

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

KEVIN BOSS, *Applicant*

vs.

**OAKLAND RAIDERS; and ACE AMERICAN INSURANCE in care of TRISTAR
RISK MANAGEMENT, *Defendants***

**Adjudication Number: ADJ9086640
Oakland 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, Order and Award of February 1, 2019, the Workers' Compensation Judge ("WCJ") found that applicant, while employed as a professional football player by the Oakland Raiders during the period August 6, 2011 to January 1, 2012, sustained industrial injury in the form of post-concussive syndrome and mild neurocognitive disorder due to traumatic brain injury, but not to his psyche, face, neck, shoulders, elbows, wrists, hip, back, knees, ankles, feet, toes or internal system, causing permanent partial disability of 42 percent, after apportionment, and the need for further medical treatment.

Defendant, the Oakland Raiders, filed a timely petition for reconsideration of the WCJ's decision. It is defendant's sole contention that the WCJ erred in finding that applicant's industrial injury caused permanent partial disability of 42 percent, because the WCJ's rating is based on a duplication of Whole Person Impairments ("WPIs") found by Dr. Anderson (osteopath) and by Dr. Munday (neuropsychologist).

¹ Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated March 28, 2019. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

Applicant filed an answer, wherein he contends that the 20% WPI found by Dr. Munday (resulting in an adjusted permanent disability rating of 30%) accurately reflects his actual impairment.

The WCJ submitted a Report and Recommendation (“Report”). We adopt and incorporate the “Introduction” section of the Report and one other part of the Report set forth below. We do not adopt or incorporate the remainder of the Report.

At the outset, and only to the extent specifically set forth below, we adopt and incorporate the part of the WCJ’s Report entitled “Applicant’s Neuropsychological Claim,” wherein the WCJ refers to her Opinion on Decision in explaining why she relied upon Dr. Munday’s medical opinion, in part, to determine the permanent disability rating:”

Claude S. Munday, Ph.D. is the parties’ agreed medical evaluator (hereinafter referred to as “AME”) as to applicant’s neuropsychological claim. Dr. Munday evaluated applicant on 03/02/2017, reviewed an extensive medical file, reviewed testing results administered by his assistant, and submitted a 03/22/2017 report. In his 03/22/2017 report, Dr. Munday diagnosed applicant with mild neurocognitive disorder due to traumatic brain injury, provided a maximal improvement date of 08/31/2016, and opined as to impairment as follows:

“Neurocognitive deficits are rated per Chapter 13 of the AMA Guidelines, specifically Table 13-6. One of the recommended methodologies is to use the Clinical Dementia Rating Scale. Using that instrument, I would note the following impairments:

Memory: 1.0 (Mild)
Orientation: 0 (No Impairment)
Judgement and Problem Solving: 1.0 (Mild)
Community Affairs: 05 (Questionable)
Home and Hobbies: 1.0 (Mild)
Personal Care: 0 (No Impairment)

The above ratings place this gentleman in Class II per Table 13-6, which is described as “impairment requires direction of some activities of daily living.” Class II is an impairment of the whole person ranging from 15% to 29%. Independently I would place him somewhere in the middle of the Class II range. I see that Dr. Anderson has gauged him at 20% and I would concur that this is a reasonably accurate assessment. That is, I would recommend 20% whole person impairment

for cognitive difficulties per Table 13-6. ... At this time, my opinion is that 100% of the impairment described above flows from the multiple concussive events sustained playing football in the NFL. (Joint Exhibit 102, at pages 1, 24-25)

Based on my review of the evidence and the relevant law, I find the reports of Dr. Munday constitute substantial medical evidence and further find applicant while employed during the cumulative period from 08/06/2011 to 01/01/2012 as a professional football player by Oakland Raiders, insured by Ace American Insurance, in care of Tristar Risk Management sustained injury to mild neurocognitive disorder due to traumatic brain injury arising out of and in the course of his employment with defendant. Based on my review of the evidence and the relevant law, I find the reports of Dr. Munday rate as follows:

13.04.00.00 – 20 – [2]23 – 590J – 33 – 30% PD

While Dr. Munday opines that 100% of the impairment described above flows from the multiple concussive events sustained playing football in the NFL he does not provide an opinion as to apportionment that constitutes substantial medical evidence. Accordingly, I do not find apportionment. [...]

We further note that Dr. Anderson rated applicant's cognitive impairment by analogy to Table 13-5 of the AMA Guides - the Clinical Dementia Rating scale; the doctor assessed applicant with a WPI of 23%. The WCJ followed Dr. Anderson's opinion apportioning 50% of applicant's permanent impairment to concussions suffered while playing for defendant, and the WCJ determined the adjusted permanent disability rating to be 17%.

Dr. Munday, the Agreed Medical Evaluator ("AME") in neuropsychology, used Table 13-6, Criteria for Rating Impairment Related to Mental Status, to place applicant in Class 2 and assess him with a WPI of 20%. The WCJ found no apportionment of the impairment assessed by Dr. Munday, resulting an adjusted rating of 30%. Combining the ratings derived from the WPIs found by both Dr. Anderson and Dr. Munday, the WCJ determined that applicant sustained permanent partial disability of 42%.

We note, however, that the goal of formulating a valid impairment rating under *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] is to approximate the rating that accurately reflects the injured

employee's actual impairment, which may or may not be the highest rating, depending on the facts of the case at hand. (*City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360, 1364-1365 [79 Cal.Comp.Cases 1].)

In this case, we are persuaded applicant's answer is correct in asserting that Dr. Munday's evaluation of impairment, placing him in Class 2 under Table 13-6 (Criteria for Rating Impairment Related to Mental Status) and giving a rating of 20% WPI within that class, most accurately reflects his actual impairment. As noted above, and in contrast to the WCJ's finding of 42% permanent disability, the rating that most accurately reflects the injured employee's actual impairment is not necessarily the highest rating. On this record, we find no good reason to reject Dr. Munday's opinion, as the AME's opinion ordinarily is followed because the AME has been chosen by the parties for the physician's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) Further, in choosing to follow Dr. Munday's evaluation of WPI over that of Dr. Anderson, we observe that it is well-established that the relevant and considered opinion of one physician may constitute substantial evidence. (*Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

Since we follow Dr. Munday's opinion on permanent disability alone, without including Dr. Anderson's assessment of WPI, there is no duplication in the permanent disability rating. This dispenses with the sole contention raised by defendant herein.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Order and Award of February 1, 2019 is **AFFIRMED**, except that Finding 6 and paragraph (a) of the Award are **AMENDED** in the following particulars:

FINDINGS OF FACT

6. Applicant's injury in the form of post-concussive syndrome and mild neurocognitive disorder, due to traumatic brain injury on an industrial basis, caused permanent partial disability of 30% without apportionment.

AWARD

...

- a. Permanent partial disability indemnity per Finding 6 in the amount of \$30,130.00 payable for 131 weeks at the weekly rate of \$230.00, beginning on the date following the last date for which temporary disability indemnity was paid, less credit for any permanent partial disability indemnity advanced heretofore on account thereof, subject to proof, less an attorney's fee of fifteen percent of the permanent partial disability indemnity awarded, payable to James A. Sims., Esq.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 3, 2022

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

**KEVIN BOSS
PRO ATHLETE LAW GROUP
COLANTONI COLLINS MARREN PHILLIPS & TULK LLP**

JTL/ara

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

**REPORT AND RECOMMENDATION
ON
PETITION FOR RECONSIDERATION**

INTRODUCTION

Defendant Oakland Raiders and Ace American Insurance in care of Tristar Risk Management (hereinafter referred to as “defendant”) petitions for reconsideration of the Findings, Order and Award that issued in this case on 02/01/2019 wherein I found applicant Kevin Boss (hereinafter referred to as “applicant”) while employed during the cumulative period from 08/06/2011 to 01/01/2012 as a professional football player by defendant sustained injury to post-concussive syndrome and mild neurocognitive disorder due to traumatic brain injury arising out of and in the course of his employment but did not sustain injury to psyche, face, neck, shoulders, elbows, wrists, hip, back, knees, ankles, feet, toes, or internal. In the same Findings, Order and Award that issued on 02/01/2019 I also found applicant’s date of injury is 01/01/2012 pursuant to Labor Code section 5412, the Application filed by applicant on 09/10/2013 is not barred by the statute of limitations set forth in Labor Code section 5405, and that Labor Code section 3600.5(e), is not applicable in this matter. In the Findings, Order and Award that issued in this case on 02/01/2019, I also found applicant’s injury to post-concussive syndrome and mild neurocognitive disorder due to traumatic brain injury caused permanent partial disability of 42 percent, after adjustment for age and occupation and after apportionment, that applicant’s injury to post-concussive syndrome and mild neurocognitive disorder due to traumatic brain injury caused a need for further medical treatment, that defendant has liability pursuant to Labor Code section 5500.5, and that counsel for applicant earned a reasonable attorney’s fee.

Defendant takes issue only with my finding applicant’s injury to post-concussive syndrome and mild neurocognitive disorder due to traumatic brain injury caused permanent partial disability of 42 percent, after adjustment for age and occupation and after apportionment. Defendant submits I erroneously awarded permanent disability based on duplicative ratings by combining the reporting of Dr. Munday and Dr. Anderson, who both rate under Table 13.5 and Table 13-6. Defendant contends the ratings that were combined were duplicative and not permitted pursuant to the AMA Guides, 5th Edition. Defendant submits I should have issued an award based only on the rating of Dr. Anderson at 17% permanent disability and that Dr. Munday’s report did not provide a separate rating and that he was only utilized to perform neuropsychological testing and merely adopted or indicated that he agreed with the ratings of Dr. Anderson. (Defendant’s Petition for Reconsideration, dated 02/20/2019, at pages 1 - 2)

Defendant’s Petition for Reconsideration was timely filed and is accompanied by the verification required under Labor Code section 5902. As of 03/04/2019, applicant had not filed an Answer.