WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SERGIO ORTIZ, *Applicant*

vs.

A-Z MANUFACTURING, INC.;
ARCH INSURANCE, administered by
GALLAGHER BASSETT SERVICES, INC., *Defendants*

Adjudication Number: ADJ10309928
Santa Ana District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the August 10, 2023 Findings and Award wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a machine operator during the period January 1, 1993 through February 18, 2016, sustained industrial injury to his back, bilateral shoulders, bilateral wrists/hands, elbows, knees, ankles/feet and dental issues and did not sustain industrial injury to his respiratory system, skin or in the form of hypertension, sleep disorder, psyche, or industrially-related diabetes. The WCJ further found that the industrial injury herein caused total permanent disability and need for further medical treatment.

Defendant contends that the WCJ erred in relying on the agreed medical examination (AME) opinion of Alexander Angerman, M.D., arguing that it does not consist of substantial medical evidence and arguing that the opinion was obtained in violation of Labor Code[1] section 4062.3 because defendant did not agree to provide Dr. Angerman with the vocational rehabilitation report of Laura Wilson. Defendant also contends that the WCJ should have found the date of injury pursuant to section 5412 to be an earlier date.

Applicant filed an Answer.

[1] All further statutory references are to the Labor Code, unless otherwise noted.

The WCJ issued a Report and Recommendation on Petition for Reconsideration recommending that we deny reconsideration.

Based on our review of the record and for the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate herein, and for the reasons stated below, we deny defendant's Petition for Reconsideration.[2]

The following exchange took place during Dr. Angerman's January 30, 2019 deposition:

Dr. Angerman:	"Sure. Did he have a voc rehab evaluation?"
Applicant's attorney:	"He will be, and we'll get you that as well."
Dr. Angerman:	"Okay. That's important."

(Dr. Angerman's 1/30/19 depo, at. p 14:3-5, applicant's Exhibit 37.)

Thus, the January 30, 2019 deposition transcript demonstrates that Dr. Angerman inquired whether applicant had had a vocational rehabilitation evaluation; applicant's attorney informed Dr. Angerman and defendant that a vocational rehabilitation evaluation was being obtained; and Dr. Angerman noted that it was important for him to review it. (Dr. Angerman's 1/30/19 depo, at. p 14:3-5, applicant's Exhibit 37.) No objection was noted by defendant to that information during the January 30, 2019 deposition.

Following Ms. Wilson's issuance of the June 26, 2019 vocational rehabilitation report, the parties again deposed Dr. Angerman on March 11, 2020. At that time, defendant objected to information about the June 26, 2019 vocational rehabilitation report being provided to Dr. Angerman. (Exhibit 36.) Applicant's attorney then provided Dr. Angerman with the June 26, 2019 vocational rehabilitation report upon which Dr. Angerman commented in his April 29, 2020 supplemental report. (Exhibit 34.) Defendant argues that Dr. Angerman's opinion should be stricken because there was no agreement between the parties to provide the Wilson vocational rehabilitation report to the AME.

As relevant here, section 4062.3 provides as follows:

> (a) Any party may provide to the qualified medical evaluator selected from a panel any of the following information:

[2] Commissioner Lowe and Commissioner Sweeney, who were on the panel that issued a prior decision in this matter, are unavailable to participate further in this case. Other panel members have been assigned in their place.

(1) Records prepared or maintained by the employee's treating physician or physicians.
(2) Medical and nonmedical records relevant to determination of the medical issue.

(b) Information that a party proposes to provide to the qualified medical evaluator selected from a panel shall be served on the opposing party 20 days before the information is provided to the evaluator. If the opposing party objects to consideration of nonmedical records within 10 days thereafter, the records shall not be provided to the evaluator. Either party may use discovery to establish the accuracy or authenticity of nonmedical records prior to the evaluation.

(c) If an agreed medical evaluator is selected, as part of their agreement on an evaluator, the parties shall agree on what information is to be provided to the agreed medical evaluator.

(d) In any formal medical evaluation, the agreed or qualified medical evaluator shall identify the following:
(1) All information received from the parties.
(2) All information reviewed in preparation of the report.
(3) All information relied upon in the formulation of his or her opinion.

(e) All communications with a qualified medical evaluator selected from a panel before a medical evaluation shall be in writing and shall be served on the opposing party 20 days in advance of the evaluation. Any subsequent communication with the medical evaluator shall be in writing and shall be served on the opposing party when sent to the medical evaluator.

(f) Communications with an agreed medical evaluator shall be in writing, and shall be served on the opposing party when sent to the agreed medical evaluator. Oral or written communications with physician staff or, as applicable, with the agreed medical evaluator, relative to nonsubstantial matters such as the scheduling of appointments, missed appointments, the furnishing of records and reports, and the availability of the report, do not constitute ex parte communication in violation of this section unless the appeals board has made a specific finding of an impermissible ex parte communication.

(g) Ex parte communication with an agreed medical evaluator or a qualified medical evaluator selected from a panel is prohibited. If a party communicates with the agreed medical evaluator or the qualified medical evaluator in violation of subdivision (e), the aggrieved party may elect to terminate the medical evaluation and seek a new evaluation from another qualified medical evaluator to be selected according to Section 4062.1 or 4062.2, as applicable, or proceed with the initial evaluation.

(Lab. Code, § 4062.3(a)-(g).)

In *Maxham v. California Department of Corrections and Rehabilitation* (2017) 82 Cal.Comp.Cases 136, 142 (Appeals Board en banc), the Appeals Board distinguished between "information" and "communication" under section 4062.3 as follows:

> 'Information,' as that term is used in section 4062.3, constitutes (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues.
>
> A 'communication,' as that term is used in section 4062.3, can constitute 'information' if it contains, references, or encloses (1) records prepared or maintained by the employee's treating physician or physicians, and/or (2) medical and nonmedical records relevant to determination of the medical issues. (*Maxham, supra*, 82 Cal.Comp.Cases at p. 138.)
>
> (*Suon v. California Dairies* (2018) 83 Cal.Comp.Cases 1803, 1810 (Appeals Board en banc).)

As quoted above, section 4062.3(c) requires the parties to agree on what information to provide to the AME. As with a violation of section 4062.3(b), the opposing party must object to a party's provision of medical records to an AME in violation of section 4062.3(c) within a reasonable time in order to preserve the objection. In *Suon*, the Appeals Board opined that "[i]n contrast to the specific remedy provided by section 4062.3(g) for an ex parte communication, the Labor Code does not provide a specific remedy for a violation of section 4062.3(b)." (*Suon, supra*, 83 Cal.Comp.Cases at p. 1815.) Rather, the trier of fact has wide discretion to determine the appropriate remedy for a violation of section 4062.3(b). (*Id*.) Six potential factors were outlined for the trier of fact to consider (as relevant to the particular facts of the case) in determining the appropriate remedy for a violation of section 4062.3(b):

> 1. The prejudicial impact versus the probative weight of the information.
>
> 2. The reasonableness, authenticity and, as appropriate, relevance of the information to determination of the medical issues.
>
> 3. The timeline of events including: evidence of proper service of the information on the opposing party, attempts, if any, by the offending party to cure the violation, any disputes regarding receipt by the opposing party and when the opposing party objected to the violation.
>
> 4. Case specific factual reasons that justify replacing or keeping the current QME, including the length of time the QME has been on the case.

5. Whether there were good faith efforts by the parties to agree on the information to be provided to the QME.

6. The constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.)

(*Id*. at pp. 1815-1816.)

In his Report, the WCJ stated:

> In the present case, applicant's counsel at the AME's prior deposition informed defendant and the AME that he was procuring a vocational rehabilitation report which the doctor indicated he would like to review. No objection to the provision of the report was made, just as no objection was made to the provision of other reporting as discussed at the deposition. Defendant's prior counsel, having not objected to the provision of the report to the AME when it was discussed at the deposition effectively waived their right to later object to the provision of the report after it was obtained.
>
> Having considered defendant's lack of objection when the provision of the AME report was discussed with defendant and AME as well as the AME's apparent desire to review the reporting, the undersigned believes that provision of the vocational reporting … does not warrant replacement of the AME.
>
> (Report at p. 4.)

While we note that applicant's attorney should have submitted the section 4062.3 dispute to the WCJ for determination rather than unilaterally sending the vocational rehabilitation report to the AME, we nevertheless agree with the WCJ's analysis as quoted above. We also note that defendant raised no specific objection to the Wilson vocational rehabilitation report other than the general assertion that they did not agree to provide it to the AME. Therefore, given the AME's expressed interest in reviewing it, the guidance of the American Medical Association Guides to the Evaluation of Permanent Impairment (5th Edition) (AMA Guides) regarding the pertinence of vocational rehabilitation evidence to a medical-legal evaluations (AMA Guides, § 2.6a.4, at p. 21), the report's probative weight, the lack of specific objection, and the timeline of events as discussed above, we discern no basis to disturb the discretion exercised by the WCJ.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the August 10, 2023 Findings and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 6, 2023

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

SERGIO ORTIZ
LAW OFFICES OF J. FELIX MACNULTY
DIXON COOPER BROWN

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Applicant was employed by defendant A-Z Manufacturing during the period January 1, 1993 through February 18, 2016 as a machine operator and claims he sustained injury as a result of his employment to his head, neck, back, upper, extremities, shoulders, wrists, arms, elbows, knees, ankles, feet, hands, fingers, respiratory system, skin, suffers diabetes, internal issues, hypertension, a sleep disorder and psychological issues. Applicant's employment ceased at the time when he was laid-off by the employer. Arch Insurance provided insurance for the employer from September 1, 2015 through September 1, 2016 with Sentinel insurance providing coverage from September 1, 2012 through September 1, 2015.

Applicant was examined by his PTP Dr. Dimitri Sirakoff, PQME Dr. Leslie Shoakes, and thereafter by AME Dr. Alexander Angerman.

Applicant's case was brought to trial on the issues of injury AOE/COE, the nature and extent of the injury, and numerous other issues including Defendant's Petition to Strike the Reporting of AME Dr. Angerman. A Findings and Order and Opinion on Decision was issued wherein the undersigned found that it was appropriate for AME Dr. Angerman to be replaced as he was provided a vocational rehabilitation report generated by Laura Wilson of which defendant was unaware of. Applicant's counsel filed a Petition for Reconsideration alleging that the provision of the vocational rehabilitation report was not improper. Upon review of the Petition and re-review of the Court's file, the undersigned found that Dr. Angerman and opposing counsel had been made aware of the pending report as well as applicant counsel's intention to provide it to Dr. Angerman. The Workers' Compensation Appeals Board returned the matter to the undersigned as requested and a new Findings and Award and Opinion on Decision issued finding applicant to be totally permanently disabled based upon the reporting of AME Dr. Angerman and vocational rehabilitation consultant Laura Wilson.

Defendant is aggrieved of the undersigned's Findings and Award and Opinion on Decision and filed a timely and verified Petition for Reconsideration.

DEFENDANT'S REQUEST TO STRIKE AME REPORTING OF DR. ANGERMAN

Defendant's first contention is that applicant counsel provision of the vocational rehabilitation report of Laura Wilson violates Labor Code section 4062.3 in that there was no agreement that the reporting would be provided to the doctor.

In the prior Report and Recommendation on Petition for Reconsideration, I indicated that:

> *After having determined that the vocational rehabilitation report was improperly provided to AME Angerman according to Labor Code section 4062.3(c), the undersigned struck the reporting of Dr. Angerman under Labor Code section 4062.3(g) and ordered the parties to meet and confer as to the selection of*

a new AME or that a Regular Physician may be appointed by the Court. In lieu of this, applicant's counsel filed their Petition for Reconsideration.

After re-review of the Court's file upon receipt of applicant's Petition for Reconsideration, the undersigned consulted the deposition transcript that was filed in the case as Exhibit 37. Upon review, the undersigned notes that Dr. Angerman on page 13 of the transcript was questioned about review of pending vocational rehabilitation reporting and indicated such would be important to review. (Exhibit 37, page 14, line 5).

No objection to that reporting was voiced at that time by defendant. More importantly, from the transcript it appears that Dr. Angerman highlighted the importance of reviewing any vocational rehabilitation report. As such, it may be a mistake on behalf of the undersigned to have stricken the reporting of Dr. Angerman in light of the fact that he apparently wished to review the document that applicant's counsel indicated would be forthcoming.

In Dr. Angerman's deposition on January 30, 2019 the parties discussed providing Dr. Angerman with additional records. Defendant's prior counsel stated on the record:

> Q: (Mr. Stonesifer) Okay. Doctor, we've had a discussion off the record. The parties have – so you requested that we present questions to you and then provide you with the medical information and the deposition transcript.
>
> A: (Dr. Angerman) Right. The deposition, and also apparently some MRIs were done, some other reports, and if there are any reports around the time of the 2011 injury.
> (Exhibit 37, page 14, line 20 – page 15, line 5).

Later during the same deposition, Applicant's counsel indicated:

> Q: (Mr. McNulty) And then I would ask you to make an opinion based overall as an expert for – over the years whether you feel based upon applicant's age, education, if you could, and then, of course, his orthopedic complaints and his overall condition, which we'll get you all the reports, whether you feel he'd be capable of competing full time in the open labor market? Will you answer that question for us?
> A: (Dr. Angerman) Sure. Did he have a voc rehab evaluation?
> Q: (Mr. McNulty) He will be, and we'll get you that as well.
> A: (Dr. Angerman) Okay. That's Important.
> (Exhibit 37, page 14, line 20 – page 15, line 5).

The transcript of the deposition evidences that Applicant's counsel was engaged in the process of obtaining vocational rehabilitation reporting; Dr. Angerman also indicated that he thought review of such would be important to his determination of the question.

At the trial setting on January 8, 2020, upon discussion with the parties it was determined that Dr. Angerman had not yet been provided reporting as requested/discussed at his prior deposition; the deposition transcript however does not indicate which party was to provide these documents to the AME. [1]

The facts of the present matter are somewhat similar to those in the Court's opinion in *Trapero v. N. Am. Pneumatics*, 20212 Cal. Wrk. Comp. P.D. LEXIS 541. In that case, at the deposition of the AME Applicant's counsel sought to provide the AME with a copy of a vocational rehabilitation report to which defendant objected. Here, the Court held that Applicant's counsel providing the information to the AME was impermissible, noting that "Here, in springing the vocational report on defense counsel when the AME was about to be deposed, applicant's attorney denied defense counsel the opportunity to determine if this new "information" was something that he would agree to provide to the AME."

This is where the present matter and the facts of *Trapero* are distinguishable. In *Trapero* opposing counsel and the AME were provided the document without any prior indication of it with no agreement. In the present case, applicant's counsel at the AME's prior deposition informed defendant and the AME that he was procuring a vocational rehabilitation report which the doctor indicated he would like to review. No objection to the provision of the report was made, just as no objection was made to the provision of other reporting as discussed at the deposition. Defendant's prior counsel, having not objected to the provision of the report to the AME when it was discussed at the deposition effectively waived their right to later object to the provision of the report after it was obtained.

Having considered defendant's lack of objection when the provision of the AME report was discussed with defendant and AME as well as the AME's apparent desire to review the reporting, the undersigned believes that provision of the vocational reporting was not a violation of Labor Code section 4062.3 in this instance and does not warrant replacement of the AME.

ADMISSIBILITY OF AME REPORTING

Defendant also raises the issue of the inadmissibility of the Report of the AME dated April 29, 2020 as it was procured after the Mandatory Settlement Conference.

The supplemental reporting in question was procured after the parties appeared at the initial trial setting on January 8, 2020. When the parties were discussing the case with the undersigned, it became apparent that AME Angerman had not been provided or reviewed the documents discussed at his deposition on January 30, 2019.

Having reviewed the doctor's testimony, the undersigned determined that due to the doctor's statement in his depo that he would like to see the vocational rehabilitation reporting as well as other requested documents, the record required development to allow Dr. Angerman to review the requested documents and issue a supplemental report. The parties were then ordered by

[1] The Court notes that defendant filed a Substitution of Attorneys dated 5/23/1019 at which time current counsel began representing Applicant.

the undersigned to procure the supplemental reporting as it was determined that development of the record would be required.

While under normal circumstances defendant's argument regarding the inadmissibility of the reporting would be correct, in this matter the undersigned ordered development of the record and directed the parties to return to the AME for supplemental reporting. This is not the situation contemplated such as in the *Tyler* opinion where one party failed to bail out a party who did not adequately prepare the case. *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases. 924] from the deposition transcript, it appears that both parties sought to have the AME review additional records; both parties were also dilatant in forwarding these reports to the AME. Here, AME requested that the documents be provided and it was clearly the intent of the parties from the deposition transcript that such would be done. Having ordered the parties to provide the documents to the AME to have the record developed, I believe it proper that the document was allowed into evidence.

SUBSTANTIALITY OF AME MEDICAL REPORTING

Defendant's third contention is that the reporting of AME Dr. Angerman does not constitute substantial medical evidence as AME Angerman's "...history of the onset or orthopedic conditions limited to only the lumbar and thoracic spine is erroneous as they were much more widespread than just the "thoracic and lumbar spine." and makes citations to Applicant's trial testimony wherein he attributes the additional plead body parts to industrial exposure and that pain began after the slip and fall incident in 2011."

In the *Powers* decision, the Court stated that "...we begin by presuming that the agreed medical examiner has been chosen by the parties because of his expertise and neutrality. Therefore his opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive." *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 11]. As the parties selected Dr. Angerman to act as the AME in this matter, unless the reporting is not substantial evidence it should be utilized.

It is well settled that the WCJ as the trier of fact has the power to choose from among conflicting medical reports, those which he deems most appropriate (Jones v. Workers' Comp. Appeals Bd. (1968) 86 Cal.2d 476 [33 Cal.Comp.Cases 221]), and the relevant and considered opinion of one doctor may constitute substantial evidence even though inconsistent with other reports in the record. (Place v. Workers' Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; Smith v. Workers' Comp. Appeals Bd. (1969) 71 Cal.2d 588, 592 [34 Cal.Comp.Cases 424]; Patterson v. Workers' Comp. Appeals Bd. (1975) 53 Cal.App.3d 916, 921 [40 Cal.Comp.Cases 799].)

AME Dr. Angerman found Applicant to have suffered from a continuous trauma claim. (Exhibit 2, page 42). Dr. Angerman noted in his history that applicant's fall of June 1, 2011 he injured his thoracic and lumbar spine. He then notes that Applicant several months later began developing pain in additional body parts that was related to both his slip and fall as well as to his repetitive job duties. The history also notes that applicant continuously worked for the employer and noticed a progressive increase in pain. (Exhibit 2, page 6).

In his report dated February 18, 2020, Dr. Angerman indicated regarding apportionment that "...I stand by my previously expressed orthopedic opinion that the medical evidence does not support that any of the patent's current level of permanent disability/impairment would be attributable to one specific industrial event. While the fall may have resulted in temporary exacerbated subjective complaints, there is no evidence that it impacted the performance of his job activities, caused him to have any time off work, or require any medical treatment. I feel it remains appropriate to state that the fall should be considered part and parcel of the patient's overall continuous trauma injury." (Exhibit 35, page 7).

Applicant's trial testimony was not vastly different from the medical history he provided to AME Angerman. I disagree with defendant's contention that Applicant's trial testimony creates a great discrepancy in the information provided to AME Angerman, and does not affect the substantiality of the evidence.

LABOR CODE SECTION 5412

Defendant's final contention is that the date of injury under Labor Code section 5412 should be no later than April 3, 2015.

The undersigned found Applicant's date of injury for purposes of Labor Code section 5412 to be February 29, 2016, the date when Applicant was examined by Dr. Sirakoff. Labor Code 5412 establishes the date for cumulative trauma injuries as the date "…upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment."

Regarding Applicant's knowledge that his disability was work related, "Knowledge of industrial causation does not occur until an applicant receives a medical opinion expressly stating so, even where the applicant indicated a belief that the disability is due to employment." *Fruehauf Corp. v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 569 [68 Cal.Rptr. 164, 440 P.2d 236].

As in the *Freuhauf* case, Applicant's injury was determined to be a cumulative trauma injury. Applicant's testimony at trial was that he was told sometime in 2014 by Dr. Perez while treating at the Bristol Medical Clinic that his pains were related to his employment. (Minutes of Hearing and Summary of Evidence dated July 15, 2021 page 5, line 21). According to his testimony, in 2013 and 2014 Applicant was being seen for complaints to his left arm as well as other body parts. Review of the records of Bristol Medical Clinic indicate that Applicant's treatment there was largely related to treatment for his diabetes and hypertensive issues. Some reporting does indicate complaints of pain to applicant's left arm which Applicant attributed to a recent injection in that arm. (Exhibit 27, page 72). A frozen shoulder is also diagnosed at this clinic as well and for which Applicant underwent imaging studies. (Exhibit 27, page 79). Reporting generated from Applicant's appointment on November 18, 2015 indicates shoulder pain since the prior year, but also states "no injury" as causation on the pain. (Exhibit 27, page 78). None of the documents indicate that any of Applicant's complaints are due to industrial causation. From the submitted record it appears that the first instance Applicant was apprised that he had suffered a continuous trauma injury was when examined by Dr. Sirakoff on February 29, 2016. (Exhibit 27, page 11).

Furthermore, Applicant continued in his employment until his layoff in February of 2016. (Minutes of Hearing and Summary of Evidence dated February 10, 2021, page 9, line 3). The first indication of any disability is when Dr. Sirakoff declared Applicant temporarily totally disabled on February 29, 2016. (Exhibit 27, page 11).

Based on the foregoing, the nexus where Applicant first suffered disability and obtained knowledge that he had suffered a cumulative trauma injury would be February 29 2016 for purposes of Labor Code section 5412.

RECOMMENDATION

It is respectfully recommended that Defendant's Petition for Reconsideration be denied.

DATE: September 25, 2023

Jeremy Clifft
WORKERS' COMPENSATION JUDGE

OPINION AND DECISION

Applicant was employed by defendant A-Z manufacturing during the period January 1, 1993 through February 18, 2016 as a machine operator and claims he sustained injury as a result of his employment to his head, neck, back, upper, extremities, shoulders, wrists, arms, elbows, knees, ankles, feet, hands, fingers, respiratory system, skin, suffers diabetes, internal issues, hypertension, a sleep disorder and psychological issues. Applicant's employment ceased at the time when he was laid-off by the employer.

Arch Insurance provided insurance for the employer from September 1, 2015 through September 1, 2016 with Sentinel insurance providing coverage from September 1, 2012 through September 1, 2015.

OBJECTION TO EXHIBITS / MOTION TO STRIKE AME

Applicant's counsel made objection to defense Exhibits A, and C through I, based on an alleged lack of service of the documents. Defense counsel was ordered to file with the Court a proof of service for the documents at the trial date on February 10, 2021, before the subsequent hearing. (MOH/SOE dated February 10, 2021 page 8, line 10). Review of the record indicates that no proof of service was filed with the Court.

Exhibit A is the denial letter addressed to Applicant dated April 15, 2016, with the previous delay letter dated February 31, 2018, offered as Exhibit G. The parties were clearly apprised that the claim was denied as the parties proceeded through the case as though it were denied and stipulated to such at trial. As such, Applicant cannot claim to be taken "off guard" by the contents of these documents and the Court will admit Exhibits A and G into evidence.

Exhibit C is a request for medical releases addressed to Applicant dated March 31, 2016. The document is addressed to Applicant at the same address listed for Applicant in the Application for Adjudication. In accordance with Evidence Code § 641 that states that "A letter correctly addressed and properly mailed is presumed to have been received in the ordinary course of mail", the Court will allow Exhibit C into evidence.

Exhibit D is defendant's Personnel file and handbook. Attached to the front of this exhibit is a Subpoena Duces Tecum Cover sheet from Republic Document Management indicating that the documents were provided to Applicant's counsel. Furthermore, the subpoena was generated from a request from Applicant's Counsel. The objection to this exhibit is without merit and Exhibit D is allowed into evidence.

Exhibit I is a notice of representation from prior defense counsel that indicates it was also served on all parties and is allowed into evidence.

Exhibits E, F, and H, the Exhibits for the records of AltaMed, Brookhurst, and Defendant's MPN notice, were not filed by defendant; furthermore, they were not identified as filed on Defendant's exhibit list at the time of trial. (EAMS Doc ID 37049561). Having not been filed by defendant, the Court will Strike Exhibits E, F and H.

Defendant objected to Applicant's Exhibits 34 through 37 as not having been included on the Pre-Trial Conference statement as well as being the reporting of Dr. Angerman also being the subject of Defendant's Motion to strike the AME.

The undersigned initially agreed with defendant's Petition in the initial Findings and Order dated October 18, 2021 that the striking of AME Angerman's reporting was appropriate due to Applicant's counsel unilaterally providing the vocational evaluation report of Laura Wilson and ordered the parties to meet and confer regarding selection of a new AME due to Dr. Angerman's death in 2020. Applicant filed a Petition for Reconsideration of this decision and upon further review the undersigned filed a Report and Recommendation on Petition for Reconsideration, stating:

> "After re-review of the Court's file upon receipt of applicant's Petition for Reconsideration, the undersigned consulted the deposition transcript that was filed in the case as Exhibit 37. Upon review, the undersigned notes that Dr. Angerman on page 13 of the transcript was questioned about review of pending vocational rehabilitation reporting and indicated such would be important to review. (Exhibit 37, page 14, line 5). No objection to that reporting was voiced at that time by defendant. More importantly, from the transcript it appears that Dr. Angerman highlighted the importance of reviewing any vocational rehabilitation report. As such, it may be a mistake on behalf of the undersigned to have stricken the reporting of Dr. Angerman in light of the fact that he apparently wished to review the document that applicant's counsel indicated would be forthcoming."

The undersigned recommended that Reconsideration be granted and the case returned to the trial level for further adjudication.

Dr. Angerman was apprised of the fact that Applicant's counsel was pending receipt of the vocational evaluation report and went as far as to request that he would like to be provided the report in question as he believed it should be reviewed. Being that Dr. Angerman had requested that he be provided with the report, the undersigned does not find that Applicant's counsel providing it to Dr. Angerman warrants replacement of the AME. As such, the Court will deny Defendant's Petition to Strike the reporting of AME Angerman.

As to the reports not having been listed on the pre-trial conference statement, due to the fact that the reporting is of an Agreed Medical Examiner selected by the parties and that defense counsel was served with the reporting and present at the depositions, the Court will allow Exhibits 34-38 into evidence.

As to Exhibit 39 that is the supplemental report of Dr. Laura Wilson, this document was unilaterally procured by Applicant's counsel after the matter was set for trial and not listed on the Pre-Trial Conference statement. The court will strike Exhibit 39 from the record.

In regards to Exhibits 13 and 33, these Exhibits were not filed with the Court by Applicant's counsel and therefore are stricken from the record.

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT / PARTS OF BODY INJURED

Applicant testified that he was employed by defendant since sometime in September of 1993. His job duties involved remained the same throughout his period of employment. According to his testimony, he was employed as a machine operator working with a machine that would polish and clean the smooth edges of parts used in the fabrication of beds. Applicant would place the parts in a bucket which he used to then dump into the machine and add water, rocks, and soap; the parts would then be placed in another machine for drying. (MOH/SOE dated February 10, 2021 page 9, line 7). After drying the parts Applicant would place them in barrels on a pallet, move the full pallet with a pallet jack, and then place a new pallet. (MOH/SOE dated July 15, 2021 page 2, line 23). Applicant estimates that the buckets he used weighed approximately 40-50 pounds and he would lift these 120-150 times a day.

Applicant indicates that he first began noticing pain in his low back, elbows, wrists, knees, legs, ankles, and feet in 2014. According to Applicant, he brought this to the attention of his employer on multiple occasions, but nothing was done. At the time when Applicant was laid off in 2016, he testified that due to his pain and complaints of injury his production had slowed down. (MOH/SOE dated July 15, 2021 page 5, line 15).

Dr. Angerman who examined applicant as an AME diagnosed Applicant as having sustained injury to his cervical and lumbar spine, noting complaints of sharp pain and persistent aching pain. MRI films indicated multiple disc bulges, electrodiagnostic studies consistent with bilateral radiculopathy, and loss of range of motion and tenderness upon examination.

Injury was also found to Applicant's bilateral shoulders and wrists. Applicant's history indicates complaints of sharp pains with repetitive use of his arm that radiated to his fingers in addition to experiencing numbness and weakness. MRIs revealed a small tear in Applicant's left shoulder with the right shoulder having mild tendinosis and osteoarthritis. The left shoulder was also found to have a slight decrease in range of motion. Injury to elbows was found to be a minimal sprain based only upon complaints of slight pain with minimal tenderness on examination.

Applicant's reported slight knee pain bilateral knees and ankles. Diagnostic testing revealed knee joint effusion, a possible cyst, and internal degeneration to Applicant's knees. On examination he was found to have decreased range of motion to his ankles and spurring shown on X-Rays.

AME Dr. Angerman's reporting determined that absent any non-industrial injury, Applicant's complaints to his back, bilateral shoulders, elbows, wrists and hands, knees, and ankles and feet are industrial in nature based upon his review of the medical record and examination of Applicant. (Exhibit 2, page 33).

Applicant was also examined for dental issues by Dr. Shames. Applicant's symptoms included headaches, facial pain as well as difficulty in chewing and upon examination was found to have joint inflammation and evidence of bruxism. Dr. Shames identified industrial impairments as to mastication as well as neuropathic facial pain as a result of his examination.

Applicant was observed at trial and found to be a credible witness. Based on Applicant's testimony and the opinions of AME Dr. Angerman, and Dr. Shames, the Court finds Applicant sustained injury arising out of and in the course of his employment to his cervical, thoracic, and lumbar spine, elbows, bilateral shoulders, bilateral wrists, and bilateral ankles. No injury is found to Applicant's respiratory system, skin, hypertension, sleep disorder, industrially related diabetes, or psyche.

EARNINGS

Applicant's wages were alleged by defendant at trial to be $425.7 per week with Applicant's counsel alleging earnings of $468.43. Upon return from reconsideration the parties were ordered to provide evidence of Applicant's earnings for which a wage statement was provided to the Court. (Exhibit 40).

Based upon review of the wage statement and in accordance with Labor Code section 4453(c), applicant's wages are found to be 440.00 per week.

OCCUPATIONAL GROUP NUMBER

Based on Applicant's testimony regarding his job duties as discussed above, Applicant's occupational group number is found to be 330, the group number assigned to the position of a polishing machine operator.

APPORTIONMENT

AME Dr. Angerman reports that Applicant denied any non-industrial injuries and reviewed no documentation contrary to Applicant's assertion. Dr. Angerman finds no apportionment to non-industrial causation. No apportionment is also found by Dr. Shames.

Based upon the medical reporting, the Court finds Applicant is entitled to an unapportioned award of permanent disability.

MAXIMUM MEDICAL IMPROVEMENT

AME Dr. Angerman's finds that Applicant reached maximum medical improvement on October 3, 2016, the same date Dr. Sirakoff determined Applicant to be permanent and stationary. In reliance on Dr. Angerman's findings, the Court finds Applicant reached maximum medical improvement on October 3, 2016.

TEMPORARY DISABILITY

Applicant's PTP Dr. Sirakoff initially found Applicant TTD on February 29, 2016, when he first examined him (Exhibit 22, page 10) through the date where Applicant was found to have reached maximum medical improvement on October 3, 2016. (Exhibit 2, page 21).

AME Dr. Angerman indicated that "It is felt that the described periods of temporary partial disability…the patient received up to the time his condition reached a permanent and stationary

status, were reasonable and warranted on an industrial basis." (Exhibit 2, page 34) (Exhibit 34, page 7).

Based on Dr. Angerman's agreement with the period of temporary disability provided Dr. Sirakoff, the Court finds Applicant is entitled to temporarily disability from the period February 29, 2016 to October 3, 2016 at the rate of $293.33**.**

PERMANENT DISABILITY

Based upon the report of Dr. Angerman, Applicant suffered permanent disability to his cervical and lumbar spine, bilateral shoulders, bilateral wrists, and bilateral ankles. No impairment was found to Applicant's thoracic spine and elbows. Dr. Shames finds Applicant to have suffered permanent disability in regards to Applicant's dental related issues. Applicant's reporting produced a permanent disability rating of 59% based on the impairments assigned by the Doctors.

Additionally, Applicant's counsel submitted a vocational evaluation report from Laura Wilson who examined Applicant as well as the medical reporting or Dr. Angerman. Mrs. Wilson's reporting finds that based upon Applicant's industrial impairments resulting limitations, medication usage, and lack of transferable skills, Applicant was found to be unable to sustain employment and is unable to complete in the open labor market. (Exhibit A, page 39).

Dr. Angerman reviewed the reporting or Mrs. Wilson and commented on her findings in his report of April 29, 2020, stating "At this time, I will defer to the vocational evaluation report described above pertaining to the patient's ability to compete in the open labor market as Mrs. Wilson was able to combine the patient's orthopaedic and non-orthopaedic disability/impairments, whereas I am limited to opinion on the orthopaedic aspects of the patient's case. Therefore, I concur with Ms. Wilson's assessment of the patient's overall condition, including orthopaedic and non-orthopaedic disability/impairment, and it is now felt that the patient would be unable to compete in the open labor market." (Exhibit 34, page 9).

Based upon the opinion of AME Dr. Angerman and the vocational evaluation reporting of Laura Wilson, it is found that Applicant is totally permanently disabled according to Labor Code section 4662. Per the attached DEU commutation, Applicant is entitled to an Award of permanent total disability at the rate of $293.33 beginning October 24, 2016.

FUTURE MEDICAL TREATMENT

Dr. Angerman's reporting indicates that while Applicant is currently not a surgical candidate surgical intervention in the future was possible should Applicant's condition worsen and diagnostic reporting indicates the need for such. Dr. Angerman recommends applicant have access to analgesics and anti-inflammatory medication as needed as well as physical therapy for acute exacerbations. Possible re-evaluation by an orthopedist is also contemplated.

Dr. Schames indicates Applicant will require further periodontal treatments due to the industrially aggravated periodontal disease.

Based on the reporting of Dr. Angerman and Dr. Schames, the Court finds that Applicant will require a provision of future medical treatment to cure or relieve from the effects of the injury herein.

DATE OF INJURY

Labor Code 5412 governs the date of injury for cases involving cumulative trauma injuries. In the present matter, the first evidence that indicates Applicant was made aware that his injury was of a cumulative trauma nature was when he was examined by Dr. Sirakoff on February 29, 2016. The Court finds for purposes of Labor Code 5412, Applicant's date of injury is February 29, 2016.

LABOR CODE SECTION 3600(a)(10)

Defendant raised the post-termination defense of Labor Code section 3600(a)(10). Applicant's Application for Adjudication of claim was filed on February 24, 2016 after Applicant's date of termination on February 18, 2016.

Applicant testified at trial that he began noticing symptoms for his claimed injury beginning from a slip and fall which occurred in 2011. According to Applicant, he reported this to his supervisor Mr. Onapa but was never offered any medical treatment. Applicant also testified that in addition to Mr. Onapa he also discussed his issues with the son and wife of the company's owner but again did not receive any treatment. Medical records of North Bristol Medical Center reveal that Applicant treated for prior complaints of left arm/left shoulder pain. Applicant underwent diagnostic testing that resulted in a diagnosis of moderate tendinosis to Applicant's left shoulder. (Exhibit 27, pages 63-70, 134).

Labor Code 3600(a)(10) acts as a bar for a claim of compensation for physical injuries filed after the employee received a notice of termination or layoff. This defense is subject to several exceptions contained in the statute. In the present matter, the evidence indicates that Applicant began having left shoulder complaints sometime in 2014 at which time he consulted a doctor. He also offered unrebutted testimony that he reported having pain to his manager Mr. Onapa to which he received no response.

Based on Applicant's testimony and the submitted record, the Court finds that while Applicant's claim was filed after his termination from the company, the post-termination defense is unavailable to defendant as the exceptions of Labor Code sections 3600(a)(10)(A)(B), and (D) are found to apply.

ATTORNEY FEES

Attorney fees in the amount of 15% are found to be reasonable and are awarded in the amount of $69,167.33. These fees shall be commuted from the side of Applicant's Award in accordance with the attached DEU commutation.

A 15% fee from Applicant's award of temporary disability benefits is also awarded to Applicant's counsel, to be adjusted by the parties.

PRESUMED COMPENSABILITY

Applicant's counsel raised the issue of presumed compensability of Applicant's claim under Labor Code section 5402(b)(1). Exhibit A is the denial letter addressed to Applicant dated April 15, 2016, with a delay letter having been issued prior to that. The Application for Adjudication in this matter appears to be the first indication to the insurer of Applicant's claim and is dated February 24, 2016 and includes a proof of service showing service on the employer. Defendant timely denied Applicant's claim prior to the 90 days allowed under Labor Code 5402 and the claim is not found to be presumed compensable.

SELF-PROCURRED MEDICIAL TREATMENT/MILEAGE

Applicant alleges defendant is liable for self-procured medical treatment and submitted as an Exhibit mileage medical expenses totaling 661.8 miles and parking reimbursement to medical appointments to for Dr. Sirakoff, Dr. Pietruska. Review of the mileage log indicates that the only non-reimbursable item is for a WCAB appearance on August 17, 2017. No testimony was offered as to any other out-of-pocket medical expenses.

The Court finds Applicant is entitled to mileage and parking reimbursement in the amount of $382.06.

LABOR CODE SECTION 4061.5 AND REGULATION 9785

Defendant raised the issues of the failure to incorporate by the Primary Treating Physician the reporting of other examining doctors. As the Court has found on the reporting of AME Dr. Angerman, the Court finds that the issue is moot.

PENALTIES AND SANCTIONS

Applicant's counsel filed a Petition for Penalties and raised the issue of Costs and Sanctions against defense counsel. Having reviewed the Petition, the Court does not find that a penalty is indicated as defendant maintained their denial of claim upon their post-termination defense. Furthermore, no sanctions are indicted by the conduct of defendant. Applicant's petition for penalties is denied.

DATE: August 10, 2023

Jeremy Clifft
WORKERS' COMPENSATION JUDGE