WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOHN WOODLEY, *Applicant*

vs.

CITY OF PASADENA, Permissibly Self-Insured, *Defendant*

Adjudication Numbers: ADJ10641716, ADJ10749935
Marina Del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

In order to further study the factual and legal issues in these cases, we[1] granted applicant's and defendant's respective petitions for reconsideration of two separate decisions issued by a workers' compensation administrative law judge (WCJ) on November 13, 2019. Applicant seeks reconsideration of a Findings of Fact and Order issued in case ADJ10641716, wherein it was found that applicant did not sustain industrial injury to his cardiovascular system or his skin while employed as a maintenance worker during a cumulative period ending November 11, 2015. The WCJ thus issued an order that applicant take nothing by way of this claim. Defendant seeks reconsideration of a Findings of Fact and Award in case ADJ10749935 wherein it was found that while employed as a maintenance worker on October 20, 2016, applicant sustained industrial injury to his back, neck and right shoulder causing permanent disability of 8% and entitling applicant to "temporary disability indemnity … for the period of October 21, 2016 through January 31, 2018, less credit for time worked…." Although the decision states that applicant sustained 8% permanent disability, it awards benefits corresponding to an award of 21% permanent disability.

Applicant contends in its Petition that the WCJ erred in not finding industrial injury to the cardiovascular system and skin in case ADJ10641716 and, consequently, in not finding an entitlement to temporary disability and permanent disability in that case. Defendant contends in its Petition that the WCJ erred in (1) finding industrial injury in case ADJ10749935, in (2) finding

[1] The Amended Order Granting Reconsideration was signed by former Commissioner Deidra Lowe, who is no longer an Appeals Board Commissioner, and Commissioner Craig Snellings, who was not available to participate in this decision. Chair Katherine A. Zalewski and Commissioner Marguerite Sweeney have been substituted in their place.

applicant temporarily disabled as a result of this claim, arguing that applicant did not lose any time from work as a result of any orthopedic injuries from the date of injury until his voluntary retirement, and in (3) awarding indemnity corresponding to a 21% award of permanent disability rather than the 8% permanent disability specified in the findings of fact. Applicant and defendant have each filed an answer to the other's petition, and the WCJ has filed a separate Report and Recommendation on Petition for Reconsideration addressing each Petition.

As explained below, we rescind the WCJ's decision in case ADJ10641716 and issue a new decision reflecting that applicant sustained industrial injury in the forms of coronary heart disease and skin scarring causing temporary disability from November 11, 2015 to February 21, 2016, and 40% permanent disability. With regard to case ADJ10749935, we will affirm the finding of industrial injury, but we amend the decision to reflect that applicant did not prove entitlement to temporary disability. We also amend the decision to reflect that applicant sustained permanent disability of 21%, as it appears that the 8% referenced in the decision was the unadjusted whole person impairment rather than the permanent disability after adjustment for the 1.4 multiplier, occupation and age.

I. Applicant's Petition in case ADJ10641716

A. Applicant Sustained Industrial Injury to His Cardiovascular System and Skin

Applicant gave qualified medical evaluator internist Jeffrey F. Capen, M.D. a history of subjective mental stress as a result of conflicts with co-workers and supervisors, periods of overwork, and periods that he felt he was being retaliated against by disciplinary actions or having work taken away up until a period in 2014. Dr. Capen wrote, "In 2013, Tom Peretz became the new Supervisor. He abruptly transferred Mr. Woodley to Eastside Parks where he became a third maintenance worker. There were no workers for him to supervise. He found work to do. In 2014, Talib Kfari became the new Eastside Parks foreman. He began diminishing Mr. Woodley's duties 'to make him not useful.' Mr. Woodley filed a complaint with Human Resources. Mr. Woodley transferred to forestry. There, things were 'great.'" (April 27, 2017 report at p. 3.)

At trial, applicant testified to conflicts he had with his foreman in early 2014. Applicant testified that his foreman would criticize his work and demean the applicant in front of colleagues. (Minutes of Hearing and Summary of Evidence of February 13, 2019 trial at p. 8.)

In his August 3, 2017 report, Dr. Capen wrote:

> In my opinion, it is reasonably probable that the coronary artery disease developed and progressed due to non-industrial factors, and would have been present absent Mr. Woodley's employment with the City of Pasadena. However, that being said, he reported stress and chest pains in the year prior to his heart surgery. In my opinion, it is reasonably medically probable that stress occurring in the workplace as a result of management actions/decisions directed at him in the year prior to the heart surgery of November 11, 2015, were a contributing factor to the overall injury and subsequent disability/impairment as of that date (November 11, 2015).

(August 3, 2017 report at p. 51.)

The WCJ found no industrial injury because, in the August 3, 2017 report, Dr. Capen identified work stress "in the year prior to the heart surgery of November 11, 2015" as the industrial causation of the injury, and the WCJ noted that applicant's subjective work stress predated this one year period. Applicant's issues with his foreman in the Eastside Parks department took place in early to mid 2014, and in the year prior to the heart surgery applicant worked in the Forestry department, where things were "great."

However, at his January 11, 2018 deposition, Dr. Capen clarified that industrial causation would still apply if applicant experienced work stress within two years of the November 2015 heart surgery. Dr. Capen testified, "[T]he medical literature is based on patient-reported stress within two years of the cardiac event, and he may have had a stress free interval. If his stress had occurred within those two years, it would still be applicable." (January 11, 2018 deposition at pp. 19-20.)

Since applicant reported significant subjective work stress up through mid 2014, which is within two years of his cardiac event and surgery, based on Dr. Capen's reporting and testimony, applicant's coronary heart disease is industrial. Since the coronary heart disease is industrial, any surgical scar injury sustained as a result of that injury is also industrial. (July 25, 2018 report at p. 6.)

B. Temporary Disability

Dr. Capen opined that applicant was temporarily totally disabled from November 11, 2015 through February 21, 2016 as a result of heart injury. (August 3, 2017 report at p. 51.) These dates are consistent with applicant's testimony that he was off work for three months after his surgery and returned to work in February. (Minutes of Hearing and Summary of Evidence of February 13, 2019 trial at p. 9.) We therefore find temporary disability corresponding to those dates.

C. Permanent Disability and Apportionment

Dr. Capen rated applicant's coronary heart disease impairment at 14% WPI (August 3, 2017 report at p. 52) and the skin impairment at 7% WPI (July 25, 2018 report at p. 6.)

With regard to apportionment of the heart disease permanent impairment, Dr. Capen wrote:

> Apportionment of the cause of the permanent impairment due to coronary artery disease is considered pursuant to Labor Code Section 4663 as clarified by the Escobedo decision. In my opinion, it is reasonably medically probable that the coronary artery disease developed as a result of non-industrial factors. That being said, the stress occurring in the workplace as Mr. Woodley has described tipped the condition over the edge and resulted in the need for bypass surgery. On that basis, I believe there is a reasonably medial probable basis to apportion 75% of the cause of the permanent impairment/disability to non-industrial factors and apportion 25% to the perceived workplace stress as described above.

(August 3, 2017 report at p. 52.)

Asked to elaborate on apportionment at his deposition, Dr. Capen only added, "The predominant cause of the event and the need for surgery was the development of coronary artery disease over time, which was not related to the stress." (January 11, 2018 deposition at p. 21.)

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

> [A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]
>
> Moreover, in the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]
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> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an

> employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo*, 70 Cal.Comp.Cases at p. 621.)

Here, Dr. Capen did not list the non-industrial factors contributing to applicant's impairment, let alone "describe in detail the exact nature of the apportionable disability." As far as Dr. Capen's short explanation that the coronary disease developed "over time," Dr. Capen does not explain how this excludes industrial contribution of industrial stress over the same long time period.

Accordingly, we find applicant entitled to an unapportioned award of permanent disability. Since Dr. Capen did not adequately discuss apportionment of the heart impairment, apportionment any apportionment of the resultant skin impairment is also not supported by substantial medical evidence. Since there is not substantial medical evidence of apportionment, there is no need to consider the applicability of *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] to the instant case. We find that applicant's injury in the instant case caused permanent disability of 40%.[2]

II. Defendant's Petition in case ADJ10749935

With regard to the finding of industrial injury in this case, defendant essentially is arguing that the WCJ should have followed the opinion on panel qualified medical evaluator orthopedist Lee C. Woods, M.D. rather than the opinions of treating physician Benham Sam Tabibian, M.D. The history given to Dr. Tabibian was consistent with applicant's trial testimony, which the WCJ found credible. (Report at pp. 7-8.)

The relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 639 [35 Cal.Comp.Cases 16].) The WCJ is empowered to choose among conflicting medical reports and rely on those deemed most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476, 479 [33 Cal.Comp.Cases 221].) There is nothing in the

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[2] Applicant's permanent disability was calculated as follows:

03.02.00.00 14 [1.4] 20 [480H] 25 – 32
08.02.00.00 7 [1.4] 10 [480E] 9 – 12

32c12=40

record compelling enough for us to reject the WCJ's determination that the opinions of Dr. Tabibian were more persuasive than the opinions of Dr. Woods. We therefore affirm the finding of industrial injury.

However, we will delete any finding of temporary disability. Applicant testified that he worked from his return from his heart temporary disability on February 21, 2016 until his retirement in July of 2017. (Minutes of Hearing and Summary of Evidence of February 13, 2019 trial at p. 9.) There was no evidence or allegation that applicant retired due to any disability or defendant not accommodating applicant's work restrictions. In *State Compensation Ins. Fund v. Workers' Comp.Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1003 [69 Cal.Comp.Cases 579], the Court of Appeal made clear that neither medical treatment nor modified work restrictions without wage loss, in and of themselves, are sufficient to constitute "disability." "[T]here is no compensable temporary disability until the worker suffers wage loss." (*Rodarte*, 119 Cal.App.4th at p. 1003.) "[T]emporary disability indemnity is payable during the injured worker's healing period from the injury until the worker has recovered sufficiently to return to work, or until his/her condition reaches a permanent and stationary status." (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798].) Here, applicant did not present any evidence supporting wage loss as a result of his orthopedic injury. We therefore find that applicant did not prove entitlement to temporary disability in this case.

Finally, we will amend the decision to reflect that applicant has sustained 21% permanent disability. The decision erroneously states 8% permanent disability, but the 8% refers to the WPI before adjustment. (January 31, 2018 report of Dr. Tabibian at p. 8.) The 21% permanent disability is calculated as follows: 15.03.01.00 – 8 [1.4] 11 [480I] 16 – 21.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Order in case ADJ10641716 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. John Woodley, age 62 on the date of injury, while employed during the period 1974 through November 11, 2015 as a maintenance worker, Occupational Group No. 480, at Pasadena, California, by the City of Pasadena, sustained injury arising out of and in the course of employment to his cardiovascular system and skin.

2. At the time of injury, the employer was permissibly self-insured.

3. At the time of injury, the employee's earnings were $1,132 per week, warranting indemnity rates of $754.67 per week for temporary disability and $290 per week for permanent disability.

4. Applicant's injury caused temporary disability from November 11, 2015 to February 21, 2016, a duration of 14.7143 weeks, entitling applicant to temporary disability indemnity in the accrued sum of $11,104.43.

5. Applicant's injury caused permanent disability of 40%, entitling applicant to 201 weeks of permanent disability indemnity at the rate of $290 per week, in the accrued amount of $58,290.00.

6. The injury herein has caused a need for further medical treatment.

7. Applicant's attorney has performed services entitling him to an attorneys' fee of $1,665.66 with regard to applicant's temporary disability indemnity recovery and $8,743.50 with regard to applicant's permanent disability indemnity recovery.

8. Applicant is entitled to reimbursement for any self-procured medical treatment caused by the injury in an amount to be adjusted by the parties with WCAB jurisdiction reserved in the event of any dispute.

AWARD

AWARD IS MADE in favor of JOHN WOODLEY against CITY OF PASADENA of:

(a) Temporary disability indemnity in the accrued amount of $11,104.43, less any amounts already paid on account thereof, and less an attorney's fee of $1,665.66 payable to Edward J. Singer.

(b) Permanent disability indemnity in the accrued amount of $58,290.00 less any amounts already paid on account thereof, and less an attorney's fee of $8,743.50 payable to Edward J. Singer.

(c) All medical treatment reasonably required to cure or relieve from the effects of the injury herein.

(d) Interest from the filing and making of this Award.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings of Fact and Award in case ADJ10749935 is **AMENDED** as follows:

FINDINGS OF FACT

1. Defendant's objection to the Formal Rating and Instructions is overruled.

2. Applicant, John Woodley, while employed on October 20, 2016, as a Maintenance Worker, Occupational Group Number 480, at Pasadena, California, by the City of Pasadena, sustained injury arising out of and in the course of employment to his back, neck and right shoulder.

3. Applicant did not sustain an industrial injury to his left shoulder while employed on October 20, 2016, as a Maintenance Worker for the City of Pasadena.

4. Applicant did not prove entitlement to temporary disability benefits as a result of this claim.

5. Applicant is entitled to a permanent disability award of 21%, equivalent to 80.50 weeks of indemnity, payable at the rate of $290.00 per week, in the accrued amount of $23,345.00, less credit for any sums already paid on account of, less the attorney fee awarded herein and reimbursement of the living expenses lien of Edward Singer in the amount of $1,000.00.

6. There is no basis for apportionment.

7. Applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein.

8. It is found that Applicant is entitled to reimbursement for out of pocket medical costs and mileage in amounts to be adjusted by the parties or determined herein upon the filing of a petition and supporting documents. Jurisdiction reserved.

9. It is found that $1,000.00 of the permanent disability indemnity shall be paid to Attorney Edward Singer in full resolution of the living expenses lien on file herein.

10. Based upon the WCAB Rules of Practice and Procedure §10775 and the guidelines for awarding an attorney's fee set forth in the Policy and Procedure Manual §1.140, a reasonable attorney's fee is found to be $3,501.00 to be paid out of applicant's accrued award of permanent disability indemnity.

AWARD

AWARD IS MADE in favor of John Woodley against the City of Pasadena, permissibly self-insured, as follows:

(a) Permanent disability as provided in Findings Number Five, Nine and Ten.

(b) Further medical treatment as provided in Finding Number Seven.

(c) Reimbursement for out of pocket medical costs and mileage as provided in Finding Number Eight.

(d) Attorney fee as provided in Finding Number Ten.

WORKERS' COMPENSATION APPEALS BOARD

/s/ _MARGUERITE SWEENEY, COMMISSIONER___

I CONCUR,

/s/ _JOSÉ H. RAZO, COMMISSIONER_________

/s/ _KATHERINE A. ZALEWSKI, CHAIR_______

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 7, 2022

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

JOHN WOODLEY
INGBER WEINBERG
EDWARD SINGER

DW/oo

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