WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HERIBERTO HINOJOSA, *Applicant*

vs.

KENNETH KIRBY dba KIRBY'S PACIFIC POOLS; CALIFORNIA INSURANCE GUARANTEE ASSOCIATION, for its servicing facility INTERCARE HOLDINGS INSURANCE SERVICES, INC., for TOWER SELECT INSURANCE COMPANY, in liquidation, *Defendants*

Adjudication Number: ADJ6999564
San Jose District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings and Award and Order (FA&O) issued on August 9, 2021, by the workers' compensation administrative law judge (WCJ) who found, in pertinent part, that applicant, while employed as a laborer on August 21, 2009, sustained injury arising out of and arising in the course of employment (AOE/COE) to his left knee, psyche, hypertension, sexual dysfunction and a sleep disorder, resulting in a previously stipulated Award of 53% permanent disability on June 27, 2013, but did not find new and further disability to the low back, right knee, and gastrointestinal disorder.

Applicant contends that the WCJ erred in finding no new and further disability to the lumbar spine and right knee. Applicant emphasizes that, prior to the original stipulated Award, Agreed Medical Evaluator (AME) Jeffrey Holmes, M.D., evaluated the low back and right knee and concluded the symptoms were entirely "non-organic." Accordingly, Dr. Holmes found no industrial causation, identified no permanent impairment, outlined no prophylactic work restrictions, and

[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

indicated no need for further medical care for either body part, thereby establishing a baseline of zero industrial disability.

However, upon re-evaluation following the Petition to Reopen, AME Dr. Holmes revised his prior opinion, concluding that applicant had subsequently developed compensable consequence injuries to both the low back and right knee. Applicant argues that, because these body parts transitioned from a strictly nonindustrial, non-organic status at the time of the original award to recognized compensable consequence injuries, this change constitutes a "new" injury to those parts and a "further" disability beyond what the prior Award compensated. Therefore, for those reasons, applicant contends he met the legal threshold for new and further disability.

We did not receive an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations in applicant's Petition and the contents of the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the WCJ's FA&O and substitute a new decision that applicant sustained new and further disability to his lower back and right knee resulting in 65% permanent disability.

FACTS

I.

Applicant, while employed as a laborer on August 21, 2009, sustained injury AOE/COE to his left knee, psyche, hypertension, sexual dysfunction and a sleep disorder and claims to have sustained injury AOE/COE to his low back, right knee and gastrointestinal system. (Minutes of Hearing (MOH), 04/27/2021, 2:3-7.)

The parties had previously resolved the case-in-chief by Stipulations with Request for Award for 53% permanent disability on June 27, 2013. (MOH, 04/27/2021, 2:12-13.) Applicant timely filed a Petition to Reopen for New and Further Disability on March 24, 2014. (MOH, 04/27/2021, 2:13-14.)

At the trial dated April 27, 2021, the parties requested, among other issues, the WCJ adjudicate the issues of applicant's new and further disability and need for further medical treatment with respect to applicant's low back, right knee and gastrointestinal system. (MOH, 04/27/2021, 2:18-20.)

The parties jointly submitted into evidence the AME reports and deposition of Dr. Holmes (Joint Exs. 1-21). Applicant submitted into evidence treating physician reports from John E. Massey, M.D. (App. Exs. 21-31) and Terence J. Delaney, M.D. (App. Exs. 33-39.)

At the trial on May 26, 2021, applicant testified, in relevant part, that he initially injured his left knee on August 21, 2009, and subsequently developed pain in his low back and right knee. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 05/26/2021, 2:33-35.) He first noticed the symptoms in his low back and right knee approximately one to two years after the initial injury, noting that the symptoms were occasional rather than daily occurrences. (MOH/SOE, 05/26/2021, 2:35-38.) He stated that his low back and right knee conditions worsened gradually over time. (MOH/SOE, 05/26/2021, 2:45.) Following two surgeries to his left knee in 2014, applicant used crutches, which required him to place additional weight on his right side. (MOH/SOE, 05/26/2021, 3:2-4.) Using the crutches exacerbated his low back and right knee conditions and caused him to experience physical limitations. (MOH/SOE, 05/26/2021, 3:4-6.) After his second left knee surgery, his low back and right knee continued to deteriorate, a progression he attributes to walking while leaning to his right side. (MOH/SOE, 05/26/2021, 3:8-11.) Due to the pain in his low back and right knee, applicant began using a walker, prescribed by Dr. Massey, two to three years ago and currently relies on both a walker and a cane. (MOH/SOE, 05/26/2021, 3:22-25, 4:9.) A physician recommended right knee surgery approximately two years ago to address his severe pain, and he wishes to undergo the procedure. (MOH/SOE, 05/26/2021, 3:13-16.) During cross-examination, he acknowledged that it is possible he experienced symptoms in his low back and right knee by the time of his 2013 settlement, although he expressed uncertainty. (MOH/SOE, 05/26/2021, 3:40-42.) He also clarified that he did not inform AME Dr. Holmes of right knee symptoms and only reported low back pain to him after the settlement. (MOH/SOE, 05/26/2021, 4:4-7.)

On December 29, 2022, the WCJ issued her FA&O finding that applicant did not establish new and further disability as to the low back, right knee, and gastrointestinal disorder.

It is from this FA&O that applicant seeks reconsideration.

II.

Following the stipulated Award dated June 27, 2013, on September 19, 2013, during Dr. Massey's follow-up for increased left lower extremity symptoms, applicant reported numbness and tingling extending from the posterior thigh and leg to the foot and stated that the left knee pain was causing back pain. (App. Ex. 29, p. 1.) He has tolerated walking on a cushioned basketball court

but has reduced exercise because of the knee symptoms and uses a cane for ambulation. (*Id.* at p. 2.) Dr. Massey's examination recorded a slowed, antalgic gait and cane use. (*Id.* at p. 3.) Applicant continued to complain of back pain in Dr. Massey's November 27, 2013 report. (App. Ex. 28, p. 1.)

As described in Dr. Massey's December 27, 2013 report, Dr. Delaney performed a right knee consultation on September 26, 2013 and recommended an MRI. Applicant continued to have difficulty walking and exercising and reported increased right knee pain because he depended on the right lower extremity more than the left because of left knee pain. He denied popping or cracking. (App. Ex. 27, p. 2.) The examination documented an antalgic gait favoring the right side with cane use. (*Id.* at p. 3.)

In his March 19, 2014 report, Dr. Massey noted that, following applicant's January 31, 2014 left knee arthroscopy and subsequent absence from work, applicant experienced constant pain, increased left lower extremity nerve pain, required crutches for ambulation, had limited activities of daily living, and was scheduled for physical therapy by Dr. Delaney. (App. Ex. 24, p. 2.)

In Dr. Delaney's April 24, 2014 report, three months after the January 31, 2014 left knee arthroscopic surgery, he documented persistent left knee pain despite protective weight bearing and range of motion (ROM) activities. He identified pain with hyperflexion and compression over the anterior aspect of the medial femoral condyle and diagnosed an osteochondral defect of the medial femoral condyle. He reported no significant relief from the arthroscopic surgery, stated that the patient remained unable to work, and recommended physical therapy and approval for an Osteochondral Autograft Transfer System (OATS) procedure. (App. Ex. 39, p. 1.)

III.

AME Dr. Holmes first documented compensable consequence right knee pain due to overuse in his July 6, 2010 re-evaluation where he found the left knee symptoms predominant, described the right knee symptoms as mild and without objective findings, and stated that the right knee symptoms resulted from overuse. (Joint Ex. 18, p. 9.) Applicant stated he favored the right knee because of the left knee problem when stepping up onto a curb. (*Id.* at p. 5.) AME Dr. Holmes apportioned 100% of the then existing permanent disability to the August 21, 2009 industrial injury and stated that no subsequent injury caused disability. (*Id.* at p. 11.)

In AME Dr. Holmes' reports dated December 11, 2012, June 9, 2014, August 27, 2015, and February 7, 2018, all based on his February 6, 2012 examination in his February 29, 2012 report

(Joint Ex. 12), applicant reported no ongoing lumbar complaints. AME Dr. Holmes therefore remained unconvinced that applicant had sustained a lumbar spine injury, characterized the intermittent lumbar and right knee complaints as "non-organic," and found no need for treatment of the low back or right knee in connection with the left knee chronic regional pain syndrome (CRPS), a condition AME Dr. Holmes was not convinced applicant had. (Joint Ex. 11, p. 2; Joint Ex. 9, p. 10; Joint Ex. 7, p. 10; Joint Ex. 5, p. 10.)

The records summarized in AME Dr. Holmes' July 25, 2014 supplemental report include a March 7, 2013 report from Dr. Massey, stating that applicant was then reporting "significant pain in the low back and right knee related to his altered gait mechanics." In addition, in Dr. Massey's June 27, 2013 visit addressed left lower extremity CRPS, lumbar disc disease, right knee internal derangement, and chronic pain syndrome and recorded an increase in low back and lower extremity pain with increased activity, particularly walking on hard or concrete surfaces. (Joint Ex. 8, p. 9.)

In AME Dr Holmes' August 27, 2015 report, applicant underwent an OATS procedure by Dr. Delaney on August 29, 2014. Applicant reported that it helped "just a little bit" but did not help him return to work or "get off" the cane he walked with. (Joint Ex. 7, p. 13.)

In his February 7, 2018 report, AME Dr. Holmes noted that applicant reported developing right knee pain and lumbar spine pain in 2015. He attributed the lumbar spine pain to "the way that he was walking" and the right knee pain to compensating for the dysfunctional left knee. (Joint Ex. 5, p. 16.) AME Dr. Holmes recorded that applicant had persistent lumbar spine and bilateral knee pain during his examination. (*Id.* at p. 17.)

AME Dr. Holmes described substantial subjective complaints in both areas. Applicant reported right knee pain on 30 days of each month, rated at 8-9/10, with swelling, limping, stiffness, aching, and the stated need for a cane. He reported lumbar pain on 30 days of each month, rated at 8/10, with radiation to the left lower extremity and up the spine, stiffness, poor motion, and increased pain with motion, lifting, bending, and stooping. He denied numbness and tingling in the lower extremities and denied bowel or bladder complaints. (*Ibid.*) He also denied any prior problems involving the lumbar spine or right knee. (*Id.* at p. 18.)

AME Dr. Holmes' physical examination documented applicant using a cane with his right hand and squatted at 20% of normal, with low back pain during the maneuver. (*Id.* at p. 19.) Applicant demonstrated inconsistent left and right paraspinal tenderness at the lumbosacral junction. (*Id.* at p. 22.) Lumbar ROM measured 42° of flexion (60° normal), 18° of extension (25° normal), and lateral bending of 14° on the left and 12° on the right (25° normal). Straight leg raising was

negative bilaterally. (*Id.* at p. 23.) AME Dr. Holmes found non-anatomic sensory abnormalities but normal bilateral quadriceps, anterior tibial, extensor hallucis longus, peroneal, and gastrocnemius strength. (*Id.* at p. 24.)

During his evaluation, AME Dr. Holmes observed right knee flexion of 0 to 115° and noted joint tenderness, particularly along the medial joint line. (*Id.* at pp. 20-21.) Objective stability testing of the ligaments and menisci was normal, as was applicant's overall muscle strength. (*Id.* at p. 21.) Additionally, AME Dr. Holmes documented that knee radiographs demonstrated varus arthrosis. (*Id.* at p. 17.)

AME Dr. Holmes diagnosed lumbar spine pain without radiculopathy and right knee pain. He found applicant permanent and stationary for the lumbar spine and right lower extremity as of February 5, 2018. (*Id.* at p. 29.) For the lumbar spine, AME Dr. Holmes identified ROM and paraspinal tenderness as objective factors and frequent slight complaints increasing to intermittent slight moderate complaints as subjective factors. For the right knee, he identified joint-line tenderness as the objective factor and the same general frequency and severity pattern of subjective complaints. (*Id.* at p. 30.)

For the lumbar spine, AME Dr. Holmes recommended preclusion from heavy lifting, repeated bending and stooping, with a 15-pound maximum lifting limit on a repetitive basis. For the right knee, he recommended preclusion from kneeling, crouching, crawling, prolonged standing, and repetitive stairs and ladders. (*Ibid.*)

AME Dr. Holmes assigned 8% whole person impairment (WPI) for the lumbar spine due to lacking signs of radiculopathy. (AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), Table 15-3, DRE Category II, p. 384.) (*Id.* at p. 31.)

For the right knee, he assigned 9% WPI based on radiographic varus arthritis and loss of medial joint space, described the remaining cartilage interval as approximately 1.5 mm. (AMA Guides, Table 17-3, p. 544.) (*Ibid*.)

AME Dr. Holmes found ongoing future medical for the lumbar spine and right lower extremity to include prescription anti-inflammatory medication, prescription analgesic medication, bracing, and physical therapy. He also identified injections and other pain-management measures, including acupuncture and a TENS unit, as potentially beneficial. (*Ibid.*)

In the addendum to AME Dr. Holmes' February 7, 2018 report, he listed a March 23, 2016 treatment note by Dr. Massey documenting increased right knee inflammatory pain and requested knee radiographs to assess the integrity of the joint, with possible injection therapy and orthopedic

referral contemplated. (*Id.* at p. 34.) In his encounter notes dated November 1, 2016, he diagnosed low back strain and requested a lumbar spine X-ray. (*Id.* at pp. 35-36.) In his encounter notes dated December 13, 2016 by Dr. Massey, he again diagnosed low back strain and requested flexion and extension lumbar X-ray films. (*Id.* at p. 36.) In encounter notes dated January 17, 2017 by Kathleen Ann Jordan, FNP, she documented increased pain with forward flexion. In encounter notes by Jessica Goza, NP dated March 29, 2017, she diagnosed low back pain and, on April 14, 2017, referenced a lumbar X-ray showing minimal posterolisthesis of L5-S1. (*Id.* at pp. 36-37.) Her encounter notes dated May 12, 2017 documented treatment included aquatic physical therapy and acupuncture referrals for the low back. In encounter notes dated August 29, 2017, Dr. Massey described a chronic condition involving the left knee and low back that had not resolved and specifically documented "compensatory pain" in the right knee. (*Id.* at p. 37.)

For the lumbar spine and right knee, AME Dr. Holmes attributed causation to the August 21, 2009 injury based on compensation for an abnormal gait and pain in the left lower extremity. He explained that the lumbar spine overcompensated and became symptomatic, as did the right lower extremity. He attributed 100% of the lumbar spine impairment to compensable consequence of that injury. He apportioned 75% of the right knee impairment to underlying varus osteoarthritis and 25% to compensable consequence of the August 21, 2009 injury. (*Id.* at p. 32.)

AME Dr. Holmes' January 10, 2020 report, involving an examination on December 11, 2019, noted that Dr. Delaney had evaluated applicant on May 8, 2018, identified an abnormal right knee MRI showing a cyst at the anterior aspect of the medial meniscus, suspected a meniscal tear as the source of the ongoing symptoms, and obtained authorization for right knee surgery, which had not yet occurred. (App. Ex. 3, pp. 2-3.) Dr. Massey continued to treat the lumbar spine with medication, topical treatment, ThermaCare HeatWraps, aquatic therapy, and acupuncture. (*Id.* at p. 3.)

Applicant rated his daily knee pain at 7-9/10, reduced walking tolerance, worsened symptoms with sitting, walking, stairs, lifting and carrying, and lumbar pain present 30 days per month rated 10/10. (*Ibid.*) AME Dr. Holmes documented decreased lumbar motion, right knee subpatellar crepitus, and equivocal MRI findings for a meniscal tear, while also noting non-anatomic sensory findings and histrionic or cogwheel movements during portions of the examination. (*Id.* at pp. 5-7.) He again attributed the impairment to the August 21, 2009 industrial injury and stated that 100% of the impairment was attributable to that injury. (*Id.* at pp. 7-8.)

In his deposition on July 30, 2020, AME Dr. Holmes testified that applicant, on December 11, 2019, applicant reported ongoing symptoms from the original injury without any new injurious

exposure. (Joint Ex. 21, p. 11:16-24.) AME Dr. Holmes confirmed that applicant's lumbar spine and right knee conditions represented a compensable consequence of the gait derangement caused by the original left knee injury. (*Id.* at pp. 17:23-25 to 18:1-3.) AME Dr. Holmes stated that this compensable consequence solidified over the course of multiple examinations spanning from the beginning of the case to the December 11, 2019 evaluation. (*Id.* at p. 22:5-14.) He agreed with the premise that in 2012, applicant's low back and right knee did not require treatment or cause impairment, acknowledging that the conditions had "gotten worse" by 2019. (*Id.* at p. 24:14-24.) AME Dr. Holmes found both impairment and a need for treatment for the low back and right knee, confirming it is medically probable that these conditions worsened as a compensable consequence of the original left lower extremity injury. (*Id.* at p. 18:11-20.)

Regarding objective findings, AME Dr. Holmes referenced a March 28, 2018 lumbar spine MRI scan read by Michael Yuz, M.D., that revealed a disc protrusion with neuroforaminal stenosis at L4-L5. (*Id.* at pp. 14:22-25 to 15:1-2, 15:14-16.) AME Dr. Holmes stated this disc protrusion, presenting without significant spondylosis, suggests an acute incident rather than a long-term degenerative process, making it most likely related to the industrial injury rather than a natural progression of aging. (*Id.* at pp. 15:3-10, 16:4-10.) Furthermore, despite noting extensive Waddell's signs and credibility issues during the evaluations, he integrated a global dataset to determine the functional impairment ratings for applicant. (*Id.* at pp. 13:1-7, 13:11-16, 14:11-21.)

AME Dr. Holmes maintained that the worsening of the lumbar spine and right knee symptoms directly derived from the original August 21, 2009 injury and verified that these compensable consequence injuries emerged prior to the June 27, 2013 settlement. (*Id.* at p. 10:13-16.)

DISCUSSION

IV.

Labor Code section 5410[2] confers continuing jurisdiction on the Appeals Board over a prior award when an injured worker timely files a petition to reopen within five years of the date of injury. The statute provides:

> Nothing in this chapter shall bar the right of any injured worker to institute proceedings for the collection of compensation within five years after the date of the injury upon the ground that the original injury has caused new and further disability.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

> The jurisdiction of the appeals board in these cases shall be a continuing jurisdiction within this period. This section does not extend the limitation provided in Section 5407.

(Lab. Code, § 5410.)

To obtain additional temporary or permanent disability benefits under section 5410, however, an injured employee must satisfy two requirements. They must timely file a petition to reopen within five years of the date of injury and must have suffered new and further disability during that five-year period, unless some other good cause supports reopening the prior award. A petition filed before expiration of the five-year period cannot confer jurisdiction over anticipated new and further disability that does not arise until after that period expires. (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 926, [72 Cal.Comp.Cases 778]; *Nicky Blair's Rest. v. Workers' Comp. Appeals Bd.* (*Macias*) (1980) 109 Cal.App.3d 941, 956 [45 Cal.Comp.Cases 876].)

In *Sarabi*, the court explained that "new and further disability" means disability resulting from "some demonstrable change in an employee's condition," including a "'gradual increase in disability.'" (*Sarabi*, *supra*, 151 Cal.App.4th at p. 926.) The court further recognized that "[h]istorically, a change in physical condition necessitating further medical treatment ha[s] been considered new and further disability," and that "[c]ommonly, new and further disability refers to a recurrence of temporary disability, a new need for medical treatment, or the change of a temporary disability into a permanent disability." (*Ibid.*)

The Court of Appeal later reiterated that definition in *Applied Materials v. Workers' Comp. Appeals Bd.* (2021) 64 Cal.App.5th 1042 [86 Cal.Comp.Cases 331] (*Applied Materials*)[3], holding that new and further disability constitutes "disability resulting from some demonstrable change in the employee's condition, including a gradual increase in disability, a recurrence of TD, a new need for medical treatment, or the change of a temporary disability into a permanent disability." (*Id*. at p. 1080.) In *Applied Materials*, the injured employee sustained injury to her neck and right arm on November 27, 2001, and settled her claim by stipulated Award in 2005. (*Id*. at p. 1054.) She filed a timely Petition to Reopen for new and further disability in October 2006. When the parties eventually proceeded to trial in 2017, defendant argued that no new and further disability existed because the claimed disability arose more than five years after the November 27, 2001 injury. (*Id*. at p. 1080.) Defendant also relied on orthopedic medical-legal reports that purportedly found no evidence of new

[3] While the record is not sealed in the WCAB proceedings pursuant to WCAB Rule 10813 (Cal. Code Regs., tit. 8, § 10813), the Court determined that applicant was not to be identified in the citation. (*Id.* at p. 1050, fn. 1.) Thus, in citing to this decision, we refer to the case as "*Applied Materials*."

and further disability attributable to the 2001 injury. The court rejected that argument, concluding that the injured employee's treatment for her psychiatric injury, including evaluations with at least eight doctors between May 2005 and November 2006, "satisfied the definition of new and further disability in *Sarabi*." (*Id.* at p. 1081.)

Section 5410 therefore requires an injured employee to establish that "the original injury has caused *new* and *further* disability." (Italics added.) The statute applies both when the claimed disability involves the original injured body part and when a new body part allegedly became injured as a compensable consequence of the original industrial injury. For example, *Sarabi* involved an industrial injury to the right shoulder followed by an additional period of temporary disability associated with a worsening condition and the need for further surgery to that shoulder. By contrast, *Southern California Rapid Transit Dist., Inc. v. Workers' Comp. Appeals Bd.* (*Weitzman*) (1979) 23 Cal.3d 158 [44 Cal.Comp.Cases 107] involved a new injury sustained in a car accident while the employee traveled home after delivering a required work release note for a prior compensable injury, and *Liberty Mutual Ins. Co. v. I.A.C.* (*Walden*) (1964) 231 Cal.App.2d 501, 504 [29 Cal.Comp.Cases 293] involved the development of asthma that the court found directly attributable to an industrial back injury. In either circumstance, the claimed new and further disability must result from or constitute an effect of the prior compensable injury. (*Applied Materials, supra*, 64 Cal.App.5th at p. 1080; *Sarabi, supra*, 151 Cal.App.4th at p. 926; *Weitzman, supra*, 23 Cal.3d at pp. 165-166.) A subsequent injury constitutes an industrial "compensable consequence" when it directly and naturally results from the original industrial injury. (*Ponce v. Barrett Business Servs.* [2017 Cal. Wrk. Comp. P.D. LEXIS 175, *5].)[4]

When an injured employee seeks to reopen for disability involving a body part injured in the original claim, the claimed disability must also be "new," meaning disability beyond that which existed at the time of the original injury or prior award. Section 5410 does not permit an injured employee to relitigate disability that already existed when the original claim was resolved. Thus, "[e]vidence as to facts which are known and events which occur during the pendency of an original claim cannot be received in support of a claim for new and further disability . . .

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

[r]eopening after an award for new and further disability appears to require that the new and further disability arose after the original award." (*Edgar v. Workmen's Comp. Appeals Bd*. (1966) 246 Cal.App.2d 660, 666 [31 Cal.Comp.Cases 376]; see also *Bolanos v. Workers' Comp. Appeals Bd*. (2014) 79 Cal.Comp.Cases 1531 (writ den.) [injured employee barred from claiming new and further disability to psyche when he knew or should have known of existence of psyche injury before prior Stipulated Awards]; *Vargas v. UCLA Dept. of Nutrition* [2010 Cal. Wrk. Comp. P.D. LEXIS 550] [no good cause to reopen for psychiatric injury when medical evidence existed of the injury existed at time of original settlement]; *Brown v. Workers' Comp. Appeals Bd.* (2006) 72 Cal.Comp.Cases 118 (writ den.) (*Brown*) [no good cause to reopen for new and further when injury employee alleged cervical spine based on information known at time of stipulated award]; *Ellis v. Workers' Comp. Appeals Bd*. (2002) 67 Cal.Comp.Cases 1494 (writ den.) [petition for new and further barred, when injured employee admitted that medical evidence allegedly establishing her neck and shoulder injury existed prior to time of trial and Amended Findings and Award].)

Here, applicant originally sustained an industrial injury to his left knee, psyche, hypertension, sexual dysfunction and a sleep disorder on August 21, 2009, which culminated in a stipulated Award of 53% permanent disability on June 27, 2013. Applicant timely filed a Petition to Reopen within the necessary five-year jurisdictional period on March 24, 2014.

The medical evidence unequivocally established a demonstrable change in the physical condition of applicant subsequent to the original award. Prior to the June 27, 2013 settlement, AME Dr. Holmes classified the subjective complaints pertaining to the low back and right knee as entirely "non-organic." At that juncture, he found no objective impairment, outlined no prophylactic work restrictions, and prescribed no medical treatment for those specific body parts. While applicant acknowledged experiencing occasional symptoms in those areas prior to his stipulated Award, the prevailing medical evidence effectively established a baseline of no industrial disability. Following the stipulated Award, applicant underwent two additional surgeries to the industrially injured left knee on January 31, 2014 and August 29, 2014, necessitating the prolonged use of crutches and a cane. He provided credible lay testimony detailing how his reliance on mobility aids and an altered gait progressively exacerbated the symptoms on his right side. Upon subsequent reevaluation, AME Dr. Holmes revised his earlier medical conclusions to find that applicant had developed compensable consequence injuries to his lumbar spine and right knee directly resulting from the physical overcompensation required by the dysfunctional left knee. AME Dr. Holmes documented newly diminished ROM, joint-line tenderness, and a recognized need for ongoing

medical care, thereby elevating the formerly "non-organic" symptoms to the level of ratable impairment.

The WCJ reasoned that applicant was improperly attempting to relitigate conditions that existed prior to the original settlement because AME Dr. Holmes later testified in his July 30, 2020 deposition that his findings regarding the compensable consequence had solidified prior to 2013. This foundational premise misconstrues the chronological evolution of the established medical record and the legal definition of new and further disability. During his deposition, AME Dr. Holmes clarified that, at the time of his 2012 evaluation, applicant's low back and right knee complaints did not rise to the level of needing treatment or causing impairment, establishing a baseline of zero industrial disability. However, by the December 11, 2019 evaluation, AME Dr. Holmes found both new impairment and a need for treatment, confirming it is medically probable that these conditions worsened as a compensable consequence of the original left lower extremity injury without any new injurious exposure. He anchored this new, ratable impairment on objective medical evidence, specifically a March 28, 2018 MRI revealing an L4-L5 disc protrusion without significant spondylosis, which he testified indicates an acute industrial incident rather than a natural progression of aging. By integrating a "global dataset" that included this objective imaging to overcome noted Waddell signs, he demonstrated a cognizable legal change in applicant's physical condition that warrants a finding of new and further disability.

The reliance on the decision in *Brown* to bar the present claim is fundamentally flawed. In *Brown*, the injured employee sought to reopen a claim based on static physiological conditions that mature medical evidence had already fully established when the parties resolved the claim. Here, applicant is not relying on static evidence. The evidentiary record demonstrates a progressive physical deterioration. Prior to the settlement, AME Dr. Holmes found no objective impairment and characterized the symptoms as "non-organic." However, following two post-settlement left knee surgeries on January 31, 2014 and August 29, 2014, and the required prolonged use of crutches, applicant suffered a demonstrable change in physical pathology. The transition from "non-organic" subjective complaints to ratable objective impairment, evidenced by newly documented joint-line tenderness, diminished ROM, and a new need for surgical intervention, constitutes a new and further disability under section 5410.

The synthesis of the credible lay testimony, the definitive evolution of AME Dr. Holmes' reporting, and the governing statutory and case law principles dictate reversal of the WCJ's decision. The documented progression of physical ailments resulting from the altered gait and subsequent

surgical recovery demonstrates a substantial change in condition beyond the impairment measured and compensated in the original award. Consequently, the evidentiary record confirms that applicant successfully met the burden of proof to establish that he sustained a new and further disability to the low back and right knee as a direct compensable consequence of the original industrial injury.

Because the low back and right knee constitute compensable new and further disability, applicant's permanent disability increased as follows:

LUMBAR SPINE – DRE CATEGORY II
100% (15.03.01.00 - 8 - [5]10 - 480I - 15 - 14%) 14%

RIGHT KNEE – ARTHRITIS
100% (17.05.03.00 - 9 - [2]10 - 480H - 13 - 12%) 12%
53 c 14 c 12 = 65% permanent disability

Accordingly, as our Decision After Reconsideration, we rescind the WCJ's FA&O and substitute a new decision that applicant sustained new and further disability to his low back and right knee resulting in 65% permanent disability.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the August 9, 2021 Findings and Award and Order is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Heriberto Hinojosa, while employed on August 21, 2009, as a laborer, occupational group number 480, in San Mateo, California, by Kenneth Kirby dba Kirby's Pacific Pools, sustained injury arising out of and arising in the course of employment to his low back, knees, psyche and in the forms of hypertension, sexual dysfunction, and a sleep disorder, but not to the gastrointestinal system.

2. At the time of the injury, the employer was insured for workers' compensation by California Insurance Guarantee Association, for its servicing facility Intercare Holdings Insurance Services, Inc., For Tower Select Insurance Company, in liquidation.

3. Applicant has sustained new and further permanent disability resulting in an award of 65%.

4. Applicant is entitled to further medical treatment to cure or relieve from the effects of the industrial injuries.

5. Applicant's attorney is entitled to attorney fees of 15% of the new and further permanent disability awarded less monies previously paid with the calculation of those fees deferred.

AWARD

AWARD is made in favor of applicant, Heriberto Hinojosa, against defendant, California Insurance Guarantee Association, for its servicing facility Intercare Holdings Insurance Services, Inc., For Tower Select Insurance Company, in liquidation, as follows:

1. Permanent disability in accordance with Finding of Fact 3 above.

2. Further medical treatment in accordance with Finding of Fact 4 above.

3. Attorney fees in accordance with Finding of Fact 5 above.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I DISSENT (see attached dissenting opinion),

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 3, 2026

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

HERIBERTO HINOJOSA
MAYEN & HERRERA
MULLEN & FILIPPI, LLP

DLP/md

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

DISSENTING OPINION OF CHAIR KATHERINE A. ZALEWSKI

I respectfully dissent as I am fundamentally unpersuaded by the contention advanced by applicant that the binding legal precedent established in *Brown* is distinguishable from the facts presented here. Upon close review of the evidentiary record within the applicable statutory framework, the record supports the WCJ's determination that applicant did not establish new and further disability to his low back and right knee. The parties formally resolved the original injury claim through Stipulations with Request for Award executed on June 27, 2013. Prior to the culmination of that settlement, AME Dr. Holmes thoroughly evaluated applicant and documented subjective symptoms in both the low back and right knee, yet affirmatively concluded that there was no industrial injury, no permanent impairment, and no need for medical treatment pertaining to those specific body parts. Following the approval of the stipulations and a subsequent timely Petition to Reopen, AME Dr. Holmes offered a revised post-settlement medical opinion finding that an industrial injury did indeed exist in the form of a compensable consequence to the low back and right knee.

This procedural and evidentiary sequence is materially indistinguishable from the circumstances addressed in *Brown*. In that case, the prevailing medical reporting generated prior to the execution of the stipulations explicitly stated there was no industrial injury to the injured employee's neck. Subsequently, a post-settlement medical opinion concluded that an industrial injury to the neck had in fact occurred. Applicant in the present action attempts to distinguish *Brown* by asserting that he would not have prevailed had he chosen to litigate the compensability of the low back and right knee at the time of the original stipulations, relying on the adverse medical opinion of AME Dr. Holmes that existed at that specific juncture. While I acknowledge the pragmatic reality that applicant likely would have been unsuccessful had he pursued a trial on those disputed body parts prior to settling the claim, the prospective hazard of an adverse trial outcome was simply not a recognized distinguishing factor in the *Brown* analysis.

Characterizing a physical condition as a compensable consequence does not exempt it from the jurisdictional requirements of section 5410. For a compensable consequence to constitute new and further disability, it must genuinely arise after the original award. In the present matter, applicant experienced symptoms in the disputed body parts from overcompensating for the left knee before the settlement and AME Dr. Holmes confirmed that, during his July 30, 2020 deposition, applicant had reported low back and right knee complaints to him before executing the Stipulations with Request

for Award dated June 27, 2013. AME Dr. Holmes further testified that his opinion regarding these conditions as a compensable consequence had solidified over the course of multiple examinations spanning from the beginning of the case, verifying that the compensable consequence injuries emerged prior to the June 27, 2013 settlement. Because the mechanism of injury and the resulting symptoms were fully known and addressed by the AME Dr. Holmes prior to the original award, a post-settlement recharacterization of these identical, known symptoms into a ratable compensable consequence is precisely the type of retroactive relitigation prohibited in *Brown*.

As the WCJ properly articulated in her Report, an injured employee possesses the procedural remedy to proceed to trial to challenge AME Dr. Holmes' conclusions regarding disputed body parts. In the present case, applicant elected to forego litigation regarding his known physical symptoms in the low back and right knee, choosing instead to execute the Stipulations with Request for Award. Consequently, the attempt to claim these identical body parts as a new and further disability upon a Petition to Reopen constitutes an impermissible effort to litigate issues for the first time that were ripe for adjudication prior to the original settlement. Because applicant knew of his low back and right knee symptoms before entering the stipulations, and because the factual sequence closely parallels the circumstances addressed in *Brown*, the record provides no sound basis for distinguishing that precedent.

Therefore, the medical evidence does not support the finding of new and further disability under the law, and I would affirm the FA&O issued by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

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