another way, his propensity for seizures was exactly the same before and after applicant's recovery from the 7/6/2020 event (Joint Exhibit FF, Deposition of Dr. Shalom, page 12: 11 – 24), and the cavernous angioma was not changed by the single seizure event.

At the point applicant returned to baseline, as defined by Dr. Shalom, the need for treatment to cure or relieve from the effects of the industrial injury ceased. Thereafter, there is no issue of apportionment of treatment, as the treatment after the identification of the non-industrial cavernous angioma was needed on a wholly non-industrial basis.

This was unequivocally described by Dr. Shalom in his deposition testimony, as referenced above.

Petitioner, on page 6 of his pleading, states that *"Judge Swanson's Findings and Order does exactly what Granado, supra, prohibits – apportioning medical care where there is an underlying non-industrial condition that was aggravated."*

This statement is incorrect. Dr. Shalom couldn't have been clearer that the 7/6/2016 seizure did not aggravate the non-industrial cavernous angioma (Joint Exhibit FF, page 12: 11 – 24, page 18: 12 – 19; Joint Exhibit BB, page 4). Once the symptoms of the 7/6/2016 seizure cleared, the event was over, and the applicant was back at baseline with no change in either his propensity to have a seizure or change in the non-industrial pathology that was causing them.

There was thus no issue of apportionment of treatment. As Dr. Shalom defined it, all treatment – all of it – after the identification of the existence of the cavernous angioma, was non-industrial.

Petitioner does not challenge the substantiality of this opinion, and there is no medical evidence from either party that contradicts it.

Petitioner goes on to state, on page 7 of his pleading, the following:

"The Findings read together as a whole are contrary to the law as stated in Rouseyrol, supra, in that "once it has been established that an industrial injury contributed to an employee's need for

medical treatment, including attendant care, employer –provided medical treatment is mandated by labor Code section 4600." Judge Swanson confirms in Finding Number 5 that the industrial injury contributed to Applicant's need for medical treatment: "Treatment provided up to and including the discovery of the source of the seizure disorder, the non-industrial cavernous angioma, was industrial and compensable."

The remaining Findings that medical care beyond the discovery of the cavernous angioma is not necessary are inconsistent with Dr. Shalom's opinion that Applicant would have continued to be at risk for seizures if he had not had the craniotomy and had continued to suffer from sleep deprivation. (Deposition of Dr. Shalom, at p. 16: 4 – 23) In other words, Applicant's risk and propensity for seizures did not magically end the day that the cavernous angioma was discovered. To the contrary, the risk still remains."

The distinction that Petitioner misses here is that applicant's continued risk for seizures is not the result of the specific injury of 7/6/2020. After the seizure of that date, applicant returned to baseline with *the same exact risk for seizures that he had prior to the 7/6/2020 incident.*

Labor Code section 4600 requires treatment to "…cure or relieve the injured worker from the effects of the worker's injury…"

The effects of Mr. Winnen's 7/6/2016 injury were gone soon after the date of the seizure, and Dr. Shalom defined the last industrially necessary act of treatment as the testing that identified the non-industrial pathology that made applicant prone to such seizures.

His need to be protected from future seizures was the same as before the 7/6/2016 injury, because as Dr. Shalom explained, the specific seizure incident did not aggravate the angioma, nor did it make applicant more prone to future seizures. Hence, the need for further treatment was non-industrial.

As Petitioner states, the risk of a seizure still remains, but as Petitioner does not understand, that risk does not in any way remain because of the 7/6/2016 incident.

Finally, Petitioner quotes from the 9/12/2019 (Joint Exhibit BB) and 10/1/2019 (Joint Exhibit AA) reports of Dr. Shalom, as follows:

"At this point, Mr. Winnen has not had any episodes whatsoever since he has been on Keppra, and the surgery has presumably removed the seizure focus. There is a theoretical risk that the scarring from surgery may be a possible epileptogenic focus, but this is not very likely, and the Keppra would likely be protective. (Report of Dr. Shalom, September 12, 2019, p.4.)"

"the 3% WPI given is not the result of the Keppra, but rather reflects the potential for the seizures that still remains, notwithstanding removal of the angioma; for example, there may be a small nest of seizurogenic cells remaining, and less likely, scarring due to the surgery itself can itself act as a seizure focus" (Report of Dr. Shalom, October 1, 2019.)"

After quoting from these reports, Petitioner then goes on to state, *"When read in conjunction with the opinion that Mr. Winnen could continue to have seizure episodes if he continued to be sleep deprived, it is clear that Mr. Winnen requires future medical care to prevent future seizures. Mr. Winnen may still have a nest of seizurogenic cells and he is continuing to work and experience sleep deprivation. If the only thing currently preventing further seizures is the Keppra, then it is illogical to strip him of the very medical care that prevents the industrial injury."*

Again, what this argument ignores is that the un-contradicted testimony of the PQME Dr. Shalom holds that the applicant returned to baseline after the seizure incident of 7/6/2016. The doctor discussed in some detail that treatment after the identification of the angioma was not needed on an industrial basis, and since that is the case, Petitioner's entire argument that the surgery to remove the angioma, the risk posed by either the possibility of a small nest of seizureogenic cells remaining, or of surgical scarring, causing the need to take Keppra, is industrially caused by the 7/6/2016 injury is based on false premise. The seizure disorder, caused by the cavernous angioma, pre-existed the 7/6/2016 industrial injury. After applicant recovered from that seizure, he returned to baseline, and suffered from the exact same risk of seizure from the non-industrial pathology as he had before the injury. Nothing had changed in the applicant's condition, except that through the medical treatment, the angioma was identified, the doctors then knew the source of the problem, and the doctors were able to remove the angioma successfully.

Since the cavernous angioma is non-industrial, and since it was not aggravated or worsened as a result if the 7/6/2016 seizure, the opinion from Dr. Shalom that the surgery to remove it was not in any way required by the industrial injury is well founded. The sequela from that surgery, and the theoretical risk that such sequela might induce a seizure, is likewise properly found by the PQME to be non-industrial. For the same reasons, the use of Keppra from this point forward is non-industrial. Dr. Shalom's opinions on this subject are unchallenged by any other medical evidence, and accepted as substantial by the Petitioner.

Moving forward to the issue of permanent disability, we can see that Petitioner's arguments on this issue suffer from the same faulty premise.

Dr. Shalom stated that the impairment he did think exists arose solely from the surgery. The surgery was needed on an entirely non-industrial basis, and therefore none of the impairment was caused by the industrial injury.

In addition, the doctor's opinions on permanent disability are speculative, because he said that the disability arises from the *"...theoretical risk that the scarring from the surgery may be a possible epileptiogenic focus, but this is not very likely, and the Keppra would likely be protective"* (page 4, Joint Exhibit BB). This is hardly an opinion that rises to the standard of reasonable medical probability.

Medical opinions are not substantial evidence if they are based on surmise, speculation, conjecture or guess. Place v. WCAB (1979) 35 CCC 525, Hegglin v. WCAB (1971) 36 CCC 93. This opinion on permanent disability is speculative on its face.

Thus, there are two very good reasons why there is no basis to award permanent disability. First, the doctor speculates on its existence, and second, if it does exist, it arises out of a non-industrial treatment.

IV.
RECOMMENDATION

It is respectfully recommended that, for the reasons discussed above, the Petition for Reconsideration be denied in its entirety.

DATE: 8/7/2020

Curt Swanson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE