WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

THOMAS LOPEZ, ***Applicant***

vs.

SWIFT TRANSPORTATION; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, administered by INTERCARE, et. al., ***Defendants***

Adjudication Numbers: ADJ2618433 MF (RIV 0063740), ADJ10382282, ADJ2437317 (RIV 0075756), ADJ2902606 (RIV 0063741)
Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.[1]

Defendant, California Insurance Guarantee Association (CIGA), seeks reconsideration of the Joint Findings, Award, and Orders (F&A) issued on July 8, 2020, by the workers' compensation administrative law judge (WCJ). In the F&A, the WCJ found in pertinent part that applicant sustained permanent total disability from the combined effect of two industrial injuries: in Case No. ADJ2618433, where applicant sustained injury on April 5, 2000, to the left knee and right ankle, and in Case No. ADJ2902606, where applicant sustained injury on August 14, 2000, to the right knee. The WCJ found that applicant did not sustain industrial injury in ADJ2437317, which alleged a specific injury to the bilateral knees and right ankle on September 15, 2001, and ADJ10382282, which alleged a cumulative injury to the bilateral knees, right ankle, and lower extremities through September 1, 2002.

Defendant California Insurance Guarantee Association ("CIGA") filed a timely petition for reconsideration of the WCJ's decision. CIGA contends that the WCJ erred in finding a single

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[1] Commission Sweeney and Deputy Commissioner Schmitz were on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board and Deputy Commissioner Schmitz is currently unavailable to participate in this matter. New panel members have been substituted in their place.

award of permanent disability as the apportionment opinions did not constitute substantial medical evidence. CIGA further contends that the findings of non-industrial injury in ADJ2437317 and ADJ10382282 were not supported by the medical evidence. Next, CIGA argues that the WCJ erred in admitting applicant's vocational report into evidence because applicant failed to produce the report at the mandatory settlement conference (MSC). Finally, CIGA argues that applicant's vocational expert improperly based his opinion on applicant's pain complaints and not on actual assigned work restrictions.

Applicant filed an Answer, which has been considered. We have not received an answer from co-defendants AIG or ESIS.

The WCJ submitted a Report and Recommendation ("Report"), wherein he recommended that reconsideration be denied.

Based on our review of the record[2], the allegations of the Petition and the Answer and the contents of the Report, and for the reasons we will explain, as our Decision After Reconsideration, we will rescind the WCJ's decision and return this matter to the trial level for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

FACTUAL AND PROCEDURAL BACKGROUND

This matter involves four separate allegations of injury, which were consolidated for trial. In ADJ2618433, applicant sustained an admitted industrial injury to the left knee and right ankle on April 5, 2000. (Minutes of Hearing, June 27, 2018, p. 2, lines 13-16.) In ADJ2902606, applicant sustained an admitted industrial injury to the right knee on August 14, 2000. (*Id*. at p. 3, lines 16-19.) In ADJ2437313, applicant claims to have sustained injury to his bilateral knees and right ankle on September 15, 2001. (*Id*. at p. 3, lines 20-23.) Finally, in ADJ2437317, CIGA claims that applicant[3] sustained injury to the bilateral knees, right ankle, and lower extremities on a cumulative basis through September 2, 2002. (*Id*. at p. 4, lines 20-23.)

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[2] Exhibits E and R were not in the record and were not reviewed. Upon return, these exhibits must be uploaded into the Electronic Adjudication System (EAMS) and appropriately marked.

[3] Although CIGA filed the application alleging the cumulative injury, so as not to confuse the parties, we will continue to use the term 'applicant' to refer to Thomas Lopez, and defendant when referring to CIGA throughout this opinion.

The primary issues for trial were injury arising out of and occurring in the course of employment on the two denied claims, and permanent disability, with applicant claiming that he was permanently and totally disabled.

A. Medical Record

1. Mechanism of Injuries

We first note that there are significant inconsistencies in the record as to the mechanisms of applicant's injuries, including testimony that appears to be at odds with the medical record, and we highlight the following.

At trial, applicant testified that "nothing other than the 4/15/2000 injury which cause his knee problems." (Minutes of Hearing and Summary of Evidence, May 13, 2019, p. 3, lines 26-28.) "There has never been an injury where applicant tripped over an object." (*Id*. at p. 3, lines 31-32.) His subsequent falls were due to his initial knee injury giving out and locking. (*Ibid*.)

Applicant reported the following history to his primary treating physician in November 2000:

> The patient states that in April of this year, his left knee was injured when he fell at work. He accidentally tripped on a crack while he was walking around his truck and twisted his knee. In August he injured his right knee when he jumped off the truck by twisting. Now, he is complaining of pain in both of his knees, right worse than left.

(Defendant's Exhibit K, Report of James Bell, M.D., November 6, 2000.)

Applicant initially attended an evaluation with QME Ronald Levin, M.D., who authored one report in evidence. (Joint Exhibit KK, Report of Ronald Levin, October 1, 2004.) Dr. Levin took a history similar to Dr. Bell:

> Mr. Lopez is a 49-year-old male, who sustained injury to his left knee and right ankle on April 5, 2000, and his right knee on August 14, 2000. These occurred while working as a flatbed truck driver for Swift Transportation, where he had been working for seven years.
>
> The first injury, the patient states he was walking and tripped on a crack in the cement and fell down, injuring his right ankle and left knee. On August 14, 2000, he fell off a trailer, injuring his right knee. Initial symptoms were burning and tearing. He reported each injury when it occurred.

> The patient states he re-injured his right knee around September of 2001, when he apparently was walking down a steep incline and his knee gave way.

(*Id*. at pp. 8-9.)

Applicant's subsequent primary treater, Dr. John Larsen took the following history for the April 2000 injury:

> On April 5, 2000, the patient was involved in a work-related injury, injuring his left knee and right ankle. He was walking along a truck when he tripped in a pothole that was in the ground. He twisted his right ankle and fell, hitting his left knee. He received medical attention. He continued to be asymptomatic.

(Applicant's Exhibit 12, Report of John Larsen, M.D., July 13, 2011, p. 5.)

Dr. Larsen took the following history for the August 2000 injury:

> On August 14, 2000, Mr. Lopez was at a delivery site in Torrance. He was in the back of a truck while securing construction material when he lost his footing and fell off the truck. He fell approximately four feet down to the asphalt. He landed on his feet, twisting his right knee and right ankle, and then fell onto his hands and knees. He felt the immediate onset of pain in his knees and right ankle. He reported the injury to dispatch. He continued to work and finished his shift.

(*Id*. at p. 2.)

Applicant was also evaluated by Stephen J. Lombardo, M.D., whose report identifies himself as an agreed medical evaluator (AME); however, it is not clear whether Dr. Lombardo was acting as an AME. (Joint Exhibit II, Report of Stephen Lombardo, M.D., October 31, 2005.)

Dr. Lombardo took the following history of injury:

> [Applicant] is a 50-year-old male who presents with complaints referable to this right knee and his right ankle which dates back to an injury that he sustained on April, 5, 2000, for his left knee and his right ankle when [he] fell off a trailer. Additionally, he is being evaluated for his right knee when he slipped on a crack on August 14, 2000.

(*Id*. at p. 1.)

Applicant had an orthopedic consult with Dr. Dhalla, who took the following history of injury:

> He said he had two injuries, both in the year 2000, one on April 5th and one on August 14th.
>
> On April 5, 2000 he says, while loading and walking about his truck, there was a crack and pothole in the ground, he stepped into it, twisted his right ankle and his left knee.
>
> The second injury was on August 14, 2000 and he said he fell off a truck while loading the truck and sustained injury to the right knee.

(Joint Exhibit JJ, Report of Raja Dhalla, M.D., July 15, 2009, p. 1.)

Applicant was subsequently evaluated by an agreed medical evaluator, Roger Sohn M.D., who authored two reports in evidence and was deposed.[4] Applicant provided a different history of injury to Dr. Sohn:

> Mr. Lopez claims to have sustained an industrial injury on April 5, 2000, while performing his usual and customary duties as a flatbed truck driver for Swift Transportation.
>
> On that day, he was placing a tarp on a load on the flatbed truck to protect it from the rain. He was 40 feet (*sic*) off the ground, and he lost his balance, falling on his right leg. He landed at an awkward angle, and his leg buckled. He twisted and fell on his right side. He sustained injuries to the right ankle and right heel.
>
> He reported his symptoms to the supervisor, but opted to continue working due to financial necessity. He continued working full duty in pain.

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[4] Applicant filed a petition to withdraw from the AME agreement with Dr. Sohn due to alleged ex-parte communication. On March 7, 2017, a hearing was held, where the following was written on the Minutes of Hearing: "AA & [defendant] CIGA proceeding to AME [and] will not rely on Dr. Sohn. . . * Dr. Sohn's reports are inadmissible." (Applicant's Exhibit 8, Minutes of Hearing, March 7, 2017.) It is unclear whether the WCJ or the parties wrote this language on the minutes, which contain no stipulation or order striking Dr. Sohn as the AME. It does not appear that the parties thereafter proceeded to another AME evaluation as the matter was then set for trial the following December.

In the F&A, the WCJ admitted all exhibits "with the exception of Defendant's Exhibit 'D', the previously excluded report of Dr. Sohn per the Minutes of Hearing 3/7/2017)." (F&A, p. 4.) However, Exhibit D is not a report of Dr. Sohn, but instead a permanent disability benefit notice. Exhibits H, I, and DD, consist of Dr. Sohn's reports and deposition, which were ordered admitted into evidence. No party has objected to this order. Accordingly, we have reviewed and considered the reporting of Dr. Sohn as it is presently admitted into evidence. Upon return, if Dr. Sohn's admitted reporting is to be stricken, the WCJ may do so by agreement of the parties. Absent agreement, that issue requires a finding of fact and order, which may issue only after providing all parties due process.

> On August 15, 2000, he was performing his usual and customary duties, and he was walking when his right leg gave way, which caused an aggravation of his right knee and right ankle symptoms.

(Defendant's Exhibit H, Report of AME Roger Sohn, M.D., December 11, 2014, pp. 2-3.)

Dr. Sohn reviewed the reporting of Dr. Bell, *supra*, indicating that applicant's April 2000 injury was from tripping on a crack and the August 2000 injury was from falling off the truck. (*Id*. at p. 11.) In his discussion, Dr. Sohn did not address the discrepancy in reporting, but simply accepted applicant's representations as true. (*Id*. at p. 49.)

2. Extent of Injury / Permanent Disability / Apportionment

Applicant underwent arthroscopy of the right knee in June 2001 (Defendant's Exhibit M, Report of James Bell, M.D., July 6, 2001), and September 2002. (Exhibit H, *supra* at p. 49.) He had a right total knee replacement in January 2004. (*Ibid*.) In 2009, applicant underwent left total knee replacement after developing bone-on-bone arthritis. (*Ibid*.) Applicant developed a quadriceps rupture and underwent surgery for that in 2010. (*Ibid*.) He also underwent two surgeries in 2013, revision of the right total knee, and surgical repair of the right quadriceps. (*Ibid*.)

Dr. Sohn found applicant permanent and stationary in 2014. (*Id*. at p. 50.) Dr. Sohn assigned work restrictions of sedentary work only. (*Ibid*.)

Dr. Sohn opined on causation and apportionment as follows:

> The applicant clearly has some underlying arthritic changes due to his obesity. He developed some degenerative arthritic changes, which are nonindustrial. In my opinion, 30% of his condition must be considered nonindustrial, due to obesity. **The remainder is due to continuous trauma while working at Swift Transportation.**
>
> He had a number of specifics. He had specific injuries in April of 2000, as well as August of 2000. He had episodes of giving way. I think all of this is inextricably intertwined.

(*Id*. at p. 51 (emphasis added).)

In deposition, Dr. Sohn maintained his opinion that 30% of applicant's disability is non-industrial. (Defendant's Exhibit DD, Report of AME Roger Sohn, M.D., August 20, 2015, p. 16, lines 15-17.)

In his Answer, applicant relies upon the opinions of his primary treater, Dr. Larsen to establish a single combined award of permanent total disability, without apportionment.

Dr. Larsen found that applicant had a poor result from total knee replacement to both the left and right knee. (Applicant's Exhibit 11, Report of John Larsen, M.D., August 28, 2014, p. 6.) Although applicant's April 2000 injury is to the left knee and the August 2000 injury is to the right knee, Dr. Larsen concluded, without explanation, that applicant's disability was 100% industrial and attributed all of it to the August 2000 injury to the right knee. (*Id*. at p. 7.) Dr. Larsen precluded applicant to sedentary work. (*Ibid*.) In deposition, Dr. Larsen clarified that applicant would need sedentary work with the ability to take breaks as needed for pain, and that applicant may miss a day or two per month. (Defendant's Exhibit BB, Deposition of John Larsen, M.D., November 6, 2014, p. 10, line 16, through p. 11, line 3; p. 14, line 15, through p. 15, line 1.)

Defendant questioned Dr. Larsen about the varying mechanisms of injury and how that impacts the issue of causation. (*Id*. at pp. 19-21.) Dr. Larsen was not able to explain his opinions on causation of injury as he had not reviewed the medical records in preparation for his deposition. (*Id*. at p. 20, lines 2-6.)

At his second deposition, Dr. Larsen disagreed with the AME's opinion as to 30% non-industrial apportionment. (*See generally*, Defendant's Exhibit CC, Deposition of John Larsen, M.D., March 12, 2015.) Dr. Larsen stated that it would be impossible to state the exact percentages of causation in this case. (*Id*. at p. 16, lines 2-6.) Dr. Larsen explained that he found no apportionment because no pre-existing pathology existed in applicant's x-rays and MRIs taken in 2000. (*Id*. at p. 27, lines 2-5.)

Applicant's left knee and right ankle were x-rayed in May 2000, both indicating a normal examination. (Defendant's Exhibit V, Report of Alan White, M.D., May 11, 2000.)

Applicant's right knee MRI indicated small joint effusion with a posterior horn medical meniscal tear with possible anterior tear as well. (Defendant's Exhibit T, Report of Neil Chafetz, M.D., Right Knee MRI, October 7, 2000.)

Applicant's left knee MRI indicated moderate joint effusion, possible meniscal tear, and flattening of the posterior surface of the patella. (Defendant's Exhibit U, Report of Neil Chafetz, M.D., Left Knee MRI, October 7, 2000.) The MRI impression was read to include "chondromalacia patellae". (*Ibid*.)

Dr. Larsen explained that the arthritic changes seen in the October 2000 MRI could be caused by either degeneration or post-traumatic change but did not opine on which. (Defendant's Exhibit CC, *supra* at p. 28, line 22, through p. 29, line 9.)

B. Applicant's vocational expert

Applicant was evaluated by Mark Remas who issued a single report on applicant's vocational feasibility. (Applicant's Exhibit 4, Vocational Report of Mark Remas, August 29, 2017.)

Mr. Remas took a history of applicant sustaining two injuries, the first on April 5, 2000, and the second on October 26, 2000 (*sic*). (*Id*. at p. 1.) Without citation to the medical record, Mr. Remas concluded that applicant fully recovered from his April 5, 2000 industrial injury. (*Ibid*.) Mr. Remas was not provided with all medical records in evidence. (*Id*. at pp. 1-2.) Mr. Remas implied, without citation to the medical record, that applicant's injury to the left knee was caused as a compensable consequence of the right knee injury.

Mr. Remas performed vocational testing that indicated applicant scored in the 35.87th percentile. (*Id*. at p. 13.)

Mr. Remas opined that applicant would not be able to take part in vocational rehabilitation because applicant's pain is unpredictable. (*Id*. at p. 15.) He further concluded that applicant was not capable of competing on the open labor market. (*Id*. at p. 17.) No analysis of jobs available on the open labor market was performed. (See generally, *id*.)

Mr. Remas provided the following opinion on 'vocational apportionment':

> Based on Acme Steel, Borman and other case law, a vocational counselor must address issues of vocational appo1tionment. Vocational appo1tionment is not the same as medical apportionment. Medical impaim1ent may develop as an individual ages and can be attributed to degenerative conditions; however, these factors do not necessarily limit work activity or have an impact on an individual's ability to perform gainful employment. Many individuals have degenerative conditions and even have medical conditions but are still able to function effectively in the work place without impediment.
>
> Mr. Lopez had a consistent work history with Swift Transportation without difficulty. He had been active in the labor force since leaving high school. Dr. Larsen and Dr. Hesseltine discussed the medical evidence and noted that Mr. Lopez did not have clinical findings prior to his industrial injuries that would result in a finding of apportionment. The other medical repo1ts reviewed also demonstrated that the consensus opinion was that Mr. Lopez's severe medical condition was caused by the knee injury on 08/14/00.

> Further, on a vocational basis, this counselor found no evidence that Mr. Lopez had any significant work disabilities prior to his industrial injury. Therefore, there would be no vocational apportionment in this case.

(*Id*. at p. 16.)

C. Trial procedure

On September 5, 2017, a co-defendant filed a declaration of readiness (DOR) to proceed to trial. (Declaration of Readiness, September 5, 2017.) The issue of injury AOE/COE was not checked in the DOR. (*Ibid*.) No party objected to the DOR.

On December 5, 2017, the matter was set for trial over CIGA's objection. (Minutes of Hearing, ADJ1768878, December 5, 2017.) The December 5 minutes stated: "PTCS [pre-trial conference statement] to be filed within 20 days of trial. Discovery otherwise closed." (*Ibid*.) According to the record, no PTCS was filed at the MSC.

On January 25, 2018, a co-defendant filed a PTCS, which references the December 5, 2017 MSC. (Pre-trial Conference Statement, January 25, 2018.) The PTCS is initialed by applicant's attorney and two of the defendants' attorneys. The WCJ did not sign the PTCS, and the PTCS contains no notes, disposition, or orders regarding this matter.

On January 26, 2018, CIGA filed a PTCS. This version of the PTCS contains hand-written changes apparently by CIGA's counsel, and it attaches an addendum in a separate document. It does not appear that any other counsel initialed this version after CIGA made changes, and there is no proof of service attached to this version. Again, the WCJ did not sign the PTCS, and there are no orders or disposition.

CIGA sought removal of the WCJ's order to proceed to trial. The Appeals Board issued an order denying removal on January 30, 2018.

On February 14, 2018, the parties appeared for trial, but the matter was continued. According to a notation on the minutes in what appears to be the WCJ's handwriting:

> AA SERVED V/R REPORT ON [DEFENDANTS] SUBSEQUENT TO MSC. [DEFENDANTS] RESERVE RIGHT TO OBTAIN REBUTTAL V [*sic*] APPLICANT WILL BE MADE AVAILABLE FOR SUCH EVALUATION.

Following a continuance, the matter proceeded to trial on June 27, 2018, wherein the WCJ read the stipulations, issues, and exhibits into the record, but took no testimony. The WCJ continued the trial without explanation.

On October 18, 2018, the matter was again continued due to a defense calendar conflict.

On January 17, 2019, the WCJ granted a joint request to take the matter off calendar for further discovery. The minutes note: "CIGA has set V/R 2/6/2019 @ 9:00AM/AA's office, and DQME Dr. Sofia set 3/10/2019". (Minutes of Hearing, January 17, 2019, p. 2.) The WCJ allowed discovery to proceed with a deposition of Dr. Hesseltine but issued an order staying discovery of CIGA's vocational rehabilitation expert and CIGA's defense QME. (*Ibid*.) The minutes note: "CIGA objects to this stay of discovery." (*Ibid*.) According to the January 2019 minutes, the matter was ordered the matter off calendar.

However, no further Declaration of Readiness was filed in EAMS. No further PTCS was completed. Instead, for reasons which are unclear, the matter proceeded to trial on May 13, 2019, where applicant's witness testimony was taken. CIGA raised no objection to proceeding despite its previous objections regarding discovery. The trial was again continued, this time to obtain post-trial briefs from the parties.

The matter was submitted for decision on July 17, 2019. (Minutes of Hearing and Summary of Evidence, July 17, 2019.)

The WCJ issued an order vacating submission on August 14, 2019, where he requested a rating from the Disability Evaluation Unit (DEU).

Both applicant and CIGA objected and requested to cross-examine the DEU rater.

The matter proceeded via testimony from the DEU rater on January 9, 2020. (Minutes of Hearing and Summary of Evidence, January 9, 2020.) Following the rater's testimony, the WCJ again submitted the matter for decision.

The WCJ vacated submission again on March 10, 2020, in order to submit amended rating instructions to the DEU rater.

The WCJ again vacated submission on April 7, 2020, in order to return the matter "to the conference calendar for further review and stipulation to submit these cases for decision." (Joint Order Vacating Submission, April 7, 2020.)

The WCJ submitted amended rating instructions, which instructed the rater to provide a rating based upon limitation to sedentary work, inability to lift, and significant pain episodes,

which rated to 74% permanent disability. (Amended Permanent Disability Rating Instruction, May 14, 2020.) The WCJ further instructed the rater to provide an alternate rating based upon "inability to compete in the open labor market," which rated to 100% permanent total disability. (*Ibid*.)

At the subsequent hearing on June 10, 2020, the matter was again submitted for decision. The F&A issued on July 8, 2020, from which CIGA timely sought reconsideration.

The Appeals Board granted reconsideration on August 18, 2020.

DISCUSSION

1. The procedural irregularities in this matter violate due process.

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).)

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd*. (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is ". . . one of 'the rudiments of fair play' assured to every litigant . . ." (*Id*. at 158.) As stated by the *California Supreme Court in Carstens v. Pillsbury* (1916) 172 Cal. 572, [The] commission, . . . must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law. (*Id*. at 577.)

A fair hearing includes but is not limited to the opportunity to call and cross-examine witnesses; introduce and inspect exhibits; and to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584]; Rucker, *supra*, at 157-158 citing *Kaiser Co. v. Industrial Acci. Com*. (*Baskin*) (1952) 109 Cal.App.2d 54, 58 [17 Cal.Comp.Cases 21]; *Katzin v. Workers' Comp. Appeals Bd*. (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].)

Pursuant to Labor Code, section 5502(d):

> (2) The settlement conference shall be conducted by a workers' compensation administrative law judge or by a referee who is eligible to be a workers' compensation administrative law judge or eligible to be an arbitrator under Section 5270.5. At the mandatory settlement conference, the referee or workers' compensation administrative law judge shall have the authority to resolve the dispute, including the authority to approve a compromise and release or issue a stipulated finding and award, and **if the dispute cannot be resolved, to frame the issues and stipulations for trial**. The appeals board shall adopt any regulations needed to implement this subdivision. The presiding workers' compensation administrative law judge shall supervise settlement conference referees in the performance of their judicial functions under this subdivision.
>
> (3) If the 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. **Discovery shall close on the date of the mandatory**

> **settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference**.

(Emphasis added.) (§ 5502(d)(2), (3).)

The Labor Code requires the WCJ to frame the issues and stipulations for trial at the MSC. Yet, here there is nothing in the record to indicate that the WCJ framed the issues and stipulations at the MSC because the WCJ did not require the parties to complete a PTCS at the MSC. Instead, the WCJ instructed the parties to file a PTCS within 20 days of trial.[5] As noted above, two versions of the PTCS were filed, neither of which were signed by the WCJ. If the WCJ does not review the PTCS with the parties at the MSC and does not approve it, there is no record that the WCJ framed the issues and stipulations. Thus, reviewing, completing and filing the PTCS at the MSC ensures that the WCJ complies with the statutory requirement to properly frame the issues and stipulations for trial and satisfies due process because the parties have had notice and an opportunity to be heard.

The Labor Code also requires the parties to disclose evidence and witnesses at the MSC. Here, CIGA objected to applicant's vocational expert report as it was not served at the time of the MSC. Although the vocational report was listed on the PTCS, the PTCS was filed over a month after the MSC concluded. Had the WCJ required the parties to disclose witnesses and exhibits at the MSC by way of a properly filed PTCS and required the parties to serve those exhibits at the MSC, defendants would have received notice as to the contents of applicant's vocational expert report and would have had the opportunity to request leave for additional discovery. The purpose of the statute is to preclude trial by surprise, and an order that the parties disclose witnesses and exhibits on a later date puts the parties at risk of preparing for trial without knowing what evidence exists.

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[5] WCAB Rule 10759(b) as amended as of January 1, 2022, now states that: "The parties shall meet and confer prior to the mandatory settlement conference and, absent resolution of the dispute(s), the parties shall complete a joint Pre-Trial Conference Statement setting forth the issues and stipulations for trial, witnesses, and a list of exhibits **by the close of the mandatory settlement conference**." (Cal. Code Regs., tit. 8, § 10759(b), (emphasis added).) In some cases, parties may agree to amend a PTCS after the close of the MSC. Such agreements are acceptable when they satisfy the purpose of the statute, which is to preclude trial by surprise. However, it is still the duty of the WCJ to ensure that a PTCS is completed on the day of the MSC, even where the parties agree to future amendments.

The Appeals Board is constitutionally bound to accomplish substantial justice. Section 5502 furthers that constitutional duty by ensuring that all parties are aware of the witnesses and evidence to be presented so that they may properly prepare for a trial. When an applicant obtains the reporting of a vocational expert, that reporting should be served in a timely manner, so that other parties may, if they wish, obtain rebuttal evidence. Where an applicant first discloses the existence of a vocational expert report on the day of the MSC or as happened here, one month after the MSC, good cause exists to allow defendant time to obtain a rebuttal report. As the WCJ failed to follow proper procedure and require that disclosure of exhibits and witnesses occur prior to setting the matter for trial, CIGA's right to due process was violated.

Next, in the middle of the trial, the WCJ issued an order taking the matter off calendar for further discovery; however, without explanation, the WCJ stayed discovery of CIGA's vocational expert and CIGA's defense QME, while permitting applicant to obtain additional discovery of a consulting physician. The WCJ offered no reason for this action, and having already ordered further discovery, it is unclear why CIGA was not permitted to obtain rebuttal evidence.

No declaration of readiness was filed to place the matter back on the trial calendar. No further PTCS was completed. Instead, for reasons wholly unknown, the matter was placed directly back on the trial calendar.

Based upon all of the above, we conclude that although the reporting of applicant's vocational expert is admissible, many fundamental errors occurred during these proceedings, resulting in the lack of a clear record, violating CIGA's right to due process.

2. The F&A is not supported by substantial medical evidence.

To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

In *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113], the Court of Appeal concluded that pursuant to Senate Bill 899 enacted in 2004, the law of apportionment mandates that multiple injuries ordinarily require separate

permanent disability awards. However, the Court also stated that "there may be limited circumstances…when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified." (170 Cal.App.4th at 1560.)

The reporting in this matter contains significant errors, which no party has remedied. The WCJ found that applicant's permanent disability was inextricably intertwined based upon the reporting of the primary treater, Dr. Larsen. However, Dr. Larsen has not adequately explained how applicant's April 2000 injury to the left knee and right ankle is inextricably intertwined with the August 2000 injury to the right knee.

Dr. Larsen expressly stated in his first deposition that he needed to review additional records before addressing the issue of applicant's injury being intertwined. Then in the second deposition, the parties focused solely on the issue of Dr. Sohn's 30% non-industrial apportionment. No party went back and provided Dr. Larsen the requested records to finalize an opinion.

Next, Dr. Larsen's opinion may have been based upon applicant providing an inaccurate history. Applicant's trial testimony appears to be inconsistent with what he told his doctors in the contemporaneous medical record.[6] Applicant told multiple doctors and the initial QME that in April 2000 he tripped on a crack or a pothole. In August 2000 he was injured falling from a truck.

Then, around 2014, applicant provided a different history. He told Dr. Sohn that he fell off the truck in April 2000 and that the injury in August 2000 was simply due to his knee giving out and / or buckling. This is a major discrepancy in the record, which required the WCJ to make credibility determinations and decide which version of events occurred. No such determinations were made. The WCJ does not discuss the discrepancies in the medical record upon which Dr. Larsen's qualified opinion rests. Again, Dr. Larsen's opinion is not substantial medical evidence.

Next, the reporting of the AME is in evidence but was not considered by the WCJ. Although it was noted in the March 7, 2017 minutes of hearing that Dr. Sohn's reporting was

[6] We would also note that applicant's 2004 deposition was filed in EAMS, but not marked as an exhibit, and we have not considered it. Upon return, the WCJ may wish to review applicant's prior testimony in 2004, which was much closer in time to when these injuries occurred. We would also note that the evaluating doctors and vocational experts should also be provided with the deposition transcript so that their reporting constitutes substantial evidence.

inadmissible, no order issued to that effect. It is unclear whether the notation on the minutes was a stipulation of the parties, and if it was a stipulation, it was required to be approved by the WCJ. If it was an order, the WCJ should have made that clear and provided reasons for striking the prior reports of an AME.

The reports were offered into evidence without objection, and it was error for the WCJ to fail to review that medical evidence in addressing the issues in this matter and explain why he did not rely on those opinions. We do not decide the issue of whether Dr. Sohn's reporting should have been admitted, and we do not consider the issue of whether Dr. Sohn's reporting was substantial evidence since those issues must be considered by the WCJ in the first instance. However, based on the record here, the AME's report appears to be inconsistent with a 100% permanent total disability award as the AME found 30% nonindustrial apportionment.

3. Applicant's vocational expert report does not constitute substantial evidence.

To the extent that Mr. Remas' vocational opinion is based upon the present medical record, we have already found that record lacking for the reasons discussed above. Accordingly, Mr. Remas' report, which derives from the medical record, would also not constitute substantial evidence. However, the analysis does not end there.

In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes I*"), the Appeals Board held that Labor Code section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, and that the Labor Code makes no statutory provision for "vocational apportionment." The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. The Board explained that an analysis of whether there are valid sources of apportionment is still required, even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the industrial injuries. The Board affirmed these holdings in *Nunes*

v. State of California, Dept. of Motor Vehicles (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*").

In this case, applicant's vocational expert's report does not constitute substantial evidence as the evaluator has incorrectly, and improperly interjected his own medical opinions into the case. Although *Nunes* dealt with apportionment, the theme of *Nunes* is clear: a vocational evaluator is not a medical expert. A vocational evaluator does not create medical facts in a case. Vocational experts review the medical record created by the doctors and reach conclusions as to applicant's vocational feasibility based upon that record.

Here, applicant's vocational expert attempts to explain why there is no apportionment on a vocational basis. This is an improper medical opinion outside the scope of his expertise.

Next, he states that applicant fully recovered from the April 5, 2000 industrial injury. Again, this is an improper medical opinion outside his expertise and not supported by the record. Moreover, this opinion must be reconciled with applicant's courtroom testimony regarding his injuries. Given that it appears that applicant directly contradicted his own expert's history, the vocational report does not contain an accurate history rendering the reporting not substantial evidence.

Next, the expert states that applicant's pain complaints preclude applicant from participating in vocational rehabilitation. No substantial *medical* opinion exists establishing this. Again, the issue of whether applicant is medically capable of participating in vocational training must be opined upon by the doctors, and such opinions must constitute substantial medical evidence.

Finally, Mr. Remas states that applicant's left knee was merely a compensable consequence of the right knee injury. This is again outside the scope of his expertise as a vocational evaluator and not supported by the medical record.

Based on our review, the report of Mr. Remas cannot support an award of permanent total disability at this time. The parties must first establish a medical record based upon substantial evidence. Thereafter, the parties may provide that record to their vocational evaluators for comment.

D. Material Misstatements of Fact

In applicant's answer, he states: "There was no Labor Code 5502 violation. In fact, the board allowed CIGA to seek its own vocational expert and CIGA declined." (Applicant's Response to Petition for Reconsideration, August 1, 2020, p. 4.)

Yet, the January 17, 2019 minutes note: "CIGA has set V/R 2/6/2019 @ 9:00AM/AA's office, and DQME Dr. Sofia set 3/10/2019". The WCJ expressly ordered that discovery of CIGA's VR expert and CIGA's QME was stayed (*Ibid*.), and CIGA objected to the order staying discovery. Therefore, applicant's representation that CIGA refused to proceed with a vocational exam appears to be without merit and borders on frivolous.

Thus, ***we admonish applicant's attorney, Juan Armenta of English Lloyd & Armenta***, that as an officer of the court, he may not include material misstatements of fact in verified petitions before a court and that such conduct may subject him to sanctions. (See Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

Accordingly, we rescind the WCJ's decision and return this matter to the trial level for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Joint Findings, Award and Orders of July 8, 2020 is **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 28, 2024

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

TESTAN LAW
ENGLISH LLOYD & ARMENTA
FLOYD, SKEREN, MANUKIAN, LANGEVIN
GODFREY, GODFREY, LAMB & ORTEGA
THOMAS LOPEZ

EDL/*ara*

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