WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANK DEVILLE, *Applicant*

vs.

EXIDE TECHNOLOGIES; ZURICH AMERICAN INSURANCE GROUP administered by TRISTAR RISK MANAGEMENT, *Defendants*

Adjudication Number: ADJ9932404
Riverside District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration[1] of the "Findings and Award" (F&A) issued on November 22, 2022, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

The WCJ found, in pertinent part, that applicant sustained industrial cumulative injury in the form of sleep while working as a furnace and blaster operator through August 14, 2014. The WCJ further found that applicant did not sustain industrial injury to the nervous system, respiratory system, skin, or internal systems. The WCJ awarded applicant 13% permanent partial disability, but found no period of temporary disability.

Applicant generally contends that the WCJ erred in finding multiple conditions non-industrial because applicant's medical reporting was more substantial than the reporting of the Qualified Medical Evaluators (QME).

We have received an answer from defendant. We received multiple answers filed by applicant to both defendant's Answer and to the WCJ's Report. Applicant did not request permission to file supplemental petitions, and thus we do not accept the supplemental responses and do not consider them. (Cal. Code Regs., tit. 8, § 10964.)

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[1] Applicant filed two petitions for reconsideration. For purposes of this opinion, we treat the petitions as a single petition.

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

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration, we will affirm the November 22, 2022 F&A.

Per the WCJ's Opinion on Decision:

> The case proceeded to trial over several days and adjourned on March 21, 2022. The matter was then submitted on April 15, 2022, after allowance and receipt of post-trial briefs. Applicant submitted his post-trial brief and a supplemental brief on March 25, 2022 and March 29, 2022. Defendant filed its post-trial brief on April 14, 2022. The court reviewed the entire record, exhibits, and the parties' briefs.
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> Submission was vacated on April 25, 2022 to allow for a formal rating by the DEU. The rating was issued and duly served on April 27, 2022. Applicant requested cross-examination of the DEU specialist, and the trial was held and resubmitted on October 13, 2022.
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> **DISCOVERY ISSUES**
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> The parties' joint exhibits 1-3 and 5-9, consisting of the panel qualified medical evaluators' reports and records from San Antonio Community Hospital, were admitted into evidence. (MOH/SOE Trial dated 11/7/2019, p. 6:7-18.)
>
> EDD filed three exhibits labeled as Lien Claimant's Exhibits 1, 2 and 3. (Id., p. 7: 3-7.)
>
> Both parties have objected to the other's respective exhibits which the court took under submission. The court now issues a determination of the parties' exhibits.
>
> Applicant has 157 exhibits identified as Exhibits 1 through 157. Defendant has 25 exhibits identified as Exhibits A through S, with the notation that Exhibit H contains four reports and Exhibit I contains four reports.
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> At the in-person trial held on March 21, 2022, the guardian for applicant precluded him from testifying and had objected to the admission of applicant's deposition transcript dated July 27, 2015 (Exh. K). (MOH/SOE Trial dated 3/21/22, p. 6:1-13.)
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> The court allows and admits all the exhibits *except* for the following because they are not relevant, they do not meet the requirements of Labor Code section 5703, and/or they provided little probative value:

Applicant's Exhibits: 1, 9, 10, 11, 12, 13, 14, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 36, 37, 40, 41, 43, 48, 50, 54, 66, 67, 68, 69, 72, 73, 74, 84, 85, 120, 121, 122, 123, 149, and 156.

STIPULATED FACTS AND ISSUES

The parties stipulated to the following facts which are admitted:

Applicant, Frank Deville, age 48 at the end of the cumulative trauma period, while employed during the period from December 2, 1986 through August 14, 2014, as a Furnace and Blast Operator, at Vernon, California, by Exide Technologies, claims to have sustained injury arising out of and in the course of employment due to heat and chemical exposure resulting in injury to the nervous system, respiratory system, skin and internal system.

At the time of the injury, the employers' workers' compensation carrier was Zurich American Insurance Group administered by Tristar.

At the time of injury, the employee's earnings were $808.00 per week warranting indemnity rates of $538.67 for temporary disability and per the Labor Code for permanent disability.

The employer has furnished no medical treatment. Applicant had received treatment by Nachman Brautbar, M.D., in toxicology / internal medicine, Thomas Curtis, M.D., in psychiatry, and Vera David, Ph.D., for counseling.

The panel qualified medical evaluators are Visant Sanathara, M.D., in psychiatry, Scott Hardy, M.D., in toxicology, and Lawrence Richman, M.D., in neurology.

The applicant's claim of serious and willful and liens other than EDD were deferred. (MOH/SOE Trial 8/21/2019, p. 3:12-14.)

The issues (*Id.*, at pp. 2-3) are:

1) Injury arising out of and in the course of employment with Parts of the body injured;
2) Occupation and group number,
    a. Applicant claiming 360 and 251,
    b. Defendant claiming 330;
3) Temporary disability,
    a. Applicant claiming 8/15/14 through 3/23/2017;
4) Permanent and stationary date,
    a. Applicant claiming 3/24/2017 per Dr. Brautbar,
    b. Defendant claiming 1/18/2016 per Dr. Hardy;
5) Permanent disability;
6) Apportionment;

7) Need for further medical treatment;
8) Liability for self-procured medical treatment;
9) Whether applicant's claim is barred by the post-termination statute of Labor Code section 3600(a)(10);
10) Lien of EDD for benefits provided from May 9, 2010 through July 11, 2010 in the total sum of $5,604.57; and for the period from April 7, 2015 through April 5, 2016 in the total sum of $37,752;
11) Attorney's fees; and,
12) Whether the claim was unreasonable denied.

INJURY ARISING OUT OF AND IN THE COURSE OF EMPLOYMENT and BODY PARTS

The guardian for the applicant precluded applicant from testifying at trial and had objected to the admissibility of applicant's deposition transcript. (MOH/SOE Trial dated 3/21/22, p. 6:1-13.) The court was unable to ascertain the guardian's reasoning for such strategy, but the court did observe applicant's demeanor during the trial proceedings, and he appeared more lucid and coherent than what the applicant's treating doctors' portray.

Based on the medical reports from the panel qualified medical evaluators ("QME"), which are better reasoned and more persuasive, it is found that applicant sustained injury arising out of and occurring in the course of employment during the period from December 2, 1986 through August 14, 2014, limited to sleep.

There is no industrial injury to the applicant's other asserted conditions including the nervous system, respiratory system, circulatory system, skin or other internal system.

Lawrence Richman, M.D., the panel QME in neurology, issued a report dated December 1, 2016. (Joint Exhibit 8.) On pages 45-46, Dr. Richman stated:

> In summary, this is a 50-year-old male who has experienced cognitive decline. Imaging of the brain does show signal changes of the hippocampal structures of the brain which are responsible for memory and is seen with Alzheimer's disease. This would not be considered an industrial disorder. He has not shown clinically significant elevation of lead levels in the blood although they have been in the low toxic range on multiple occasions. Dr. Hardy does not believe the patient has a medical disturbance related to lead exposure.
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> Based on the current information available to me the patient's underlying cognitive disturbance is primarily related to early Alzheimer's disease. He should undergo a SPECT scan of the brain or PET scan of the brain to further document this disorder. I do not

> believe the patient has a lead toxicity disturbance as relates the central nervous system. In my opinion there is 100% apportionment of his cognitive complaints to non-industrial factors with respect to permanent disability. As relates his syncopal spell in my opinion there is 100% apportionment to non-industrial factors. With respect to the patient's headache complaints there is 100% apportionment to non-industrial factors.
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> The patient does have a sleep disturbance related to musculoskeletal pain which to reasonable medical probability is related to continuous trauma. In my opinion the patient qualifies for 6% whole person impairment from Table 13-4. In my opinion there is 100% apportionment of the patient's sleep disturbance to musculoskeletal pain that is industrially related.

Dr. Hardy found no evidence of a disturbance related to lead exposure.

OCCUPATION AND GROUP NUMBER

The parties stipulated applicant was a "Furnace and Blast Operator." (MOH/SOE Trial dated 8/21/2019, p. 2: 4-5.)

Applicant claims the occupational group number 360 and 251; defendant claims 330. Neither side provided a job description despite applicant's long employment with this employer. According to applicant's deposition testimony, applicant was initially hired as a utility person, requiring him to operate the furnace, skim kettles, jackhammer material, sweep and mopping. (Deposition of applicant dated 7/27/15, Exh. K, p. 12:17; 13:13-14). He transferred and worked in the water treatment area, adding chemicals into the water. (*Id.*, p. 14:8-21.) He then worked in refining that required duties of jack-hamming, skim kettles, and adding agents. (*Id.*, pp. 18:20-25 to 19:3.) He also operated the furnace and worked in the smelting department, working with batteries. (*Id.*, pp. 20 and 21:1-5.)

Based on the parties' stipulation, foregoing discussion, and applying the rating schedule's occupation group number of 341 for "Furnace Cleaner" in "any industry," the court finds applicant worked as a Furnace and Blast Operator with the occupational group number 341.

TEMPORARY DISABILITY

Applicant asserts temporary disability benefits from August 15, 2014 through March 23, 2017. Based upon the medical reports of the QMEs, which are better reasoned and more persuasive, it is found applicant is not entitled to temporary disability benefits.

PERMANENT DISABILITY DATE

The court finds applicant reached maximum medical improvement on December 1, 2016 per Lawrence Richman, M.D. (Jt. Exhibit 8.)

PERMANENT DISABILITY

The factors of permanent disability are based on the medical record admitted into evidence, the parties' stipulations, the evidence received, and in accordance with the recommendation of the disability evaluation specialist dated April 27, 2022 (EAMS DOC ID 75451045); it is found that applicant is entitled to a permanent disability award of 13 percent, equivalent to 42.25 weeks of indemnity payable at the rate of $290.00 per week, in the total sum of $12,252.50, payable forthwith, less the holding of reasonable attorney fees of $1,837.87, which may be commuted from the far end of the award.

APPORTIONMENT

There is no apportionment to the compensable condition of sleep based on the medical opinions of Dr. Richman. (Jt. Exh. 8, p. 46.)

NEED FOR FURTHER MEDICAL TREATMENT

Based upon the medical report of Dr. Richman, it is found that applicant is in need of further, limited medical treatment to cure or relieve from the effects of the injury herein.

LIABILITY FOR SELF-PROCURED MEDICAL TREATMENT

Based upon the entire record, it is found that applicant may have incurred self-procured, reasonable and necessary medical treatment as a result thereof in the amounts to be adjusted by the parties. However, no actual evidence was presented. This issue is deferred with jurisdiction reserved.

POST-TERMINATION

Applicant's claim is not barred by Labor Code section 3600, subsection (a)(10). The court finds defendant waived this affirmative defense due to lack of filing an Answer to the application. According to Labor Code section 5505, "Evidence upon matters not pleaded by answer shall be allowed only upon the terms and conditions imposed by the appeals board or referee holding the hearing. Mirroring this statute, Title 8 of the California Code of Regulations, section 10465, provides "Evidence upon matters and affirmative defense not plead by Answer will be allowed only upon such terms and conditions as the Appeals Board or workers' compensation judge may impose in the exercise of sound discretion."

On the basis of enforcing substantial justice under the law and with an applicant who has represents himself with a guardian for the majority of the time, the court denies defendant's affirmative defense due to the lack of filing an answer.

EDD LIEN

EDD filed a lien for benefits provided from May 9, 2010 through July 11, 2010 in the total sum of $5,604.57; and for the period from April 7, 2015 through April 5, 2016 in the total sum of $37,752. The court disallows EDD's lien.

The first period of benefits was related to applicant's appendectomy. (Lien Claimant's Exh. 1.) And there was no evidence to support such treatment was related to this claim.

The second period of benefits were paid due the diagnosis of anxiety. (Lien Claimant's Exhibits 2 and 3.) The family doctor who certified the disability opined the condition was not work related (Lien Claimant's Exh. 3, pp. 7 and 8).

ATTORNEY FEES

Based on Title 8 of the California Code of Regulations § 10844 and the guidelines for awarding an attorney's fee set forth in Policy and Procedure Manual § 1.140, a reasonable attorney's fee is found to be up to 15% of the permanent partial disability award ($1,837.87).

The court finds Brian Freeman from Workers' Compensation Lawyer, Inc., had represented the applicant from April 24, 2015 (date application was filed) to October 31, 2017 (filing of the dismissal of attorney).

The sum of $1,837.87 of the permanent disability shall be withheld by defendant and disbursed upon further order or agreement between applicant and his former attorney.

WHETHER THE CLAIM WAS UNREASONABLY DENIED

Applicant provided no compelling evidence illustrating defendant had unreasonably denied the claim.

Applicant was laid off on August 14, 2014 (Exh. C or J), and the application for adjudication of claim was originally filed subsequently on April 24, 2015 (EAMS DOC ID 14637546). Defendant then issued a denial on July 13, 2015 (Exh. B).

We have reviewed the combined Petitions for Reconsideration filed by applicant. However, they are difficult to decipher both due to a lack of clear arguments, and adequate citation to law and, in many parts, a lack of citation to the record.

Notwithstanding the lack of guidance, we have reviewed the record independently. The most significant claim applicant alleges is chronic lead exposure. However, multiple doctors found that applicant's lead exposure is below that of the ordinary population. (Joint Exhibit 6, Report of Scott Hardy, M.D., April 5, 2016, p. 17; Joint Exhibit 8, Report of QME Lawrence Richman, M.D., December 1, 2016, p. 42.)

The psychological QME found that the causation of applicant's psychological injury was premised upon whether the WCJ found QME Dr. Hardy's opinion more persuasive than the primary treating physician, which the WCJ did. (Joint Exhibit 1, Report of QME Visant Sanathara, M.D., May 15, 2018, p. 10.)

Next, QME Dr. Sanathara calls into question the entirety of applicant's psychological claim noting the following:

> The applicant refuses to fill out the paperwork and wife fills out the paperwork including testing. This is not typical practice and the validity of the test answers are in question whenever this happens. Even if the applicant's wife accurately conveys the answers by the applicant, it is unclear if there was any kind of bias or tone changes conveyed (even inadvertently) that could affect the outcome of the test.

(*Id*. at p. 11.)

Applicant refused to testify at trial, and thus, we are left simply with the paper record by which to judge his claim. That record supports the findings issued by the WCJ.

Accordingly, as our Decision After Reconsideration, we affirm the November 22, 2022 F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on November 22, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,



/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 22, 2026

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

FRANK DEVILLE
PUREMD GROUP
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EDL/mt

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