WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ESHAK ABDELMALAK, ***Applicant***

vs.

RK CHEVRON (CLARENDON/ENSTAR);
HANI, INC. (CIGA), ***Defendants***

Adjudication Numbers: ADJ11379405;ADJ1424684;ADJ1556152
Marina del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award issued on May 8, 2024, by a workers' compensation administrative law judge (WCJ) in ADJ1556152, which found in relevant part that applicant sustained injury to his lumbar spine, right leg, and internal injuries in the form of upper gastro (GERD), hypertension, hypertensive kidney disease and hypertensive heart disease while employed during the period from December 3, 2001 to February 5, 2002 by defendant Hani, and the workers' compensation insurance carrier is CIGA by its servicing facility Intercare, for Casualty Reciprocal Exchange in liquidation (CIGA) (ADJ1556152); that applicant sustained injury to his back and right leg while employed by defendant Chevron on July 2, 1998, and the workers' compensation insurance carrier is American All-Risk Loss Administrators, Clarendon National Insurance Company as successor in interest, as administered by Enstar (Clarendon) which was resolved by way of a Stipulated Award of 52% (ADJ1424684); that applicant is in need of further medical treatment with liability to both Clarendon and CIGA for the body parts of back and right leg, and liability to CIGA for future medical treatment for all other industrially injured body parts; that applicant has a totally diminished future earning capacity and cannot work in the open labor market, entitling the applicant to permanent total disability of 100% in ADJ1556152;

and that CIGA will have a credit through the "subtraction method" for the prior award of 52%, including for the attorney's fees.

In the Findings and Order issued in ADJ1424684, the WCJ found in pertinent part that applicant did not sustain new and further disability; and that Clarendon and CIGA are liable for future medical treatment to applicant's back and leg.[1]

Defendant also seeks reconsideration of the Findings and Order in ADJ11379405, which found that the claimed injury of January 1, 1991 to July 2, 1998 was barred by the statute of limitations.

Defendant contends that Clarendon is "other insurance" where Clarendon stipulated to applicant's need for further medical treatment; that the award of compensation should be calculated by subtracting the percentage of permanent disability of 52% for the original Clarendon stipulated award instead of subtracting dollars from the award of 100% permanent disability; that the opinions of Dr. Gillis were not substantial evidence; that the claim in ADJ11379405 is not barred by the statute of limitations; and that the threshold for predominant cause of an injury to psyche was met based on "the combined effects of applicant's injuries."

We received an Answer from applicant, which was filed on June 14, 2024.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) on June 18, 2024. He recommended that the Petition be granted to amend the finding as to future medical care for the back and the right leg to find that it should be the sole responsibility of Clarendon (Finding of Fact 8 (ADJ1424684); Finding of Fact 12 (ADJ1556152)) and to amend the finding as to calculation of the award to subtract the percentage of permanent disability from the original award and find that the award in ADJ1556152 should be for 48% permanent disability of 252 weeks at $170.00 per week, which equals $42,840.00, and an attorney's fee on this amount at 15%, which equals $6,426.00 (Findings of Fact 11 and 13). He recommends that the Petition otherwise be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, and as discussed below, we will grant reconsideration, amend the F&A in ADJ1556152 and the F&O in ADJ1424684 as recommended in the Report to find that

[1] The three cases were consolidated for trial, but the WCJ issued three separate decisions. Defendant properly filed a single Petition for Reconsideration, listing all three case numbers, and raised contentions in all three cases.

future medical treatment for applicant's back and right leg shall be by defendant Clarendon (Finding of Fact 8 (ADJ1424684) Finding of Fact 12 (ADJ1556152)), and to defer the issue of calculation of the award and of attorney's fees in ADJ1556152 (Findings of Fact 11 and 13), and otherwise affirm the F&A in ADJ1556152 and the F&Os in ADJ1424684 and ADJ11379405.

A decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350] [a full and complete record allows for a meaningful right of reconsideration].) If a novel issue arises, a case may be returned to the trial judge for consideration in the first instance. (*Gangwish vs. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th1284, 1295 [66 Cal.Comp. Cases 584].) All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 643 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].) Here, applicant filed his Answer before the WCJ issued the Report. Consequently, applicant has not had an adequate opportunity to respond to the WCJ's recommendation as to calculation of the award. In addition, the WCJ is best positioned to consider the issue and render a decision in the first instance.

Accordingly, we grant reconsideration, amend the F&A in ADJ1556152 and the F&O in ADJ1424684 to find that future medical treatment for applicant's back and right leg shall be by defendant Clarendon (Finding of Fact 8 (ADJ1424684) Finding of Fact 12 (ADJ1556152)), and we will defer the issue of calculation of the award and of attorney's fees in ADJ1556152 (Findings of Fact 11 and 13), and otherwise affirm the F&A in ADJ1556152 and the F&Os in ADJ1424684 and ADJ11379405.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award in ADJ1556152 issued by the WCJ on May 8, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

> 11. Applicant has a totally diminished future earning capacity and cannot work in the open labor market, entitling the applicant to permanent total disability of 100%. The issue of calculation of the award is deferred.
>
> 12. It is found that the applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein, and medical care will be distributed between the two defendants as follows: For the body parts of back and right leg, Chevron/Clarendon/Enstar will be solely responsible; for all other industrially injured body parts, except injury to psyche, Hani/CIGA will be solely responsible.
>
> 13. The issue of attorney's fees is deferred.

IT IS FURTHER ORDERED that the Findings and Order in ADJ1424684 issued by the WCJ on May 8, 2024 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

> 8. It is found that the applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein, and medical care will be distributed between the two defendants as follows: For the body parts of back and right leg, Chevron/Clarendon/Enstar will be solely responsible; for all other industrially injured body parts, except injury to psyche, Hani/CIGA will be solely responsible.

IT IS FURTHER ORDERED that the Findings and Order in ADJ11379405 issued by the WCJ on May 8, 2024 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 2, 2024

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

ESHAK ABDELMALAK
BERKOWITZ AND COHEN, APC
GUILFORD SARVAS & CARBONARA LLP
NEWHOUSE CREAGER, LLP

AS/mc

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

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION JUDGE ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

1.	Applicant's Occupation:	General Manager of Gas Station/Minimart
2.	DOI in ADJ11379405:	1-1-91 to 7-2-98, filed by CIGA in 2018
3.	DOI in ADJ1424684:	Prior Stip 52% PD, lumbar R leg; PTRO
4.	DOI in ADJ1556152:	12-3-01 to 2-5-02 lumbar, internal, psyche & multiple other body systems.
5.	Manner in Which Injuries Occurred:	Allegedly lifting merchandise
6.	Identity of Petitioner:	Defendant Hani by CIGA
7.	Timeliness:	Petition was timely filed
8.	Verification:	Petition was verified per LC Section 5902
9.	Date of issuance of 3 Awards:	05-08-2024

10. Petitioner's Contentions:

(a) Petitioner contends the WCJ erred by failing to find that Clarendon/Enstar is "other insurance" in a situation where Clarendon stipulated to applicant's need for further medical treatment.

(b) The WCJ erred by subtracting dollars from the 100% PD award instead of subtracting the PD percent (52%) for the original Clarendon stip award.

(c) The WCJ erred by relying on Dr. Gillis' revised opinions which purportedly were not based on an accurate history.

(d) The WCJ erred by relying on Dr. Gillis' unsupportable revised opinions.

(e) The WCJ erred by finding the SOL barred the claim in ADJ11379405.

(f) The WCJ erred by finding no psychiatric injury at Clarendon's insured.

II.
FACTS

The applicant worked as a manager of various gas stations which also had minimarts. He worked for an employer named RK Chevron from 1991 until about July of 1998. RK Chevron had workers' compensation insurance with Clarendon which later was acquired by Enstar, its successor in interest. On 07-02-1998 the applicant suffered a work-related specific injury to his back and right leg while lifting an item at RK Chevron. Applicant settled his 07-02-1998 date of injury on 07-13-2001 by way of a Stipulated Award of 52%. This is reflected by ADJ1424684. The only body parts on the Stip Award were the back and the right leg. WCJ Gil Katen signed the Award, which included a need for medical treatment. This need for medical treatment for the back and right leg was specifically limited to "the findings of the agreed medical examiner Dr. Alexander Angerman, M.D." The applicant had had a back surgery in June of 2000. The Stip Award indicated the applicant had been temporarily disabled (TD) from 07-03-1998 (which was the day after the specific injury of 07-02-1998) until 08-29-2000.

Applicant then went to work for a new employer named BC Oil and worked briefly as a regional manager overseeing multiple gas stations/minimarts. BC Oil is not a party in this litigation. When BC Oil went bankrupt, the applicant then went to work at yet another gas station/minimart called Hani, Inc, which had workers' compensation insurance with Casualty Reciprocal. This carrier later went into liquidation. Hence, we have the involvement of the California Insurance Guarantee Association ("CIGA") on behalf of Hani, Inc. Applicant worked for Hani as a general manager of a gas station/minimart from 12-03-2001 through 02 -05-2002, a period of about two months.

Applicant filed a continuous trauma claim against Hani for multiple body parts (including the back and the right leg), and applicant also filed a timely Petition to Re-Open (PTRO) the case involving RK Chevron for the specific injury of 07-02-1998.

A third case was filed, not by the applicant but by CIGA. In mid-2018, twenty years after applicant stopped working for RK Chevron and over 15 years after the applicant filed for a CT claim against Hani and a PTRO for the specific injury at RK Chevron, CIGA filed a CT claim alleging an injury to multiple body parts in ADJ11379405.

Clarendon agreed with applicant's attorney in 1999 to use Dr. Angerman as an Agreed Medical Examiner (AME) in orthopedics. The agreement was reaffirmed on 07-13-2001

in the Stip Award. Clarendon and applicant's attorney agreed in 2006 to use Dr. Bruce Gillis as an AME in internal medicine. CIGA never joined in these AMEs. However, in 2006, CIGA and applicant's attorney agreed to use Dr. Howard Greils as a psychiatric AME.

The applicant had a lumbar surgery in June of 2000 and was TD until 08-29-2000. This information is outlined in the report of Dr. Angerman dated 12-07-2000 on page two. The applicant has been deposed several times and there have been many reports from Dr. Angerman, Dr. Gillis and Dr. Greils. These physicians have changed their minds over the years and any of the three parties can quote from various reports of these extremely high quality doctors for an advantage on a particular point.

The WCJ feels that it is noteworthy that CIGA has paid over 13 years of TD for the CT claim of 12-03-2001 through 02-05-2002 in ADJ1556152. The applicant has been deposed several times and he has failed to be consistent. At the 20-plus trial dates in this matter, the applicant most recently has been "consistently inconsistent." He has given starkly contradictory answers to questions asked within a few minutes of each other. The applicant is in his seventies now and his memory and cognition might be dimming. The applicant makes an average to slightly below average witness in terms of his credibility. The attorney for CIGA impeached the applicant to a point where one began to feel it was not guile for secondary gain but something far more serious causing the applicant to give so many inconsistent answers. The applicant has not worked for the last 22 years.

III.
DISCUSSION OF PETITIONER'S CONTENTIONS

A. PETITIONER CONTENDS THE WCJ ERRED BY FAILING TO FIND THAT CLARENDON/ENSTAR IS "OTHER INSURANCE" IN A SITUATION WHERE CLARENDON PURPORTEDLY STIPULATED TO APPLICANT'S NEED FOR FURTHER MEDICAL TREATMENT.

For the Petition to Re-open (PTRO), the WCJ found that there was no increase in PD above the 52% level set out in the in the Stip Award of 07-13-2001, and that the medical reporting of Dr. Gillis and Dr. Angerman support the finding of no increased PD attributable to the specific injury of 07-02-1998 in ADJ1424684. The WCJ did indeed find that pursuant to the original Stip Award of 07-13-2001, the defendants RK Chevron/Clarendon/Enstar continued to have responsibility for providing the applicant with future medical care for the back and

the right leg. Furthermore, the WCJ found that Hani/CIGA had responsibility to provide the applicant with future medical care for the back and the right leg.

The attorney for CIGA in his Petition for Reconsideration (PFR). has rightly argued that in the case of CIGA v. WCAB (Weitzman) (2005) 70 CCC 556, the court felt that Labor Code (LC)4600 indicates that there is joint and several liability on an employer in a situation where the full costs of medical care is partially attributable to a previous injury. The attorney for CIGA has correctly argued that under Insurance Code section 1063.1 (c) (9) and the Weitzman case, this shared responsibility for future medical care for certain body parts equals "other insurance."

The WCJ feels that he erred in a one particular area, and that carefully defined area is that all future medical care for the body parts of the back and the right leg should be the sole responsibility of Clarendon/Enstar, and that future medical care for the back and the right leg should NOT be the responsibility of CIGA. This does not mean that there is joint and several liability for all benefits, only for future medical for two of the many body parts.

B. THE WCJ ERRED BY SUBTRACTING DOLLARS FROM THE 100% PD AWARD INSTEAD OF SUBTRACTING THE PD PERCENT (52%) FOR THE ORIGINAL CLARENDON STIP AWARD.

The Petition for Reconsideration (PFR) of CIGA has correctly indicated that the WCJ erred by subtracting dollars instead of subtracting PD percentages for the prior award of 52%. The case of Brodie v. WCAB (2007) 72 CCC 565; 40 Cal. 4th 1313 cited by the attorney for CIGA is definitely on point. The correct formula is Formula A outlined in the Brodie case. The PD award against Hani/CIGA in ADJ1556152 should be for 48% PD which is 252 weeks at $170.00 per week, which equals $42,840.00. An attorney's fee on this amount at 15% equals $6426.00.

The WCJ does not agree with the argument of the attorney for CIGA that an additional 10% should be subtracted for the CT claim where Dr. Angerman in (only) one of his reports said there could be 10% apportionment to the CT claim filed against RK Chevron/Clarendon if the applicant's 2003 deposition was to be believed. The 2003 deposition is only one of the opportunities applicant had to testify and the WCJ feels that it has fundamental problems and should not be the basis of a 10% subtraction of PD in a situation where the CT claim against RK Chevron in ADJ11379405 was not filed for 20 years and was not even filed by the applicant. The testimony of CIGA's witness Hani Baskaron is as uneven as the applicant's testimony

and cannot help, and indeed hurts, the argument for an additional 10% subtraction of PD for the CT claim in ADJ11379405.

C. THE WCJ ERRED BY RELYING ON DR. GILLIS' REVISED OPINIONS, WHICH, PURPORTEDLY, WERE NOT BASED ON AN ACCURATE HISTORY

In the earliest reports of internal AME Dr. Gillis, he indicated that felt the internal PD the applicant had was inextricably intertwined for causation and apportionment purposes between the 07-2-1998 specific injury at RK Chevron and the CT claim of 12-03-2001 through 02-05-2002 at Hani/CIGA. In the deposition of Dr. Gillis of 11-12-2009 as set out in Joint Exhibit X19 (which the WCJ incorrectly described in his Opinion on Decision as a "report"), the attorney for RK Chevron/Clarendon/Enstar questioned Dr. Gillis about causation and apportionment for applicant's internal injuries. Please see page 9 line 7 through page 14 line 13 of Joint Exhibit X19. Dr. Gillis changed his opinion by saying, "[a]nd, therefore, it's – as you said, it's the employment at Hani that is the basis for the manifestations of the internal medical disabilities". Please see page 14 lines 9-11. When questioned by applicant's attorney a minute later, Dr. Gillis said on page 15 of Joint Exhibit X19 on lines 5 through 13:

> Q I want to talk about his [applicant's] problem. From what I gather, you found two separate areas of industrial disability; correct?
>
> A Yes, one gastrointestinal and one due to hypertensive cardiovascular disease.
>
> Q And as I understand from Mr. Greenspan, those are both as a result of the CT; correct?
>
> A Yes, based upon the findings of Dr. Angerman.

The attorney for CIGA is correct in his statement on page 14 of his PFR that "Dr. Angerman said 100% of the increased orthopedic PD was due to the injury at Hani …." The attorney for CIGA has suggested that Dr. Gillis has been guilty of a crucial misreading Of Dr. Angerman's apportionment. The WCJ disagrees.

Before the applicant began to work at Hani 2001, the applicant had not been diagnosed with gastrointestinal problems or hypertensive cardiovascular disease. The applicant has been on and off pain medication which sometimes has included Vicodin. While applicant's memory is very poor, it seems that while he was at the interim employer BC Oil in 2000 and

2001, applicant's Pain symptoms eased up a bit and applicant medication usage diminished. The attorney for CIGA caught applicant in mistakes (or lies) in applicant's testimony about his symptoms and/or medication usage during the critical period of 2000-2001. When the applicant signed the stip award in July of 2001, there was no allegation of internal injuries and no medical reporting which supported any internal injuries.

In Dr. Angerman's report of 12-07-200, the only medication the applicant was taking was Celebrex, two tablets per day. See Joint Exhibit X35 page 2. Dr. Angerman's report of 12-07-2000 summarized surgical and post-surgical reporting from Dr. Shamlou and Dr. Robert Hunt, in 2000-2001, and the only medication the applicant was taking at that time according to the summary was Celebrex.

Dr. Gillis later felt that the use of strong pain medication contributed to applicant's internal injuries. When he analyzed what changes the applicant had been through, Dr. Gillis appeared to have felt the increased orthopedic symptoms noted by Dr. Angerman were a basis for Dr. Gillis to change his mind from the inextricably intertwined opinion to finding causation and apportionment only with the subsequent Hani CT date of injury.

D. <u>THE WCJ ERRED BY RELYING ON DR. GILLIS' UNSUPPORTABLE REVISED OPINIONS.</u>

In CIGA's PDR, CIGA's attorney argued that Dr. Gillis failed to analyze the medical reporting of Dr. Angerman and others when he changed his opinion on causation and apportionment of the internal injury at the time of his deposition of 11-12-2009. Dr. Gillis was again deposed on 03-21-2013. Please see Joint Exhibit X3. Robert Greenspan, the attorney for RK Chevron/Clarendon/Enstar had the following exchange on page 2 lines 3 through 16:

> Q Based thereon, do you therefore again reiterate as your opinion given in the testimony you provided on November 12, 2009, on the issue of causation and apportionment, as between applicant's first employer at RK Chevron and his second employer Hani, Inc., and based on reasonable medical probability, your review of records, your examination of the applicant, and your expertise and experience in the field of internal medicine, that the entire period of industrial expose for applicant's internal medical complaints was during the period of the applicant's second employment with Hani, Inc.?
>
> A Yes.
>
> Q I have no further questions.

There was a mix up which prevented the attorney for CIGA from attending the deposition of 03-21-2013. On August 3, 2016 the attorney for CIGA deposed Dr. Gillis. Please see Joint Exhibit X21. The attorney for CIGA worked very hard in this deposition of 08-03-2016 to get Dr. Gillis too change back his opinion on causation and apportionment but Dr. Gillis continued to feel the causation and apportionment for applicant's internal injuries were completely the responsibility of Hani/CIGA.

To attempt to accommodate the concerns of the defense attorney for CIGA, the WCJ ordered Dr. Gillis to complete a supplemental report to explain supposed discrepancies alleged by CIGA regarding Dr. Gillis' conclusions in his report of 09-14-2012 and his deposition of 03-21-2013. Dr. Gillis prepared a report dated 01-08-2019, as set out in Joint Exhibit X17. Dr. Gillis again provided his explanation about applicant's internal disability and stated "… Mr. Abdelmalak's disability was indeed solely the consequence of his employment at Hani."

The WCJ felt the so-called "revised" reporting of Dr. Gillis, where Dr. Gillis time and again stated that the internal disability of the applicant was the sole responsibility of Hani/CIGA, was substantial medical evidence. And after reviewing carefully the reports and depositions of Dr. Gillis for a second time, the WCJ continues to feel the most recent opinions of Dr. Gillis are substantial medical evidence.

E. THE WCJ ERRED BY FINDING THE STATUTE OF LIMITATIONS BARRED THE CLAIM IN ADJ11379405.

In his PFR, the attorney for CIGA indicated on page 7 that "Dr. Angerman's deposition in 2017 was the first medical opinion that applicant sustained a cumulative injury at Chevron. Before that time, no doctor, including the PTP, had addressed whether applicant sustained a cumulative injury at that employer, so there was no basis for applicant to have knowledge and disability before then." This statement is reasonable under the circumstances, but the WCJ feels that there is solid evidence to suggest otherwise, concerning knowledge and disability.

The applicant worked at RK Chevron insured by Clarendon/Enstar from 1991 through July 2, 1998. Applicant suffered a specific injury at RK Chevron on July 2, 1998 and was evaluated for his condition by orthopedic AME Dr. Alexander Angerman. Dr. Angerman's first report is dated 12-02-1999 and is set out in Joint Exhibit X37. On page two is a description of how the injury occurred as a specific event. On page 4 is a description of

applicant's job duties at RK Chevron. Dr. Angerman wrote, '[t]he patient was employed by RK Chevron as a manager since 1991. His usual and customary job activities included stocking shelves and refrigerators. He did time sheets, merchandise and gas orders. He also did work schedules, supervised employees, mopped floors and cleaned restrooms. He worked seven hours a day, five days a week."

Dr. Angerman, with his characteristic thoroughness, continued on. "Physical requirements of this job included frequent standing, walking, kneeling, squatting, crouching, bending, stooping and twisting his body. He did occasional climbing of stairs and ladders as well as sitting. He did frequent lifting of under 10 pounds, occasional lifting of 11-25 pounds and rare lifting of 26-75 pounds. He did occasional carrying of 20-25 pounds for a distance of 20 feet. He did frequent overhead reaching and heavy physical labor "most of the time." He occasionally used a cash register." This is certainly a comprehensive list of the applicant's duties at RK Chevron from 1991 through 07-02-1998 by Dr. Angerman.

On page 16 of his report of 12-02-1999, Dr. Angerman diagnosed that applicant had suffered a work-related injury in the form of "lumbosacral spine herniated disc syndrome."

Dr. Angerman's permanent and stationary report is dated 12-07-2000 and is set out in Joint Exhibit X35. The applicant had had a lumbar surgery on June 21, 2000 and was on TD until about September of 2000, when he was released to regular duties. The applicant was continuing to work at BC Oil when Dr. Angerman saw him on 12-07-2000. Dr. Angerman felt the applicant was permanent and stationary at that time. Dr. Angerman said on page six of this report that the applicant was limited to light work only and that "if this patient were to perform employment activities which exceed this work restriction, he would cause further damage." How prophetic Dr. Angerman was.

For the section of his report under the caption of "Apportionment," Dr. Angerman said, [i]t also needs to be taken into account that this patient's job activities he performed at Chevron from 1991 up until the time of the industrial injury occurring on July 2, 1998, appear to have been quite physically strenuous entailing frequent bending, stooping and twisting of his body as described. I do feel the medical evidence in this case supports at most, the patient may have residual subjective complaints referable to the lumbosacral spine classified as intermittent slight pain, however, it is felt the remaining portion of his ratable disability outlined

above does appear to be directly attributable to the industrial injury occurring on July 2, 1998." Please see page 8.

This paragraph, written in 2000, has Dr. Angerman diagnosing a continuous trauma (CT) claim from 1991 through 07-02-1998 for a low back injury at RK Chevron, and Dr. Angerman is giving genuine permanent disability (although rather small) to this CT injury at RK Chevron. The report suggests it was served on 03-21-2001. With five days for mailing, the report would have been received by 03-26-2001. The one-year Statute of Limitations would have begun to run for a CT claim at RK Chevron on 03-26-2001. The report of 12-07-2000 equals "knowledge" as that term is used for purposes of LC5412, (knew or should have known), and the statement by Dr. Angerman on page 8 about the giving of a PD value for this CT injury, constitutes "disability" as that term is used for LC 5412 purposes.

A CT claim was indeed filed against RK Chevron in 2017 (by CIGA and not by the applicant), over 16 years after the time the statute began to run. The WCJ feels the filing of this CT claim in ADJ11379405 was 15 years too late. Please also see Defendant Clarendon's Exhibit Z which is a denial letter for this late-filed CT claim of 1991 through 07-02-1998 in ADJ11379405.

While the WCJ concedes his limitations as a lay person with only very basic medical training, and that he should avoid making any medical determinations, the law acknowledges that there may be certain types of diseases which have a latency period that then justifies extending the Statute of Limitations. Asbestos claims and HIV-related claims can fall into this category which allows special consideration for extending the Statute of Limitations. The orthopedic-style injury the applicant had at RK Chevron would not fall into this category of special-consideration injuries that would justify extending the Statute of Limitations.

The WCJ believes he made a proper decision on the Statute of Limitations barring ADJ11379405. The WCJ acknowledges he should have cited the reports of Dr. Angerman in Joint Exhibits X35 and X37 in his Opinion on Decision.

F. THE WCJ ERRED BY FINDING NO PSYCHIATRIC INJURY AT CLARENDON'S INSURED.

The WCJ believed that there was no evidence showing predominant cause for a psychiatric injury at RK Chevron, the insured of Clarendon/Enstar. LC 3208.3 (b) (1) is the law governing the requirement for predominant cause for a psychiatric injury. It says that "to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury."

Some of Dr. Greils' most crystalized opinions in this very complex case occurred in his deposition of 11-09-2021, as set out in Court Exhibit X50. The following exchange occurred between Mr. Mendez (attorney for defendant RK Chevron/Clarendon/Enstar) and Dr. Greils on page 83 line 11 to page 84 line 7.

> Q … We're just talking about the two litigating cases here.
>
> A The one in 1998?
>
> Q And 2002.
>
> A And the 2002. No. I can't pinpoint the onset of – I would have to state that the pain disorder surfaced after the last injury, unless there's some evidence that a pain disorder was diagnosed between '98 or 2002. I have no evidence to suggest that, so the pain disorder developed after.
>
> Q With the understanding that the pain disorder developed after, **would you say that the 2002 claim is a predominant cause of the pain disorder?**
>
> A **Yes.** It's the straw that broke the camel's back, so to speak. The pain disorder has gotten worse over the years.
>
> Q Would you also say there is some involvement for the 1998 claim in the involvement of the pain disorder?
>
> A That is correct. That is incorporated – he did not have a pain disorder until subsequent to the last injury.
>
> (Emphasis added).

Clearly, Dr. Greils is talking about predominant cause of an injury here, not predominant apportionment of disability; there is a question about whether we even have a standard in California Workers' Compensation about something called predominant apportionment of disability. In other reports for this case, Dr. Greils has indicated that there is predominant cause "due to the pain and limitations afforded to him by his orthopedic condition." But the rules of assessing predominant causation for a psychiatric injury are supposed to focus on a particular date of injury, not on a particular "condition." The WCJ agrees with the defense attorney for CIGA that Dr. Greils felt there was some level of causation for the psychiatric injury involving both the date of injury of 07-02-1998 (ADJ1424684) and the date of injury of 12-03-2001 through 02-05-2002 (ADJ1556152). And yet it strongly appears that Dr. Greils indicated that there was predominant cause for one of these dates of injury, and that Dr. Greils chose the CT claim in ADJ1556152 as the date of injury having predominant cause. Could the parties have phrased the questions more precisely for Dr. Greils? Could Dr. Greils have more fully explained the significance of his answer? The WCJ feels that the Dr. Greils' deposition of 11-09-2021 remains substantial evidence for the issue of predominant cause for the injury of 07-02-1998 and for the CT claim of 12-03-2001 through 02-05- 2002. The WCJ feels that Dr. Greils has indicated that there was predominant cause for the injury date for the CT of 12-03-2001 through 02-05-2002. If this is true, there cannot be predominant cause for the remaining date of injury; there cannot be two causes totaling more than 50% each. It is a misfortune for the applicant that Dr. Greils chose the date of injury at the employer who could not meet the six-month employment requirement.

The thornier question is whether predominant cause for a psychiatric injury can be spread over two or more dates of injury at two or more separate employers.

The case cited in the PFR of CIGA on this issue is Truegreen Landcare v. WCAB (Gomez) (2010) 75 CCC 385.

In the Gomez case, the applicant had two different work-related injuries at the same employer. This is in stark contrast to our instant case, where we have two injuries at **two separate employers**. In Gomez, the causation for psychiatric injury was 20% non-industrial, and 40% to an event where he saw the dead body of a co-worker/friend, and 40% compensable consequence of his work-related back injury at the **same employer**. The

WCJ feels the Gomez/Truegreen Landcare case supports rather than undermines his decision in the instant case.

The WCJ feels that the case of Lewis v. WCAB (2011) 77 CCC 108 is not distinguishable on any major issue but that it is indeed on point. In the Lewis case, the applicant worked for an employer named Browning Construction, where he had four different work-related orthopedic injuries. The applicant did not request and did not receive psychiatric care for these four work injuries at Browning Construction. (The exact same situation in our instant cases). The applicant then left Browning and began to work at Elite Landscaping and had a work-related motor vehicle accident. The parties used a psychiatric AME who felt there was 35% causation of the psychiatric injury to the injuries at Browning Construction and 65% causation to the motor vehicle work injury at Elite Landscaping.

The applicant in Lewis and the defendant Elite Landscaping argued that when a worker has successive injuries with different employers that combine and reach the predominant cause threshold in LC 3208.3, each separate employer is liable for its pro rata share, even in a situation where the pro rata share is beneath the predominant cause threshold. The Board wisely noted that such a result would allow an injured worker to go back in time to each of his or her employers where he or she had a work-related psychiatric injury and cobble together a 51% predominant cause for a psychiatric injury. The Board noted that the legislative purpose behind LC3208.3 was to make a higher not a lower standard for psychiatric injuries. The Board suggested that without the motor vehicle accident at Elite, the applicant may never had looked for psychiatric treatment. The WCJ feels that the Lewis case and the Gomez/Truegreen Landcare case work together to support his decision on this particular issue in our instant case.

IV.
RECOMMENDATIONS

A. The WCJ recommends that his finding about "no other insurance" should be amended to indicate that there is a very limited application of the "other insurance" provision of Insurance Code 1063.1 (c) (9) to require that all future medical care for the right leg and back be the sole responsibility of RK Chevron/Clarendon/Enstar; the WCJ feels the application of the "other insurance" provision should not go beyond its applying to future medical care for these two body parts of the right leg and the back.

B. The WCJ recommends that his Finding Number 11 in ADJ1556152 be amended to read as follows. "It is found that the PD apportioned to the injury of 07-02-1998 at Chevron in ADJ1424684 remains at 52%, and that all PD owed on the Stip Award of 52% for the injury in ADJ1424684 has been paid out. There is no new and or further PD owed in ADJ1424684. It is found the applicant has a totally diminished future earnings capacity and he cannot work in the open labor market, entitling applicant to a permanent total disability of 100% before apportionment. And after apportionment pursuant to Formula A set out in the case of Brodie v. WCAB (2007) 72 CCC 565; 40 Cal. 4th 1313, where applicant has a prior Award of 52%, the PD remaining after apportionment is 48%, equivalent to 252 weeks of PD at the agreed-upon PD rate of $170.00 per week. The PD has a value which equals $42,840.00. The start date for PD is 10-12-2017. An attorney's fee of 15% is deemed reasonable."

The WCJ recommends that Finding Number 12 in ADJ1556152 be amended as follows. "It is found that applicant is in need of further medical treatment to cure or relieve from the effects of this injury herein, but the medical care for the right leg and back will be the sole responsibility of RK Chevron/Clarendon/Enstar, and Hani/CIGA will have no responsibility for medical care costs for applicant's right leg and back. For all other physical (i.e. non-psychiatric) body parts injured on an industrial basis, only Hani/CIGA will have responsibility for the cost of medical care. Because applicant did not work for the defendant employer Hani for at least six months, Hani/CIGA has no responsibility for the cost of psychiatric treatment. Because there was no award of psychiatric injury in the Petition to Reopen in ADJ1424684, RK Chevron/Clarendon/Enstar has no responsibility for any psychiatric medical care."

The WCJ recommends that Finding Number 13 in ADJ1556152 be amended as follows. "It is found a reasonable attorney's fee is 15% of $42,840.00 which is $6426.00."

C. The WCJ recommends he be upheld on his decision to rely on the so-called "revised" opinions of Dr. Gillis.

D. The WCJ recommends he be upheld on his decision to rely on the reporting of Dr. Gillis which the WCJ feels is substantial medical evidence.

E. The WCJ recommends he be upheld on his decision that the Statute of Limitations bar the claim filed in ADJ11379405.

F. The WCJ recommends that he be upheld in his finding that there was no compensable work-related psychiatric injury at RK Chevron, which is the insured of Clarendon/Enstar.

DATED: June 18, 2024

Robert F. Spoeri
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE