

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

CARMEN LANDIN-TAYLOR, *Applicant*

vs.

**MAGIC MOUNTAIN LLC. dba SIX FLAGS MAGIC MOUNTAIN and
PROPERTY AND CASUALTY INSURANCE COMPANY OF
HARTFORD, administered by BROADSPIRE, *Defendants***

Adjudication Number: ADJ11614069

Van Nuys District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 12, 2023, wherein the WCJ found in pertinent part that on January 15, 2017, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her shoulders/scapula and clavicle, right knee/patella, and right ankle/malleolus; that the injury caused temporary disability through the period ending September 1, 2021; that the injury caused 45% permanent disability; and that the lack of right knee apportionment as explained by primary treating physician (PTP) Philip H. Conwisar, M.D., at his October 20, 2022 deposition was legally/medically appropriate.

Defendant contends that applicant sustained injury to her left shoulder, and not to both shoulders; that applicant worked modified duties during periods of temporary partial disability, and she received temporary total disability payments in excess of 104 weeks, so there is no basis for awarding additional temporary disability indemnity; that applicant did not sustain additional upper extremity impairment due to post-surgical loss of strength; that the rating of applicant's right knee disability should have included 50% apportionment to non-industrial factors; and that applicant's counsel's questioning of Dr. Conwisar, at his October 20, 2022 deposition, regarding applicant's right knee disability and apportionment was a violation of defendant's due process.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be granted for the limited purpose of amending the Findings to find injury to applicant's left shoulder, not her bi-lateral shoulders; and that it otherwise be denied. We received an Answer from applicant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, and for the reasons discussed below, we will grant reconsideration, and affirm the F&A except that we will amend the F&A to find that applicant sustained injury AOE/COE to her left shoulder, right knee, and right ankle (Finding of Fact #1); and that the trial record does not contain substantial evidence regarding apportionment of applicant's right knee permanent disability (Finding of Fact #6).

BACKGROUND

Applicant claimed injury to her left shoulder, right knee, and right ankle, while employed by defendant as a cashier on January 15, 2017. Applicant underwent a course of treatment including diagnostics and physical therapy for her right ankle and left shoulder. (App. Exh. 1, Philip H. Conwisar, M.D., January 22, 2019, p. 2.) On April 10, 2018, she underwent a right total knee arthroplasty (knee replacement surgery). (App. Exh. 1, p. 2.)

Applicant was examined by orthopedic PTP Dr. Conwisar on January 22, 2019. The diagnoses were: "status post right total knee arthroplasty, left shoulder impingement syndrome with high-grade partial rotator cuff tear, [and] right ankle sprain." (App. Exh. 1, p. 8, original in uppercase.) Dr. Conwisar determined that applicant needed further medical treatment and that her condition was not permanent and stationary. (App. Exh. 1, pp. 8 – 9.)

Orthopedic qualified medical examiner (QME) Andrew D. Rah, M.D., evaluated applicant on September 16, 2019. The diagnoses included right knee strain, right ankle strain, and status post right knee replacement. (Def Exh. C, Andrew D. Rah, M.D., September 16, 2019, p. 17.) Regarding applicant's right knee disability, Dr. Rah stated:

As mentioned earlier, I will accept that the industrial injury that occurred on January 15, 2017 is likely to have accelerated the need for the knee replacement surgery. Conversely, absent the industrial injury that occurred on January 15, 2017, given her underlying obesity and underlying arthritis, she would have required the surgical treatment eventually. In my opinion, 40% of the applicant's present impairment has been caused by the industrial injury of January 15, 2017,

and 60% has been caused by other factors including underlying obesity and underlying arthritis.
(Def Exh. C, p. 20.)¹

On September 18, 2020, PTP Dr. Conwisar performed left shoulder surgery and the postoperative diagnoses included left shoulder rotator cuff tear and impingement syndrome. (App. Exh. 14, Philip H. Conwisar, M.D., September 18, 2020, p. 1.) In his September 1, 2021 report Dr. Conwisar stated that applicant “can be considered permanent and stationary. Her condition is at maximal medical improvement, as of today's date.” (App. Exh. 21, Philip H. Conwisar, M.D., September 1, 2021, p. 11.) Addressing the issue of apportionment, the doctor stated:

Regarding the right knee, the patient had treatment prior to the industrial injury of January 15, 2017. She clearly had underlying degenerative osteoarthritis prior to the injury of January 15, 2017. I would apportion 50% of the patient's condition to the subject industrial injury of January 15, 2017, and the remaining 50% of the patient's left knee condition to underlying degenerative joint disease. (App. Exh. 21, p. 12.)

Dr. Conwisar described applicant’s left shoulder permanent disability/impairment as follows:

Using Figures 16-40, 16-43, and 16-46, pages 476 through 479, [Shoulder Motion Impairment] Ms. Landin-Taylor demonstrates 11% upper extremity impairment. ¶ Additionally, the patient underwent a hemi-distal clavicle excision at the time of the arthroscopic rotator cuff repair on September 18, 2020. Using Table 16-27, page 506, there is 10% upper extremity impairment based on the resection arthroplasty. ¶ Using Table 16-35, page 510, [Impairment of the Upper Extremity Due to Strength Deficit From Musculoskeletal Disorders] is also used. She had a very large rotator cuff that was repaired. The repair causes a separate pathoanatomic condition, specifically, the change in the musculotendinous length of the rotator cuff and rotator cuff muscles. In addition, strength testing was not impaired by pain or loss of motion. In my opinion, the patient has approximately 25% strength deficit in abduction, flexion, and external rotation of the left shoulder. This provides 11% upper extremity impairment.
(App. Exh. 21, p. 13.)

¹Having re-evaluated applicant, Dr. Rah did not change his opinion as to the right knee apportionment. (See Def. Exh. F, Andrew D. Rah, M.D., April 12, 2021, pp. 40 - 41.)

The parties proceeded to trial on March 21, 2022. (Minutes of Hearing and Summary of Evidence (MOH/SOE) March 21, 2022.) The issues submitted for decision included temporary disability/permanent and stationary date, permanent disability, and apportionment. (MOH/SOE, March 21, 2022, p. 2.) The WCJ issued an Order vacating the submission on May 26, 2022. At the July 25, 2022 status conference, the WCJ noted that the deposition of PTP Dr. Conwisar had been scheduled. Dr. Conwisar's deposition was taken on October 20, 2022, and at the December 7, 2022 status conference the parties stipulated to Dr. Conwisar's deposition transcript being admitted into evidence as Joint Exhibit L. (MOH, December 7, 2022.) The parties were unable to reach an agreement on apportionment of applicant's permanent disability and matter was re-submitted for decision as of November 2, 2023. (MOH, November 2, 2023.)

DISCUSSION

We first note that in the Report, the WCJ stated, "Regarding the inclusion of the right shoulder in the Findings of Fact was indeed error, ... and it should be corrected to just the left shoulder." (Report, p. 3.) Therefore, we will amend Finding of Fact #1 to clarify that applicant sustained injury to her left shoulder, not her bi-lateral shoulders.

As to defendant's argument that there is no basis for awarding additional temporary disability indemnity; the F&A states that applicant's condition became permanent and stationary as of September 1, 2021, and the injury caused temporary disability ending on that date, "less credit for time worked and subject to the 104-week cap to be adjusted between the parties with jurisdiction retained."² The award of temporary disability indemnity was, "at the rate of \$175.88 per week, subject to periods worked and limited under the 104-week cap, less credit for any sums heretofore paid on account thereof with jurisdiction retained." (F&A, pp. 1 and 2.) Since the amount of temporary disability benefits owed to applicant, if any, was to subsequently be resolved by the parties, the F&A does not include a specified award of additional temporary disability benefits, and in turn, defendant was not "aggrieved" by Finding #3 nor Award section "a." (Lab. Code, § 5903.)

² Finding #4 states that applicant's temporary disability ended "9/21/2021", this is inconsistent with Finding #3 and appears to be a clerical error.

Defendant also argues that applicant did not have any impairment due to “post-surgical loss of strength.” As quoted above, Dr. Conwisar explained that the rotator cuff repair surgery caused “a separate pathoanatomic condition, specifically, the change in the musculotendinous length of the rotator cuff and rotator cuff muscles.” (App. Exh. 21, p. 13.) During his deposition Dr. Conwisar repeatedly explained the basis for his opinion that applicant’s loss of strength after the rotator cuff surgery was not related to the pre-surgical partial rotator cuff tear. (Joint Exh. L, Philip H. Conwisar, M.D., October 20, 2022, pp. 11 – 24, deposition transcript.) For example:

[I]f you're having a partial tear of a tendon, which the rotator cuff is a tendon, a partial tear, the basic length of the tendon is the same. A partial tear is not a disruption of fibers completely. So, the overall length of the musculotendinous unit is the same. Strength in that case, one, should be normal or, two, if it's not normal, would be reduced because of other conditions, such as pain or atrophy or some other reason. So no, a partial tear will not cause a loss of strength in and of itself, because the musculotendinous unit is still intact.
(Joint Exh. L, pp. 19 – 20, deposition transcript.)

It is important to note that a party’s arguments are not evidence. Having reviewed the record, we agree with the WCJ that:

Dr. Conwisar did indicate she [applicant] did have residual pain and stiffness. On the physical exam she had a demonstrated weakness due to the extensive rotator repair and notes at that time there was now atrophy on the left biceps. The applicant at that time still reported occasional residual pain and stiffness. ¶ The undersigned found the reporting of Dr. Conwisar to be a comprehensive and more accurate assessment of the applicant’s disability, in particular [sic] the deposition of Dr. Conwisar dated 10/20/2022.
(Opinion on Decision, p. 3.)

As to the issue of apportionment regarding applicant’s right knee disability; an award, order or decision by the Appeals Board must be supported by substantial evidence such as medical opinion and/or testimony in light of the entire record. (§§ 5903, 5952; *Garza v. Workmen’s Comp. App. Bd.* (1970) 3 Cal.3d 312, 317-319 [33 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635-637 [35 Cal.Comp.Cases 16].) In order to constitute substantial evidence on the issue of apportionment, the physician must explain the nature of the non-industrial factors, how and why those factors were causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board

en banc.) Here, neither the September 16, 2019 report from QME Dr. Rah (Def Exh. C, p. 20), nor the September 1, 2021 report from PTP Dr. Conwisar (App. Exh. 21, p. 12), include an explanation addressing how and why the non-industrial factors were causing right knee permanent disability at the time of the evaluations. Also, neither doctor explained how and why those factors were responsible for the percentages of disability they assigned. Thus, defendant did not meet its burden of proof as to the issue of right knee disability apportionment. (Lab. Code, § 5705; *Lantz v. Workers' Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers' Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204 [60 Cal.Comp. Cases 289].)

Finally, as to whether applicant's counsel's questioning of Dr. Conwisar at his deposition was a violation of defendant's due process rights, obviously, defense counsel participated in the deposition. (Joint Exh. L, pp. 4 – 29.) Having completed his questioning of Dr. Conwisar, applicant's counsel said, "Okay. I have nothing further on my end" to which defense counsel responded, "One moment, please. Doctor, I'll suspend my questions for today." (Joint Exh. L, p. 33.) Clearly, defense counsel had the opportunity to ask additional questions of the doctor, regarding his testimony in response to applicant's counsel's questions, or in the alternative, the deposition could have been continued for further testimony by the doctor. Defense counsel chose not to ask additional questions or to continue the deposition for additional testimony. Additionally, we note that the December 7, 2022 status conference MOH state that the "Parties stipulate to Dr. Conwisar's deposition [transcript] being admitted into evidence as exhibit L [...] Ct will review and issue a rating consistent with any changes in exhibit L" (MOH, December 7, 2022, original in uppercase.) There was no objection to the deposition transcript being admitted into evidence, or to the portion of the transcript containing the questioning by applicant's counsel. Defendant cites no legal authority in support of its assertion that its due process rights have been "violated." (Petition, pp. 8 – 9.) Based thereon, we agree with the WCJ that:

Petitioners alleged denial of due process in permitting applicant's counsel to ask questions at cross examination is not well-placed and would have afforded applicant's attorney the exact same objection. No such restriction was placed on the cross examination of Dr. Conwisar. I found all aspects of Dr. Conwisar's cross-examination very illuminating, especially with regards to the shoulder and knee.

(Report, p. 3.)

Accordingly, we affirm the F&A except that we amend the F&A to find that applicant sustained injury AOE/COE to her left shoulder, right knee, and right ankle (Finding of Fact #1); and that the trial record does not contain substantial evidence regarding apportionment of applicant's right knee permanent disability (Finding of Fact #6).

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on December 12, 2023, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 12, 2023 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. CARMEN LANDIN TAYLOR ... while employed on 01/15/2017 as a CASHIER/SERVER GROUP #214 at Valencia, California, by SIX FLAGS MAGIC MOUNTAIN, whose workers' compensation insurance carrier was PROPERTY & CASUALTY INSURANCE COMPANY OF HARTFORD sustained injury arising out of and occurring in the course of employment to her left SHOULDER - (scapula and clavicle), her right KNEE (Patella) and right ANKLE (malleolus).

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6. The trial record does not contain substantial evidence regarding apportionment of applicant's right knee permanent disability.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 1, 2024

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

**CARMEN LANDIN-TAYLOR
YAZDCHI LAW, P.C.
FLOYD SKEREN MANUKIAN LANGEVIN, LLP**

TLH/mc

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