WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL THOMAS, *Applicant*

vs.

PETER KIEWIT SON'S, INC.; Permissibly Self-Insured, adjusted by, SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ9229556
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant Kiewitt Infrastructure West Co., permissibly self-insured, seeks reconsideration of the Findings, Award and Orders, served October 22, 2020, wherein the workers' compensation administrative law judge (WCJ) found that applicant, Michael Thomas, while employed as a boilermaker by Peter Kiewit Son's, Inc., sustained an admitted industrial cumulative trauma injury to lumbar spine, bilateral knees and skin over the period October 11, 1993 through December 19, 2012, resulting in permanent total disability. The WCJ awarded permanent disability indemnity, at an unspecified rate, less a 15% attorney fee to be informally adjusted with jurisdiction reserved. The WCJ also awarded reimbursement and payment for the services of applicant's vocational expert, Mr. Diaz.

Defendant contends the finding that applicant is permanently totally disabled is not supported by substantial evidence, asserting that the vocational report of Mr. Diaz which the WCJ relied upon does not meet the requirements to rebut the scheduled rating of applicant's impairment. First, defendant asserts that Mr. Diaz's vocational report is invalid because an assistant was assigned to conduct substantive non-clerical tasks in preparing the report, in violation of Appeals Board Rule 10685. Second, defendant asserts that the vocational expert's assessment of applicant's functional limitations and amenability to participate in vocational rehabilitation was improperly based on his own evaluation of the synergistic effect of impairments that were not identified in the medical reporting. Defendant also argues that Mr. Diaz impermissibly relied upon non-industrial

factors in concluding applicant cannot return to the open labor market, and that his report is not consistent and relies upon inaccurate information. Defendant further asserts that Mr. Diaz is not adequately credentialed to qualify as a vocational expert and his report was not reviewed by Dr. Mechel Henry, the Physiatric Qualified Medical Evaluator. Finally, defendant argues that it was deprived of due process of law when the WCJ denied its request for a continuance on the day of trial to allow defendant the opportunity to submit its own vocational expert report to further develop the record. Defendant asserts that after it received applicant's vocational expert report in April of 2020, it then sought to obtain a rebuttal report but was unsuccessful due to delays caused by the Covid-19 shutdown. Defendant notes that it had disclosed a vocational expert report in the pre-trial conference statement and listed the admissibility of a rebuttal report as an issue. Defendant's Petition for Reconsideration also asserts the statutory basis of Labor Code section 5903(d), that it has newly discovered material evidence that it could not have discovered and produced with the exercise of reasonable diligence at the time of trial.

Applicant has filed a verified Answer to the Petition for Reconsideration, in which he asserts the petition does not fairly state all of the material evidence relative to the issues raised, that defendant has not produced any reports that qualify as "newly discovered evidence," and that substantial evidence in the record justifies the finding that he is permanently totally disabled.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the WCJ's determination and deny defendant's Petition for Reconsideration.

At the outset, we note that the Appeals Board has 60 days from the filing of a Petition for Reconsideration to act on that petition. (Lab. Code §5909.) Here, however, through no fault of defendant, the timely-filed petition did not come to the attention of the Appeals Board until January 22, 2021, after expiration of the statutory time period. Consistent with fundamental principles of due process, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a timely filed Petition for Reconsideration begins no earlier that the Board's actual notice of the petition. (See *Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1107-1108 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v.*

Workers' Comp. Appeals Bd. (*Felts*) (1981 119 Cal.App.3d 193 [146 Cal.Comp.Cases 622, 624].) Therefore, we will consider the Petition for Reconsideration on its merits.

FACTS

The parties stipulated that applicant sustained an industrial cumulative trauma injury to his lumbar spine, bilateral knees, and skin over the period ending December 19, 2012. At trial on August 20, 2020, applicant testified that he has worked as a boilermaker for over 20 years. The work required heavy lifting, often up to 100 pounds. He would carry anything up to 100 pounds, and use a pallet for anything over that. He learned rigging, welding and became a journeyman mechanic. While working, he had to stoop, squat and crawl. He worked six days a week, 10 hours a day, but when he worked at a refinery he worked 12 hour days, seven days a week.

He testified that he cannot do the job now. He cannot sit or stand for long. He described his body as torn up. Since his last evaluation by Dr. Henry in 2016, his pain and mobility have gradually deteriorated. He testified that he is in constant pain, normally at the level of 7 out of 10, but any type of activity can get him to level 10. His pain level prevents him from concentrating on a regular basis and his memory isn't as good as it used to be. He also avoids pain medications. He testified that it is very painful to bend. He can stoop or squat while hanging onto something, but it will cause pain. Climbing stairs is painful. He can walk 20 to 25 minutes, but then must sit. He cannot sit or stand for a long time. The heaviest thing he can lift is a case of water bottles, but cannot lift anything overhead.

Before he saw Dr. Henry, he drove his son cross-country to Virginia. The trip took two weeks each direction, and he took a lot of breaks. He testified that he could not do that trip today, as he needs to take a break every 30 to 40 minutes.

Applicant was first evaluated by Dr. Henry in 2014. She reported applicant's history of experiencing a lot pain in early 2012, performing work that required "repetitive motions including lifting, walking, climbing and crawling, a lot of things that required him to be on his knees and strain and put a lot of weight on to the lumbar area of the spine." (Jt. Ex. 109, 7/10/14 Dr. Henry QME Report, p. 2.) Applicant reported that he worked through his pain until he was laid off on December 19, 2012, but his symptoms continued. Applicant had right knee surgery in January of 2013, for chondromalacia and torn medial meniscus. Subsequently, his left knee worsened and he required injections bilaterally to relieve pain. (Jt. Ex. 108, 1/13/16 Dr. Henry Report, p. 2.)

In her January 13, 2016 evaluation, Dr. Henry noted applicant's lumbar pain had worsened, to a level 8 out of 10. As with his bilateral knees, the pain is present most of the time. His knee pain increases with walking, day to day activities, weightbearing, stairs and getting in and out of cars.

She described applicant's job duties.

> He worked as a boilermaker Union steward doing construction for this company for a year, working 10-hour days, six days a week, it was a very busy job, with two 10-minute rest breaks, one 30-minute lunch break, working in shifts, working 90% outdoors, 10% indoors. Mostly the job required squatting, working overhead, walking, climbing, crawling, grasping, standing, bending, pushing, leaning, twisting, pulling, a small amount of writing and sitting. He would have to do what he called rigging, climbing, crawling, squatting, walking, and training, working on concrete, dirt, and asphalt, lifting very heavy things up to 100 pounds all day long including steel chain falls, tools, and cribbing wood. He lifted 80-100 pounds pretty regularly at work. Now, he can lift about 10-20 pounds. Before he had no problems lifting. He states that he had to reach above and at shoulder level, move his feet constantly, and use his hands. He was exposed [to] various construction and boiler rooms. He had to work on uneven ground, hazardous vehicles and he has not been able to do his normal work duties since I last saw him.
>
> The formal job description sent was reviewed in my last report: June 2007, boilermaker functional requirements, loading 50 pounds, total push/pull 100 pounds, upper extremity up to 40 pounds, stairs 20 per hour, ladder 30 rungs an hour, walking 2 miles per eight hours, hand and tool use, standing eight hours, needing vision, confined access, high tolerance outside work.
> (Jt. Ex. 108, 1/13/16 Dr. Henry Report, p. 5.)

Dr. Henry diagnosed applicant with chronic low back pain with L4-5 herniation and degenerative disc disease with stenosis, and bilateral knee DJD, status post right knee arthroscopy for meniscal tear. She found applicant was temporarily totally disabled from his date of injury until he reached permanent and stationary status as of the date of the evaluation. She concluded applicant was not able to return to his usual employment and placed work restrictions of standing 4-6 hours, walking 4-6 hours, driving 4-6 hours, sitting 2-4 hours with ability to change positions, no bending, squatting, twisting, reaching, crawling, grasping and pushing/pulling, and climbing rarely. He was also restricted from lifting more than 25 pounds for more than 1 hour per day. (Jt. Ex. 108, p. 11.) Her whole person impairment rating for spine was 40%, and knees was 2% left

knee and 3% right knee. She later increased the right knee WPI to 4%. (Jt. Ex. 103, 7/19/18 Dr. Henry Supplemental Report, p. 2.)

> He has a chronic pain situation and his pain is greater than what would be expected for his diagnoses of the lumbar spine, his primary complaint today, for the additional 3% add-on justified for the lumbar spine. This is a 37+3=40% WPI spine, 2% WPI left knee, 3% WPI right knee.

Dr. Henry found applicant had sustained a cumulative trauma injury on an industrial basis without apportionment, stating: "100% of the assigned impairment is related to the cumulative trauma through 2012 with reasonable medical probability for the bilateral knees and lumbar spine. 0% is nonindustrial with reasonable medical probability. (Jt. Ex. 108, p. 13.) She recommended additional pain and medical management for his "serious and chronic condition," including a future provision for bilateral total knee replacements.

Dr. Henry indicated that to most accurately rate applicant's impairments, they should be added per *Kite* (See Jt. Ex. 101, 5/15/19 Dr. Henry Supplemental Report.) She explained in her deposition testimony that "In this case, *Kite* is appropriate because it is both knees affected, it is multiple levels of the lumbar spine affected, there is weakness and imbalance, and I did not rate gait, which is going to be affected in this case, and gait impairment. . . . So if we use *Kite*, which I think is appropriate to cover the fact that there is no good knee, and the gait will be antalgic, then that's 51 percent whole person impairment. But I'm not separately rating antalgic gait. I'm simply doing an *Almaraz*/*Guzman*, *Kite* addition." (Jt. Ex. 104, 10/17/17 Dr. Henry Deposition Transcript, 23:6-21.)

Applicant's skin injury was evaluated by Dr. Alaiti, who reported on June 20, 2017, that applicant sustained an injury in the form of lentigo maligna on his left cheek. Dr. Alaiti found applicant's employment, causing him to spend an extensive amount of time working outdoors, was a contributing cause of the injury, and "there is reasonable medical probability to conclude the injury is industrial and should be treated on industrial basis." (Jt. Ex. 110, 6/20/17 Dr. Alaiti Report, p. 13-14.) The only work restrictions indicated was to avoid sun exposure as much as possible and use high SPF sunscreen and protective clothing. He assessed an 8% whole person impairment, and apportioned 50% to his sun exposure while working between 1993 and 2012, and 50% to non-industrial sun exposure.

At a hearing set for a Mandatory Settlement Conference on July 2, 2019, the matter was taken off calendar to allow the parties to obtain vocational evaluations, as well as to consider using an agreed vocational evaluator.

Applicant obtained a vocational evaluation from Frank Diaz, who reported on April 10, 2020. (Ex. 1, 4/10/20 Report of Frank Diaz.) Mr. Diaz had an assistant interview applicant to obtain his background and work history and conduct vocational testing.[1] The interview occurred over two days, and at the completion of both days applicant complained of significant pain.

Mr. Diaz reviewed applicant's medical history, work restrictions and vocational testing and concluded, based upon the functional limitations caused by the industrial injury to his bilateral knees and lumbar spine, that applicant has lost the ability to function in the open labor market. Mr. Diaz indicated initially that the medically imposed work limitations would limit applicant to light work, but concluded that the synergistic effect of the limitations from his bilateral knees and low back resulted in a greater loss of labor market access than the limitations caused by each body part separately would indicate.

> From a vocational standpoint, the functional limitations to Mr. Thomas' bilateral knees create a greater level of disability than should I consider his bilateral knee functional limitations individually.
>
> Mr. Thomas' inability to lift or carry greater than twenty-five (25) pounds for more than one (1) hour a day as well as his inability to bend, squat, or crawl relegates him to work occurring, at best, at a Light level of physical functioning with the ability to sit and stand at-will. However, as Mr. Thomas also has a preclusion from bending, squatting, and crawling he will have a significant loss of labor market access. As an example, he cannot perform occupations such as Stock Clerk or Retail Salesperson as these occupations would require Mr. Thomas to perform repetitive bending and stooping.
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> In order to provide an accurate determination regarding Mr. Thomas' loss of labor market access I must take into account the synergistic effect of not only his bilateral knees, but, as well, the synergistic effect of his bilateral knees and lumbar spine.
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> Based upon my review of Mr. Thomas' functional limitations as set forth by Dr. Henry, I am of the opinion that the synergistic effect of Mr. Thomas' functional limitations regarding the bilateral knees and lumbar spine creates a greater level

[1] Defendant's contention that the vocational report is invalid because it fails to meet the requirements in WCAB Rule 10685 is belied by the disclosure at page 27 of the report that identifies the individual other than the vocational expert who assisted in the preparation of the report, consistent with the requirements of Rule 10685(b)(4)(A), (B) and (C).

> of disability when combined then should I take into account the functional limitations for each body part individually.
> . . .
>
> Even though the functional limitations to any one of these areas as set forth by Dr. Henry would not remove Mr. Thomas from the workforce, it is the combination of Mr. Thomas' functional limitations that creates a greater level of disability then if I were to take into account his functional limitations individually. The synergistic effect of Mr. Thomas' functional limitations to his lumbar spine and bilateral knees renders Mr. Thomas with an inability to effectively function in the work place.
> (Ex. 1, 4/10/20 Diaz Report, p. 14-15.)

In addition, Mr. Diaz found that applicant's functional limitations were compounded by the effect that his chronic pain, noting that Dr. Henry found applicant's chronic pain is greater than would be expected from his low back injury. Mr. Diaz concluded that applicant's "chronic pain, in all vocational probability, will negatively affect his ability to maintain a work pace appropriate to a given workload." (Ex. 1, 4/10/20 Diaz Report, p. 16.) He further opined that due to his pain and functional limitations, there are no occupations available to applicant in the open labor market.

Mr. Diaz further considered applicant's amenability to vocational rehabilitation, and concluded that applicant had no avenue to employment through vocational rehabilitation. "However, it is clear to this Consultant that the synergistic effect of the functional limitations as set forth by Dr. Henry in conjunction with Mr. Thomas' chronic pain render Mr. Thomas with an inability to benefit from a vocational training program." (Ex. 1, 4/10/20 Diaz Report, p. 17.)

Defendant did not offer a vocational rehabilitation evaluation into evidence, though it had indicated at the continued Mandatory Settlement Conference on June 30, 2020, after it had received applicant's Diaz Report, that it would offer a report by M. Brady at trial. The WCJ closed discovery at that hearing and deferred the determination of the admissibility of defendant's report to the trial judge. The Minutes of Hearing from the trial on August 20, 2020, indicates that the WCJ denied defendant's request to submit a vocational rehabilitation report. The record does not establish that defendant submitted a specific report into evidence at trial.

On this record, the WCJ concluded, based upon Mr. Diaz's vocational report, that applicant had rebutted the 72% permanent disability rating of Dr. Henry and Dr. Alaiti's reports, and that applicant was not able to return to the open labor market due to his physical limitations together with his chronic pain. The WCJ credited applicant's trial testimony that he experienced constant

pain. "I believed applicant when he testified that he is in constant pain at a pain level of 7, on the 1-10 pain scale. I also believed him when he said he did not know what activity would trigger an increase in his pain level since any type of activity could." (Opinion on Decision, p. 4).

DISCUSSION

Defendant challenges the WCJ's reliance upon the vocational evaluation by Mr. Diaz, to conclude applicant had satisfied the requirements set forth in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] and *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587], to rebut the scheduled permanent disability rating derived from the reports of Dr. Henry and Dr. Aliati. Besides contending that Mr. Diaz did not adequately identify the assistance he received in preparing his vocational evaluation, which we find unpersuasive per footnote 1 above, defendant argues that Mr. Diaz improperly provided an unqualified medical opinion by relying upon the synergistic effects of applicant's bilateral knee and low back impairments. Defendant argues that Mr. Diaz exceeded his authority as a vocational expert by finding a greater level of disability than indicated by Dr. Henry.

On this record, based on Dr. Henry's medical reporting and the vocational evidence from Mr. Diaz, we concur with the WCJ that applicant has successfully rebutted the scheduled permanent disability rating, per *Ogilvie* and *LeBoeuf*.

Labor Code section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), the proper application of the PDRS in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

The scheduled rating is not absolute. (*Fitzpatrick*, *supra* at 1685.) A rating obtained pursuant to the PDRS may be rebutting by showing applicant's diminished future earning capacity is greater than the factor supplied by the PDRS. (*Ogilvie*, supra; *Contra Costa County v. Workers' Comp. Appeals Bd*. (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119].) The court in *Ogilvie, supra,* addressed the question of: "What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating?" (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the schedule rating is based upon a determination that the injured worker is "not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating." The employee's diminished future earnings must be directly attributable to the employee's work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education. (*Ogilvie*, 197 Cal.App.4th at pp. 1274–1275, 1277).

While defendant here asserts that Mr. Diaz relied upon impermissible non-industrial factors in concluding that applicant sustained a total loss of future earning capacity, our reading of his report shows that he relied solely upon the effects of applicant's work injury. Mr. Diaz did not attribute applicant's vocational impairment to any non-industrial factors, but relied upon the factors identified by Dr. Henry, including the vocational factor that the combination of applicant's knee and low back impairments caused a greater loss of function than they would individually. In relying upon the "synergistic effect" of the combined impairments, Mr. Diaz used the medical evidence to reach his vocational determination.

Defendant also argues that Mr. Diaz should not be considered a vocational expert because he does not have a credential cited in a panel decision as the "gold standard." (*Meza v. Perma Steel* 2013 Cal. Wrk. Comp. P.D. LEXIS 441.) While that opinion is not controlling or persuasive, we note the Curriculum Vitae Mr. Diaz attached to his report shows that he has qualified as a vocational expert in cases before the Workers' Compensation Appeals Board since 1987. The Report of the WCJ adopted by the panel in *Meza* indicates that the vocational expert there did not have "credentials from any of the recognized vocational expert associations. Additionally, she has had no prior experience in testifying to such matters in any court of law." As Mr. Diaz has been

recognized as an expert in vocational rehabilitation for several decades, we see no error in relying upon his opinion that applicant is not amenable to benefit from vocational rehabilitation services.

Finally, defendant argues that it was deprived of due process of law by the WCJ's refusal to continue the trial to allow defendant to submit a rebuttal vocational expert report. Defendant argues that because it listed a report of Maria Brady at the MSC, it was error for the WCJ not to grant a continuance for rebuttal evidence. Defendant argues that due to the complications caused by the Covid-19 shutdown it did not have an adequate opportunity to obtain a report after it received the Diaz report in April of 2020.

Applicant has offered extrinsic evidence to show that defendant did not exercise due diligence in seeking to obtain a vocational evaluation. Such evidence is not in the record, and is not admissible on reconsideration. However, defendant has not provided a full explanation that is consistent with the record of proceedings in this matter. Specifically, defendant's argument fails to account for the continuance granted at the proceedings on July 2, 2019, at which time both applicant and defendant were provided an opportunity to obtain a vocational report. Applicant obtained a report from Mr. Diaz. Defendant has not alleged that it has obtained a vocational report. The fact that defendant appeared at trial more than one year later seeking leave to obtain a report was sufficient grounds for the WCJ's denial of a continuance for that purpose.

Additionally, defendant's Petition for Reconsideration asserted the statutory basis of Labor Code section 5903(d). To the extent this claim refers to a vocational report for which it sought a continuance to obtain, defendant fails to provide an offer of proof required by WCAB Rule 10974, with "a full and accurate statement of the reasons why the testimony or exhibit could not reasonably have been discovered or produced before submission of the case."

Accordingly, we will affirm the WCJ's determination and deny defendant's Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings, Award and Orders, served October 22, 2020, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 23, 2021

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

MICHAEL THOMAS
BUTLER & VIADRO
HAIGHT BROWN & BONESTEEL LLP

SV/*pc*

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