WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JEFFREY McKENNEY, *Applicant*

vs.

SOUTHERN CALIFORNIA EDISON COMPANY, Permissibly Self-Insured, *Defendants*

Adjudication Number: ADJ7850534 and ADJ7904327
Van Nuys District Office

OPINION AND ORDERS DENYING PETITION FOR RECONSIDERATION, GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Jeffrey McKenney seeks reconsideration of the July 8, 2024 Partial Findings of Fact, Award and Orders, wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained injury arising out of and in the course of employment to his lumbar spine and psyche and did not sustain injury to his bilateral lower extremities, ankles (right ankle solely due to cumulative trauma claim), left wrist, right shoulder, or right upper extremity (all right elbow and wrist due to cumulative trauma injury), in the form of sleep and sexual dysfunction, kidney, stomach, brain/hematoma, head, headaches, and liver, arising out of and in the course of employment. The WCJ deferred the issue of injury to applicant's left shoulder pending further development of the record.

Defendant Southern California Edison Company seeks reconsideration of the July 8, 2024 Partial Findings of Fact, Award and Orders, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that the October 30, 2020 report from Agreed Medical Evaluator Alexander Angerman, M.D., (Court Exhibit 15) is inadmissible and marked for identification only. (Finding no. 4.)

Applicant contends that (1) the WCJ erred in failing to award applicant 100% permanent disability based on the reports of Alexander Angerman, M.D.; (2) the WCJ erred in failing to award 100% permanent disability based on the reports of David Friedman, M.D.; (3) the WCJ erred in failing to award 100% permanent disability based on the vocational reporting of Laura Wilson &

Associates; (4) applicant's right elbow and right wrist injuries should be added together per *Kite v. Athens Administrators* (2013) 78 Cal.Comp.Cases 213; (5) Dr. Angerman found an industrial left shoulder injury per his October 29, 2019 report; (6) Dr. Friedman's opinion to add whole person impairments complies with *Kite*, *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686, and *Elaneh v. Workers' Compensation Appeals Board* (2023) 888 Cal.Comp.Cases 905; (7) Dr. Angerman's apportionment of the applicant's lumbar injury is invalid as all of applicant's permanent impairment for the lumbar spine is attributable to the cumulative trauma; (8) defendant's exhibits S, T, B, X, Y, Z, AA, MM, NN, OO, PP though DDD and EEE through JJJ should not have been admitted; (9) the WCJ erred in concluding that there was no violation of Labor Code, section 132(a); (10) the WCJ erred in failing to take into evidence the medical article regarding Ibuprofen creating a false positive marijuana test; (11) Bruce Gillis, M.D.'s medical opinions are not substantial evidence and the WCJ erred in his reliance on the opinions of Lawrence Richman, M.D, and should have instead relied on the opinions of Nachman Brautbar, M.D.; (12) there is medical evidence for applicant's sleep and sexual disorders; (13) the specific injury and cumulative trauma injury are inextricably intertwined; and (14) the WCJ erred in finding no stomach injury and Dr. Gillis's opinion on applicant's stomach injury must be disregarded.

Defendant contends that the October 30, 2020 report of Dr. Angerman should be admitted under the doctrine of amanuensis because Dr. Angerman's office manager, at the direction of Dr. Angerman, signed the medical report on Dr. Angerman's behalf. Dr. Angerman was not able to sign due to his own medical condition and subsequent death. Defendant contends that the office manager, who signed on Dr. Angerman's behalf, exercised no judgment or discretion.

We received an answer from defendant Southern California Edison Company in response to applicant's Petition for Reconsideration. We received an answer from applicant Jeffrey McKenney in response to defendant's Petition for Reconsideration. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petitions for Reconsideration, the Answers, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and, for the reasons discussed below, we deny reconsideration as to applicant's contention involving final orders and deny removal as to applicant's contentions involving non-final orders, both which are found in the July 8, 2024 Partial Findings of Fact, Award and Orders.

Additionally, for the reasons discussed below, we grant defendant's petition for reconsideration, affirm the July 8, 2023 Partial Findings of Fact, Award and Orders, and amend Finding no. 4 to admit into evidence the October 30, 2020 report of Dr. Angerman.

FACTS

As the WCJ stated in his Joint Partial Opinion on Decision:

> Summarizing, the factual issue: Dr. Angerman dictated his final, five page supplemental report which he sent out for transcription. At the time, Dr. Angerman was experiencing chronic heart failure and was not on a transplant list. He called his office manager of forty years and told him that he was going to the hospital where he thought he would likely die but that he wanted to get his final report out even if he was unable to sign the transcribed report when it was returned. He instructed his office manager to sign for him if he was unable to do so himself. The office manager testified that this was the only time in forty years where the doctor had asked him to sign on his behalf. Dr. Angerman died two days later. The office manager followed Dr. Angerman's orders and signed the transcribed report on his behalf and initialed that he had done so. (Joint Partial Opinion on Decision, p. 8.)

DISCUSSION

A. This Decision is Timely

Preliminarily, former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on July 30, 2024 and 60 days from the date of transmission is September 28, 2024. The next business day that is 60 days from the date of transmission is September 30, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on September 30, 2024, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on July 30, 2024, and the case was transmitted to the Appeals Board on July 30, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because

[1] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 30, 2024.

B. Applicant's Petition for Reconsideration

Turning to the merits, the July 8, 2024 Partial Findings of Fact, Award and Orders contains both final and non-final orders. A petition for reconsideration may properly be taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) A "final" order has been defined as one that either (1) "determines any substantive right or liability of those involved in the case . . ." (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661, 665]); or (2) determines a "threshold" issue that is fundamental to the claim for benefits. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650, 650-651, 655-656], emphasis added.) Interlocutory procedural or evidentiary decisions entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian*, *supra*, 81 Cal.App.4th at p. 1075; *Rymer*, *supra*, 211 Cal.App.3d at p. 1180; *Kramer*, *supra*, 82 Cal.App.3d at p. 45.)

A party may petition for removal of an interim order. (Cal. Code Regs., tit. 8, § 10955.) Removal is an extraordinary remedy rarely exercised by the Appeals Board. (*Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].) The Appeals Board will grant removal only if the petitioner shows that substantial prejudice or irreparable harm will result if removal is not granted. (Cal. Code Regs., tit. 8, § 10955(a); see also *Cortez*, *supra*; *Kleemann*, *supra*.) Also, the petitioner must demonstrate that reconsideration will not be an adequate remedy if a final decision adverse to the petitioner ultimately issues. (Cal. Code Regs., tit. 8, § 10955.)

Here, applicant has fourteen contentions in his Petition for Reconsideration. The following contentions involve a final order:

> (8) defendant's exhibits S, T, B, X, Y, Z, AA, MM, NN, OO, PP though DDD and EEE through JJJ should not have been admitted;
>
> (9) the WCJ erred in concluding that there was no violation of Labor Code, section 132(a);

(10) the WCJ erred in failing to take into evidence the medical article regarding Ibuprofen creating a false positive marijuana test;

(11) Bruce Gillis, M.D.'s medical opinions are not substantial evidence and the WCJ erred in his reliance on the opinions of Lawrence Richman, M.D, and should have instead relied on the opinions of Nachman Brautbar, M.D.;

(12) there is medical evidence for applicant's sleep and sexual disorders;

(14) the WCJ erred in finding no stomach injury and Dr. Gillis's opinion on applicant's stomach injury must be disregarded.

The following contentions involve a non-final order:

(1) the WCJ erred in failing to award applicant 100% permanent disability based on the reports of Alexander Angerman, M.D.;

(2) the WCJ erred in failing to award 100% permanent disability based on the reports of David Friedman, M.D.;

(3) the WCJ erred in failing to award 100% permanent disability based on the vocational reporting of Laura Wilson & Associates;

(4) applicant's right elbow and right wrist injuries should be added together per *Kite v. Athens Administrators* (2013) 78 Cal.Comp.Cases 213;

(5) Dr. Angerman found an industrial left shoulder injury per his October 29, 2019 report;

(6) Dr. Friedman's opinion to add whole person impairments complies with *Kite*, *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686, and *Elaneh v. Workers' Compensation Appeals Board* (2023) 888 Cal.Comp.Cases 905;

(7) Dr. Angerman's apportionment of the applicant's lumbar injury is invalid as all of applicant's permanent impairment for the lumbar spine is attributable to the cumulative trauma;

(13) the specific injury and cumulative trauma injury are inextricably intertwined.

With respect to the contentions involving final orders, we deny reconsideration based on the Report, which we adopt and incorporate herein.

With respect to the contentions involving non-final orders, we agree with the Report that the WCJ has not made any finding relating to impairment and apportionment and therefore, these contentions are premature. While we sympathize with applicant's need for finality in this lengthy

litigation, applicant has not shown substantial prejudice or irreparable harm in these non-final orders.

Accordingly, we deny reconsideration as to applicant's contentions involving final orders and deny removal as to applicant's contentions involving non-final orders.

C. Defendant's Petition for Reconsideration

Defendant urges us to apply the doctrine of amanuensis in order to admit the October 30, 2020 report of Dr. Angerman. The "amanuensis" rule provides that "where the signing of the grantor's name is done with the grantor's express authority, the person signing the grantor's name is not deemed an agent but is instead regarded as mere instrument or amanuensis of the grantor, and that signature is deemed to be that of the grantor." (*Estate of Stephens* (2002) 28 Cal.4th. 665, 670-671.) In order for the signature to be deemed that of the grantor, it used to be required that the amanuensis sign in the presence of the grantor. (*Id.* at pp. 674-675.) Subsequent case law, however, clarified that an amanuensis signature is valid if the amanuensis was "acting with merely mechanical and no discretionary authority." (*Id.* at p. 675.) Defendant contends that Dr. Angerman's office manager mechanically signed the October 30, 2020 report at the behest of Dr. Angerman and had no discretionary authority.

Our research has not revealed that the doctrine of amanuensis has been applied in workers' compensation cases, let alone in the requirements of section 4628. Indeed, in *Estate of Stephens*, the Court stated that the "amanuensis rule is an exception to Civil Code sections 2309 and 2310 and also operates as an exception to Probate Code section 4264, subdivision (c)." (*Estate of Stephens,* p. 677.) We are unclear whether the doctrine of amanuensis is limited to the application of those statutes or whether it is a broader principle that can be applied in workers' compensation.

Nevertheless, we conclude that the October 30, 20202 report of Dr. Angerman is admissible in this very unique set of circumstances where the doctor examined applicant, reviewed applicant's medical records, and drafted the report but was unable to sign due to his own medical issues and subsequent death. The purpose of section 4628, is to "ensure the quality of the medical evaluations, the bill [enacting Labor Code, section 4628] included, among others, anti-ghostwriting provisions to prohibit '[a]nyone other than the doctor signing the report … from conducting the examination or participating in the medical aspects of preparing evaluation reports.'" (*Ameri-Medical Corp. v. Workers' Compensation Appeals Bd.* (1996) 61 Cal.Comp.Cases 149, 163-164 [1996 Cal. Wrk. Comp. LEXIS 3039] citing Sen. Com. on

Industrial Relations, November 1989, Margolin-Bill Greene Workers' Compensation Reform Act of 1989, Summary of Major Provisions, p. 11.)

Here, the purpose of section 4628 has been met as the record shows that Dr. Angerman performed the necessary aspects of the report but for unfortunate reasons was not able to sign the report after it was transcribed. We, thus, conclude that under these unique circumstances the spirit of the section 4628 has been satisfied. To conclude otherwise would place form over substance. (*County of Kern v. T.C.E.F, Inc.* (2016) 246 Cal. App. 4th 301 ["A general principle of statutory construction is that courts do not place form over substance where doing so defeats the objective of a statute, especially a statute designed to protect a public interest. (citations omitted.) It is an 'established principle of the law that the substance and not the mere form of transactions constitutes the proper test for determining their real character. If this were not true it would be comparatively simple to circumvent by sham the provisions of statutes framed for the protection of the public. This the law does not permit.' (citations omitted)."]; *Pulaski v. American Trucking Associations, Inc.* (1999) 75 Cal. App. 4th 1315, 1328 [64 Cal. Comp. Cases 1231, 1236] ["Substantial compliance, as the phrase is used in the decisions, means actual compliance in respect to the substance essential to every reasonable objective of the statute . . . . Where there is compliance as to all matters of substance technical deviations are not to be given the statute of noncompliance. . . . Substance prevails over form. (citations omitted.)" (internal quotations omitted).]

Accordingly, we grant defendant's petition for reconsideration, affirm the July 8, 2023 Partial Findings of Fact, Award and Orders, and amend Finding no. 4 to admit into evidence the October 30, 2020 report of Dr. Angerman.

For the foregoing reasons,

IT IS ORDERED that applicant Jeffrey McKenney's Petition for Reconsideration of the July 8, 2024 Partial Findings of Fact, Award and Orders is **DENIED**.

IT IS FURTHER ORDERED that applicant Jeffrey McKenney's Petition for Removal of the July 8, 2024 Partial Findings of Fact, Award and Orders is **DENIED**.

IT IS FURTHER ORDERED that defendant Southern California Edison Company's Petition for Reconsideration of the July 8, 2024 Partial Findings of Fact, Award and Orders is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the July 8, 2024 Partial Findings of Fact, Award and Orders is **AFFIRMED EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

. . .

4. The October 30, 2020 report from Agreed Medical Evaluator Alexander Angerman, M.D., (Court Exhibit 5) is admitted.

. . .

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

JOSEPH V. CAPURRO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 30, 2024

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

JEFFREY MCKENNEY
LAW OFFICE OF DENNIS J. HERSHEWE
PURINTON, JIMENEZ, LABO & WU, LLP

LSM/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

The undersigned issued his Joint Partial Opinion on Decision and Partial Findings & Award & Orders on 7/8/24. Applicant, Jeffrey McKinney, has filed a timely, verified, Petition for Reconsideration on 7/19/2024.

Applicant contends that:

1. The Appeals Board acted without or in excess of its power,
2. The evidence does not justify the Findings of Fact,
3. The Findings of Fact do not support the Order, Decision or Award.

Applicant has listed fourteen errors or grounds for appeal. The fourteen claimed errors basically fall into 3 categories: (1) the undersigned's finding that applicant was not entitled to L.C. §132(a) benefits, (2) the undersigned's finding that the record required further development pursuant to Nunes (which issued after trial commences) and Vigil (which issued after the case was submitted), with applicant contending the existing record supported a finding of 100% permanent disability on an industrial basis, (3) evidentiary findings (not admitted a copy of a medical publication, and failing to exclude employer records for purported lack of authentication).

The undersigned would recommend that reconsideration be denied.

II

FACTS

Applicant, Jeffrey McKenney, began working for Southern California Edison (Edison), as a lineman in 1980. On August 31, 1995, applicant sustained an admitted specific injury to his lumbar spine (ADJ7850534), received minimal treatment, and then returned to work at his usual and customary position. Over the subsequent sixteen years, applicant was involved in motor vehicle accident in 1998, underwent a right ankle arthroscopic surgery to address an "old medial malleolar fracture/bone chip, underwent right cubital and carpal tunnel surgeries in 2003, and had a two level lumbar artificial disk replacement surgery in 2009. Applicant returned to work performing his usual and customary duties following each of these prior events.

In 2010, during periodic random drug testing, required by the employer to comply with Department of Transportation (DOT) regulations, applicant tested positive for marijuana. He completed mandatory counseling, a short period of unpaid leave, and was subjected to more frequent random observed testing over the following year. In March 2011, applicant tested positive again for marijuana. He disputed the finding, contending that he had not used marijuana since the prior positive testing. A "split" or second sample taken at the March 2011 sample production testing session was sent to a different lab for another analysis. The results were also positive. Although there were no employer or DOT procedures for applicant to conduct his own testing, he did so a week later. The unobserved testing was reported as negative for marijuana. Applicant was terminated due to the employer obtained second positive test on 3/7/11.

Post-termination applicant filed a continuous trauma injury claim encompassing his entire period of employment from October 1, 1980 through March 7, 2011 (ADJ7850534). He also filed a Petition for Increased Benefits relating to his termination under L.C. § 132(a).

Two years post-termination, in January 2013, applicant underwent revision lumbar surgery consisting of a L4-S 1 fusion.

Two months following the lumbar surgery, a previously undiagnosed congenital anterior venous malformation (A VM) began bleeding resulting in emergency surgery consisting of a left side craniotomy with resection of the AV malformation with excision of a large left frontal hemorrhage with cystic cavity atrophy noted. Over the next few years applicant was periodically hospitalized for seizures associated with the brain bleed.

In addition, on 2/24/19 while walking at a park, applicant's left leg gave out causing him to fall resulting in a closed displaced proximal left humeral spiral fracture. The fracture was treated without surgery. There are also references in the medical reporting that applicant complained of increased symptoms associated with his neck and back due to the fall. Applicant contended that the injuries associated with the fall were a compensable consequence of his lumbar injuries. Defendant accepted the humerus fracture but denied other alleged orthopedic injuries associated with the fall.

The two cases initially came before the undersigned for trial on October 8, 2013 relating to whether applicant's 8/31/95 admitted lumbar spine injury (ADJ7850534) was barred by the statute of limitations, and if not, whether applicant was entitled to continuing temporary disability indemnity benefits associated with that injury (104 week TD cap, not applicable to that DOI).

Following trial, the undersigned issued his Partial Joint Opinion on Decision and Partial Joint Findings and Award on November 25, 2013 finding in relevant part that applicant's 1995 claim was not barred by the statute of limitations and that applicant was entitled to temporary disability indemnity benefits from March 8, 2013 and continuing at the weekly indemnity rate applicable to his 1995 injury which had no temporary disability indemnity cap.

The parties returned to the trial calendar before the undersigned on May 25, 2016 relating to issues associated with defendant's petition(s) to terminate applicant's entitlement to ongoing temporary disability benefits. Following that trial, the undersigned issued his Joint Opinion on Decision and Findings of Fact & Order on August 4, 2016 finding in relevant part that applicant's entitlement to temporary disability pursuant to the prior November 25, 2013 award was terminated as of February 10, 2016.

The parties returned to the trial calendar before the undersigned for a third time on January 25, 2017 relating to treatment issues associated with a home care assistance evaluation and medical/personal transportation.

Trial recommenced relating to all the remaining issues on 9/28/22, including applicant's claim to entitlement of L.C. § 132(a) benefits.

Other potentially relevant historical, medical, litigation history (some of which is referenced above) includes:

1970s: identified as smoking one-half to one pack of cigarettes/day until purportedly stopping in 2010.

"Early" 1980s: commenced long-term excessive alcohol use, chronicled as a minimum of 6-12 beers per day, up to a bottle of vodka/day, until purportedly stopping in 2009 or 2010.

1995: Bankruptcy.

1998: surgical repair of tear in lower abdomen.

5/26/98: motor vehicle accident with Ll compression fracture, 3 weeks off work (treating doctors at the time chronicled applicant saying he had no residuals from prior 1995 work injury-Defendant Exhibit V, page 3).

12/3/01: arthroscopic surgery to address an "old medical malleolar fracture, bone chip".

5/28/03: right carpal tunnel and right cubital ulnar transposition surgery.

7 /31/05: deep right elbow laceration due to "altercation at home".

2009: lost house due to foreclosure.

2/6/09: industrial back surgery, L4-L5 disk replacements, off work 6-10 months.

2009: diagnosed with cirrhosis of the liver, with delirium tremens and hallucinations during post back surgery withdrawal.

1/21/13 and/or 1/23/21: revision back surgery, L4-S 1 fusion.

4/10/13: AV malformation bleed, necessitating left side craniotomy with resection of the AV malformation with excision of a large left front hemorrhage with cystic cavity atrophy noted. Chronic thrombocytopenia also diagnosed.

5/16/15- 2017: Hospitalized periodically for seizures.

2/24/19: compensable consequence fall resulting in a closed displaced proximal left humeral spiral fracture.

The undersigned issued his Partial Joint Opinion on Decision, with separate Partial Findings and Awards/Orders on 7/9/24 making specific findings relating to body parts injured, that applicant failed to prove that he was entitled to benefits pursuant to L.C. §132(a), and that the record required further development on the extent of applicant's impairment, including vocational reporting to comply with Nunes, and whether impairments should be added rather than combined to comply with Vigil

III

DISCUSSION

Applicant has raised fourteen purported errs the undersigned made in his Partial Joint Opinion on Decision. Applicant also alleges, erroneously, that the undersigned did not review all the evidence submitted at trial. Applicant's contentions are addressed in the order raised in applicant's petition.

1. DID THE UNDERSIGNED COMMIT ERR IN FAILING TO AWARD 100% PERMANENT DISABILITY BASED ON THE ORTHPEDIC AME REPORTS OF DR. ANGERMAN?

No. Dr. Angerman provided appropriate impairment and apportionment analysis (except for his upper extremity Kite analysis done prior to the recent en bane decision in Vigil), relating to applicant's orthopedic injuries.

In his petition for reconsideration (pages 5-6) applicant lists numerous orthopedic disability rating strings, all of which are presented zealously, but inaccurately, as 00% related to a single injury. Although the undersigned has not made any findings relating to impairment and apportionment due to the necessity of developing the record, it should be noted that Dr. Angerman's reporting clearly apportions much of applicant's impairments between the two admitted industrial injuries and a non-industrial motor vehicle accident. With apportionment his impairment findings were in the 60% to 70% range.

Applicant's attorney further argues in the petition that the medication applicant was prescribed in 2018 " . . . alone would be enough to find applicant 100% disabled". This is merely the attorney's argument and is not adopted in any of Dr. Angerman's reporting.

Despite repeated interrogatories by applicant's attorney, Dr. Angerman consistently stated that he would defer any findings on permanent total disability to the trier of fact and vocational rehabilitation experts. He stated he had no reason to disagree with any vocational rehabilitation reporting. Both applicant and defendant obtained vocational reporting, one found applicant unable to compete in the open labor market, one didn't.

In Dr. Angerman's reporting from 8/27/20 (Court Exhibit 14, page 4) he stated as follows:

> "I am asked again to address if I believe this patient is orthopedically 100% disabled and unable to complete in ·the· open labor market. In response to these interrogatories, I would refer parties' attention to my re-examination report dated October 29, 2019, at which time Mr. Hershewe asked me that same question. On page 9 of that report I stated that I felt the orthopedic work restrictions that I have laid out in this case are appropriate and warranted strictly from an orthopedic standpoint, and that I felt the issue as to whether the patient would be considered 100% totally and permanently disabled would best be addressed by a vocational rehabilitation specialist who could take into account his multiple disabilities/impairments and how all those factors would impact his overall ability to compete in ·the open labor market. I stand by that opinion at the present time from an orthopedic standpoint."

As more fully detailed below, the undersigned found the vocational reporting, particularly from applicant's reporting VR expert, Ms. Wilson, to be non-compliant with the analysis/requirements set forth in the en bane decision in Nunes v. State of California, Dept. of Motor Vehicles (2023) 88 Cal. Comp. Cases, 741 & 894, 2023 Cal. Wrk. Comp. LEXIS 30. Rather

than finding that applicant had failed to meet his burden of proof, the undersigned ordered further development of the record so that the vocational reporting could be supplemented in conformity with the Nunes decision which issued after the start of trial herein.

2. DID THE UNDERSIGNED COMMIT ERR IN FAILING TO A WARD 100% PERMANENT DISABILITY BASED ON THE PSYCHIATRIC AME REPORTS OF DR. DAVID FRIEDMAN?

No. Dr. Friedman's reporting is not substantial on the issue of impairment and apportionment. He simply concludes that all impairments, in all specialties, should be added without providing a competent explanation why adding everything is more accurate than utilizing the CVC, and he fails to discuss how the various impairments, particularly in areas outside his expertise as a psychiatrist, affect applicant's activities of daily living.

Dr. Friedman also incorrectly states in his reporting that AME, Dr. Angerman, found the applicant to be 100% disabled on an orthopedic basis (Court Exhibit 24, page 21). A careful reading of Dr. Angerman's reporting and deposition testimony shows that this conclusion by Dr. Friedman is incorrect.

Dr. Friedman also acknowledged at his deposition that pain caused some of applicant's psychiatric injury and impairment, and that some of applicant's pain is due to the 1995 specific industrial injury, but then concludes that there is no psychiatric apportionment to the prior 'specific injury because "it would be speculative to say that applicant developed a psychiatric injury due to the 1995 injury alone" (emphasis added) (Court Exhibit 24, page 77-78). The correct analysis should have been did the 1995 contribute to the onset of the psychiatric injury and is it in part causative of his current psychiatric impairment.

Finally, Dr. Friedman relied in part on the vocational reporting from Lara Wilson, which he found to be the most persuasive. As referenced below, the undersigned found the reporting from Lara Wilson to not be substantial, having failed to comply with Nunes, which issued after her reporting was obtained.

3. DID THE UNDERSIGNED COMMIT ERR IN FAILING TO AWARD 100% PERMANENT DISABILITY BASED ON THE VOCATIONAL REPORTING OF LARA WILSON?

No. Lara Wilson concluded that applicant was permanently totally disabled, but failed to consider industrial apportionment and non-industrial apportionment in her impairment analysis.

Orthopedic AME, Dr. Angerman, found that impairment components of some of applicant's injuries were validly apportioned to either other industrial injuries, or to non-industrial factors pursuant to L.C. §4663. Ms. Wilson ignored this apportionment, merely concluding that applicant was permanently totally disabled on an industrial basis.

Likewise, concluding that prior injuries (both industrial and non-industrial) didn't keep applicant from working, and could thus be disregarded in her vocational analysis is simply wrong. (Applicant Exhibit 23, page 35).

The non-industrial AVM brain bleed with substantial post-event sequelae, is also completely ignored in her analysis. Applicant may very well be permanently totally disabled based on the entirety of his industrial and non-industrial impairments, but medical apportionment needs to be competently addressed in any vocational reporting. In Grace Nunes v. State of Calif. Dept. of Motor Vehicles (2023), 88 CCC, 741 & 894 on 6/23/23. The Board made three specific findings relating to the use of vocational reporting:

> 1. Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."
>
> 2. Vocational evidence may be used to address issues relevant to the determination of permanent disability.
>
> 3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

Although this was not done in this case, the undersigned concluded that the parties should be offered an opportunity to develop and complete the record in light of the Nunez decision which was issued after trial commenced in this case. Why applicant did not request an opportunity to address their reporting prior to submission, in light of Nunez, is perplexing, but the alternative would be to find that applicant failed to meet his burden of proof in rebutting the presumptively correct CVC.

4. DID THE UNDERSIGNED COMMIT ERR BY FINDING IN PART THAT THE RECORD REQUIRES FURTHER DEVELOPMENT ON WHETHER APPLICANT'S RIGHT UPPER EXTREMITY IMPAIRMENTS TO THE WRIST AND ELBOW SHOULD BE ADDED PURSUANT TO KITE?

No. In response to an interrogatory on the issue, Dr. Angerman stated in his 5/30/19 report (Court Exhibit 10, page 19): "I do feel the Kite decision applies from an orthopedic standpoint with regard to the patient's level of disability/impairment with regards to the right elbow and right wrist as the patient had surgery on each causing a greater impairment."

Subsequent to that report, and trial herein, on 6/10/24 the En Banc decision in Sammy Vigil v. County of Kern. (ADJl1201607, ADJl1201608) issued. As noted in the undersigned's Opinion on Decision, although Dr. Angerman perhaps reasonably concluded that the right wrist and elbow impairments should be added rather than combined he did not analyze why adding was more accurate than the presumptive CVC (other than noting applicant had two surgeries), or how the impairments affect applicant's ADLs. The undersigned does not believe that "two surgeries" without something more satisfies the requirements of Kite and Vigil.

5. DID THE UNDERSIGNED COMMIT ERR IN FINDING THAT DR. ANGERMAN'S CONCLUSIONS RELATING TO A LEFT SHOULDER INJURY WERE AMBIGUOUS AND REQUIRED CLARIFICATION/DEVELOPMENT OF THE RECORD?

No. There were two components to the undersigned's finding that Dr. Angerman's conclusions regarding causation of injury to the shoulder were ambiguous. The first component pertained to whether the admitted compensatory fall in 2019 that resulted in a left proximal humerus fracture, also resulted in an injury to the left shoulder. Defendants admitted injury to the humerus but not to the left shoulder. In the Joint Opinion on Decision, the undersigned stated that there was ambiguity as to whether the bone fracture resulted in a separate injury to the shoulder. Upon further review of the rating manual, the undersigned' s opinion has changed as it appears that the proximal portion of the humerus is considered a part of the shoulder. This combined with an observed decrease in the shoulder's range of motion, despite no shoulder complaints by the applicant during evaluation, leads the undersigned to agree that there is in fact no ambiguity about whether applicant sustained a compensable consequence injury to the left shoulder.

The second component of the undersigned's conclusion finding that there was ambiguity in Dr. Angerman's reporting dealt with causation of the shoulder injury and apportionment of impairment. This ambiguity remains. According to Dr. Angerman, applicant sustained injury to

his low back due to the specific injury in 1995, a separate motor vehicle accident, and due to the continuous trauma injury herein. Applicant ultimately underwent two back surgeries related to his lumbar spine due to those injuries. Dr. Angerman credibly apportioned applicant's lumbar impairment between those injuries. As noted above, the undersigned previously found that applicant was entitled to temporary disability following his 2013 surgery due to the prior 1995 back injury. After the last surgery, applicant developed increasing lumbar related symptoms including left lower extremity weakness that was causative of his fall in 2019. Dr. Angerman failed to address in his reporting the causes of the compensable consequence fall, other than to identify it as a compensable industrial injury. At page 7 of his 10/29/19 report (Court Exhibit 12) he merely states the fall " . . . would be considered a valid compensatory injury relating to his industrial lumbosacral spine disability and impairment". Under apportionment at page 8 he states ".. it is felt the left humeral fracture sustained on February 24, 2019 would be a compensable consequence injury relating to his ongoing left lower extremity weakness from his lumbosacral spine industrial injury and related surgeries". No clarity of causation and apportionment between his lumbar spine industrial injuries and/or the motor vehicle accident is given.

The left shoulder is raised as an injured body part by applicant in both the specific and the continuous trauma injuries herein. Back injuries are admitted by defendant in both injuries. It may be reasonable to conclude that the compensable consequence fall and humerus fracture were due in part to both prior back injuries and the prior motor vehicle accident, but a competent medical opinion on causation and apportionment is required.

Based on the foregoing, the undersigned does not believe that he committed err in finding that Dr. Angerman's reporting was ambiguous relating to the cause(s) of the left shoulder injury and that the record required further development.

6. DID THE UNDERSIGNED COMMIT ERR IN FAILING TO FIND THAT DR. FRIEDMAN'S CONCLUSION THAT ALL OF APPLICANT'S IMPAIRMENTS SHOULD BE ADDED, RATHER THAN COMBINED, BECAUSE APPLICANT HAD NOT BEEN WORKING FOR 1 1 YEARS AND WAS ON SOCIAL SECURITY, WAS SUBSTANTIAL EVIDENCE ON THE ISSUE?

Not a bonafide issue for reconsideration. The undersigned did not making [*sic*] findings relating to impairment as the record required further development.

Dr. Friedman's opinion on causation of injury and impairment relating to the psychiatric components of applicant's psychiatric related injury was found to be substantial. However, his

analysis relating to adding all impairments, even in areas outside his expertise and in which other more competent physicians were able to provide credible analysis of apportionment between the industrial injuries and between non-industrial factors of impairment, was not found to be credible. As noted in the undersigned's Joint Opinion on Decision, Dr. Friedman's Kite analysis is not valid. He fails to adequately state why adding is more accurate than combining. Applicant argues in his petition for reconsideration support for one of the more prominent errors in Dr. Friedman's analysis, i.e. that applicant "has not been working for 1 1 years and is on social security disability" as a foundational basis for his opinion. In addition, as further noted in the undersigned's Opinion on Decision, pursuant to the 6/ 1 0/24 en bane decision in Sammy Vigil v. County of l' em. (ADJl 1201607, ADJ l 1201608), a substantial analysis requires a competent discussion of what the presumptively correct CVC impairments would be, why adding the impairments results in a more accurate representation of applicant's overall impairments, and how the impairments affect applicant' s ADLs.

The undersigned could have found that applicant failed to meet his burden of proof that adding impairment pursuant to Kite was appropriate in this case. However, since the decision in Vigil was issued after trial herein, and the decision provided clarification on how the issue should be properly addressed, the undersigned concluded that the reporting physicians should be provided with an opportunity to reanalyze applicant' s impairments in light of the new, clarifying decision.

7. IS DR. ANGERMAN'S SPINE APPORTIONMENT INVALID?

Not a bonafide basis for reconsideration. The undersigned is uncertain what basis for reconsideration applicant believes this alleged error supports. No findings were made relating to permanent impairment or apportionment. Those issues were deferred pending further development of the record.

8. DID THE UNDERSIGNED COMMIT ERR IN F AILING TO EXCLUDE DEFENDANT EXHIBITS S, T, V, X, Z, AA, MM to JJJ?

No. S, T, V are medical reporting from Dr. Richman, and X, Z and AA are medical reporting from Dr. Merman (who the parties stipulated was a consulting physician reporting to applicant' s primary treating physician, Phillip Sobol, M.D. (MOH from 4-26/23, page 2, line 14-15),, none of which the undersigned found to be non-substantial as argued by applicant.

MM through JJJ are all employer records relating to applicant's periodic drug testing, positive test results, and e-mails from management relating to the positive tests. Applicant testified and confirmed the periodic testing and two positive samples from testing in 2010 and 2011 at trial (although he disputed the validity of the positive results from the 2011 testing, at two different labs). In addition, the employer' s medical officer credibly testified relating to the employer retained records.

All the exhibits applicant is objecting to were admitted into evidence at trial. Failure to specifically deny applicant' s motion to strike those exhibits is equivalent to a denial of the motion(s).

9. DID THE UNDERSIGNED COMMIT ERR IN FINDING THAT APPLICANT FAILED TO MEET HIS BURDEN OF PROOF THAT THE EMPLOYER DISCRIMINATED AGAINST HIM IN VIOLATION OF L.C. §132(a)?

No. L.C. §132(a) states: "It is the declared policy of this state that there should not be discrimination against workers who are injured in the course and scope of their employment."

Applicant has the burden of proof pursuant to L.C. §3202.5 in proving by a preponderance of the evidence that he is entitled to the increased benefits pursuant to L.C. §132(a).

Applicant contended at trial that he thought the employer had discriminated against him by subjecting him to increased drug testing following a prior positive test in 2010, and by terminating him following an employer obtained second positive test.

The only component of L.C. § 132(a) that is arguably applicable to the alleged discriminatory acts raised by applicant is L.C. §132(a)(l) which states:

> "Any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made known his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor and the employee's compensation shall be increased by one-half, but in no event more than ten thousand dollars ($1 0,000), together with costs and expenses not in excess of two hundred fifty dollars ($250). Any such employee shall also be entitled to reinstatement and reimbursement for lost wages and work benefits caused by the acts of the employer."

Pursuant to the holdings in the California Supreme Court case of Department of Rehabilitation v. Workers' Comp. Appeals Bd (Lauh er), 30 Cal. 4th 1281, 68 CCC 835 (2003),

an applicant needs to show that they were not only discriminated against because they were injured at work or filed a claim, but also that they were treated differently than other employees with non-industrial injuries. Applicant has failed to meet either evidentiary burden herein.

The only claim in existence at the time of applicant's termination in 2011 was the back injury claim from 1995. He was working his usual and customary occupation at the time of his first periodic positive random urine test in 201 0. He was continuing to work full duties at the time of his second positive drug test from a sample obtained on March 2, 2011 (Defendant Exhibit CCC). Testing of a second sample at a different lab also was reported positive Defendant Exhibit (HHH). The employer's medical director credibly testified that she was unaware of applicant' prior work injury. She credibly testified that there was no alternative except termination after a second positive test within a year of the first positive test. Applicant's supervisor testified that applicant was a good worker, pleasant to work with, and that he was upset at having to notify him of his termination. The employer credibly testified that the employer valued the lineman who worked for them because of the extensive training and experience required to perform the job that was invested into each lineman. The medical director further credibly testified that during her multi-year period of service for the employer, she was involved in approximately 70 employees who tested positive for impermissible drugs twice within a year, and every one of those employees was terminated, whether they had a work injury or not.

Applicant testified that he thought he had been singled out for excessive random testing during the year following his first positive test. The employer credibly rebutted applicant's contention. In any case, excessive testing was not the reason for applicant' s termination.

Applicant also testified that he thought the two positive tests, at different labs, taken from the same observed sample, were both inaccurate. This alone would not show discrimination, just the possibility of bad independent lab testing (twice?). Applicant's obtaining of his own private testing seven days following when the employer sample was obtained (resulting in the two positive test reports), is likewise not relevant. The employer credibly testified that there is no provision by the employer or the Department of Transportation for procuring a "rebuttal" private test. In addition, the employer testified that applicant's self-procured testing was not an "observed" test which was required for all employees tested during the year following an initial positive test. Finally, the employer credibly testified that urine samples taken after a positive sample, in this case seven days later, can be reported as negative at that time.

Applicant further contended that the employer should have tested for Ibuprofen, which he claimed he was taking at the time of the second positive testing. The employer testified that this was not a part of the employer/Department of Transportation required testing. The most credible evidence at trial showed that Ibuprofen would not have caused a positive marijuana test at the time of applicant's testing in 2011. In addition, the undersigned notes that applicant apparently did not considered it relevant as he did not obtain testing for Ibuprofen at the time of his own self-procured testing (Defendant Exhibit GGG).

Finally, in his petition for reconsideration applicant contends that the employer wanted to get rid of him because of his injuries. Although arguably zealous argument, there is virtually no credible evidence in the record to support the allegation.

Based on the foregoing the undersigned does not believe that he committed err in finding that applicant did not meet his evidentiary burden in proving by a preponderance of the evidence that the employer discriminated against him in violation of L.C. §132(a).

10. DID THE U N DERSIGNED COMMIT E R R BY FAILING TO ADMIT A PRINT OUT OF A MEDICAL JOURNAL ARTICLE?

No. The undersigned does not recall applicant offering the obscure medical journal article into evidence, but would have excluded it as a non-treating, non-medical-legal document being offered to prove a contested issue. The undersigned did allow applicant's attorney to use the article in formulating his questioning of the employer's medical director.

11. DID THE UNDERSIGNED COMMIT E RR IN RELYING UPON THE MEDICAL REPORTING OF AG REED MEDICA L EVALUATOR IN INTERNAL MEDICINE, BRUCE G ILLIS, M.D. DUE TO FAIL U R E TO REVIEW E M P LOYER MSDS?

No. Dr. Gillis was firm in his opinion that applicant's post-termination brain bleed in 2013 was medically probably not caused or aggravated by his employment. He stated in his deposition that he would be happy to review any employer MSDS documentation if the parties provided such documentation to him. As applicant's attorney acknowledged in the petition for reconsideration, no one ever provided such documentation to the AME. The doctor's detailed review of applicant's voluminous prior treatment records, was sufficient for the AME to render a competent and credible opinion on causation relating to the brain bleed.

12. DID THE UNDERSIGNED COMMIT ERR BY FAILING TO RELY ON APPLICANT'S TREATING PSYCHOLOG IST, DR. LAMM, ON T H E ISSUE OF WHETHER APPLICANT SUSTAINED INJURIES IN THE FORM OF SLEEP AND SEXUAL DYSFUNCTION?

No. The undersigned did not rely on the reporting from Dr. Lamm, as the reporting from Psychiatric AME, David Friedman, M.D. (Court Exhibits 23-24) was found to be more reliable and credible on issues of injury. Dr. Lamm concluded that applicant's entire psychiatric related impairment was industrial, due to two specific injuries (although only one pled) and the continuous trauma injury with it "impossible to separate out the percentages" and therefore "they must be lumped together". Dr. Lamm ignores the internal AME's findings that applicant' s catastrophic brain bleed from his congenital A V malformation, two years after his termination, was not industrial. Dr. Lamm also appears to be under the impression that applicant' s termination was not an unlawful or discriminatory act by the employer. Dr. Lamm made her findings relating to sleep and sexual dysfunction based solely upon the history provided to her by the applicant, without any testing.

Sleep and sexual dysfunction were deferred to the AME psychiatrist, Dr. Friedman, by the other agreed medical evaluators. Dr. Friedman made no separate injury findings relating to either claimed injury, but did note that applicant's self-reported Epworth testing score was "borderline".

13. DID THE UNDERSIGNED COMMIT ERR BY FAILING TO FIND THAT "APPLICANT'S INJURIES, BOTH THE SPECIFIC INJURY AND THE CUMULATIVE TRAUMA, ARE INEXTRICABLY INTERTWINED"?

Not a bonafide basis for reconsideration. The undersigned is uncertain what basis for reconsideration applicant believes this alleged error supports. No findings were made relating to permanent impairment or apportionment. Those issues were deferred pending further development of the record. Applicant relies upon the reporting from Dr. Lamm, which, as noted above, the undersigned did not find persuasive.

14. DID THE UNDERSIGNED COMMIT ERR IN FINDING NO INJURY TO APPLICANT'S STOMACH?

No. The parties selected Bruce Gillis, M.D. as an agreed medical evaluator in internal medicine to address issues of injury, causation, and apportionment. Dr. Gillis reviewed and competently analyzed applicant' s voluminous prior treatment records. He noted that although

applicant had a history. of taking nonsteroidal anti-inflammatory medications, and that those medications can be ulcerogenic, there was no evidence that any of the findings of a gastrointestinal endoscopy were consistent with injurious effects from taking those drugs (Court Exhibit 1 6, page 1 7).

IV

RECOMMENDATION

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

DATED: 7/29/2024

S . MICHAEL COLE
WORKERS' COMPENSATION JUDGE