WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JIMMY YOUNG, *Applicant*

vs.

MAGIC MOUNTAIN, LLC;
HARTFORD PROPERTY AND CASUALTY INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ14881837; ADJ12757312
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued on March 27, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed as a plumber during the period December 1, 2008 through December 10, 2021, applicant sustained injuries arising out of and in the course of his employment to his bilateral knees; (2) applicant did not sustain injury to his back or ankles; (3) at the time of injury defendant's workers' compensation insurance carrier was Hartford Property and Casualty Insurance Company; (4) applicant's average weekly wage was $1,284.40 per week, warranting rates of $856.27 per week for temporary disability and $290.00 per week for permanent disability; (5) applicant's injury caused temporary disability for the periods November 20, 2015 through August 15, 2016, and May 9, 20017 through October 20, 2017, payable at the rate of $856.27 per week; (6) the EDD lien is allowed in its entirety; (7) EDD is entitled to interest pursuant to Unemployment Insurance Code section 2629.1; (8) the injury became permanent and stationary on November 10, 2021; (9) the injury caused permanent disability of 68 percent, equating to 415.25 weeks of indemnity, payable at the rate of $290.00 per week, commencing October 21, 2017, for a total of $122,742.50; (10) defendant failed to meet its burden of proof on apportionment; (11) 100 percent of the permanent disability herein is apportioned to this case; (12) the injury caused a need for future medical care; (13) the value of applicant's attorney's services is 15 percent of the permanent disability benefits set forth above, and 15 percent of any net temporary disability benefits due as set forth above after credit for the EDD lien; and (14) defendant's motion to strike the formal rating is denied.

The WCJ issued an award in accordance with these findings and ordered that (1) the EDD lien be allowed in its entirety, plus interest pursuant to Unemployment Insurance Code section 2629.1; and (2) defendant is allowed full credit for the EDD lien against the temporary disability benefits awarded herein.

Defendant contends that the WCJ erroneously (1) found that it did not meet its burden of proof as to apportionment; (2) calculated permanent disability by adding impairments instead of combining them using the CVC; (3) found right knee impairment of 20 percent; (4) found applicant entitled to temporary disability benefits for the periods of November 20, 2015 through August 15, 2016, and September 6, 2017 through October 20, 2017; and (5) awarded reimbursement to EDD for the periods of November 15, 2015 through January 13, 2016.

We did not receive an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be granted to find that defendant met its burden of proof as to apportionment and to state that applicant is not entitled to temporary disability benefits after September 5, 2017, and otherwise be denied.

We have reviewed the contents of the Petition and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that (1) applicant's injury caused permanent disability of 86 percent, equating to 689.25 weeks of indemnity, thereafter a life pension, payable from October 21, 2017, at a weekly rate and for a total to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute; (2) applicant is entitled to temporary disability benefits as to the periods of November 20, 2015 through August 15, 2016, and May 9, 2017 through September 5, 2017; and (3) the cumulative injury period is from December 1, 2008 through November 10, 2021.

FACTUAL BACKGROUND

On March 4, 2024, the matter proceeded to trial of the following relevant issues:

1. Injury AOE/COE
2. Body parts.
3. Applicant's claim for temporary disability, January 14, 2016, to August 16, 2016; and May 9, 2017, to October 20, 2017.
4. EDD's claim for temporary disability, November 17, 2015, to August 14, 2016; May 10, 2017, to September 5, 2017.
5. Permanent and stationary date.

6. Permanent disability, including *Kite*.
7. Apportionment.
8. Need for further medical care.

. . .

10. EDD lien for periods November 17, 2015, to August 14, 2016; ($24,091.43); and May 10, 2017, through September 5, 2017 ($10,268).

(Minutes of Hearing and Summary of Evidence, March 4, 2024, pp. 3:15-4:5.)

The WCJ admitted an exhibit entitled QME Report of Dr. Fields dated November 10, 2021, into evidence. It includes the following:

> CAUSATION
>
> . . .
>
> Having reviewed his history, which was not available on my first evaluation, it seems like he had a progressive rapid arthritis. For causation I believe cumulative trauma and partly because of morbid obesity and family history. So I would say 85% cumulative trauma from his job at Magic Mountain and 15% from the obesity as it is a fairly symmetrical problem.
>
> . . .
>
> APPORTIONMENT
>
> As I stated under causation, I would apportion 85% of this to his work at Six Flags Magic Mountain and I would apportion 15% to his morbid obesity.
>
> (X2, QME Report of Dr. Fields, November 10, 2021, p. 26.)

The WCJ admitted an exhibit entitled Report of Dr. Fields dated September 9, 2022, into evidence. It includes the following:

> So, I think multiple falls this may be a little overstated and as far as the falls that he had status post his knee replacements, they basically add to his level of pain but considering that he is morbidly obese, his knees are working harder than they have to so I do not know that the post total knee falls actually made a difference as CT and bone scans have not shown any evidence of loosening and the patient does not have signs of infection.
>
> Also, in my reports, I put down that I apportioned 15% to weight and 85% to work and I think that should also be changed based on the fact that I think his morbid obesity is such a large factor as it appears he had been gaining weight throughout that he be apportioned 25% to the morbid obesity and 75% to the work-related injuries.
>
> So, in summary, changes: Apportionment 25% to weight, 75% to work.
>
> (Ex. X4, QME Report of Robert Fields, M.D., (Supplemental), September 9, 2022, p. 11.)

The record also includes applicant's Formal Rating and Instruction issued by the DEU issued on March 14, 2024. It includes the following:

> Please rate:
>
> Left Knee: 20%wpi
> Right Knee 20% wpi
>
> Please apportion 75% of the overall disability to this injury.
> Please add the impairments under *Kite*. Do not use the CVC.
> . . .
> Date of Injury: 12-10-2021
> . . .
> The recommended rating is 65.00 % amounting to 391.25 weeks of disability payments at the rate of$290.00 a week in the total sum of$113,462.50.
>
> FORMULA:.
> LEFT KNEE: 17.05.06.00 -20 - [l.4]28 -4811- 36 -43 PD (A)
> RIGHT KNEE: 17.05.06.00 -20 - [l.4]28 - 4811 - 36 - 43 PD (A)
> (A) 75% (43 + 43 = 86) 65 FINAL PD AFTER APPORTIONMENT
> (Formal Rating Instructions and Rating, March 14, 2024, pp. 1-2)

In the Opinion on Decision, the WCJ states:

> The applicant herein claims to have sustained a specific injury on 10/6/2017 to his knees, lift ankle and back (ADJ 12757312). He also claimed cumulative injuries to the same body parts for the period 2008 through 10/6/2017 (ADJ 14881837). On the date of the injury or injuries he was a 55-year-old plumber for the Defendant.
>
> The specific injury of 10/6/2017 was initially admitted. The CT claim was denied. Dr. Robert Fields acted as the QME in both cases. . . .
>
> The medical history then presented by Kaiser Records (Ex. A) reveal that Applicant underwent total left knee replacement on 5/9/2017 (Ex. A, p.1043) which is 5 months before this specific injury. Those records also reveal that Applicant underwent *right* total knee replacement previously on 4/26/2016 (Ex. B, p.780) See Kaiser notes of 4/18/2013 (Ex. B, p.312).
> . . .
> Dr. Fields then saw the patient again on 10/10/2021 (Ex. X-2). Now he has received a very detailed packet of medical records. He made a history of his job duties over the years. He became aware that there were bilateral complaints for several years and that the TKA surgeries pre-dated the incident of 10/6/2017.
>
> The doctor also received a history of another incident involving the left knee on 9/8/2021. His review of the records and the history of work resulted in a

significant change of opinion. Dr. Fields concluded that Applicant was P&S and that his injuries were cumulative in nature.
. . .
He continued to work until 12/10/2021.
. . .
The EDD received a certification of disability commencing 11/10/2015 for bilateral knee pain. This appears to be supplied by a Dr. Kohl at Kaiser-Lancaster. MRIs of the knees were taken by Renaissance Imaging Center of 11/18/2015 (Ex. B). Those films were dispatched to Dr. Cordero who did the two TKA procedures per Applicant's testimony.
. . .
Causation (aoe/coe)

Dr. Fields as QME has reviewed all the evidence and examined the Applicant. The records definitely supported his opinion that indeed he had sustained cumulative trauma over the years as a plumber (30 years) rather than a singular specific injury.

He also received the history of the subsequent "event" on 9/8/2021. He holds to his opinion that this case is strictly cumulative. . . .

Date of Injury
The Applicant continued to work until 12/10/2021. The injury was caused by all his employment. Hence this will be the date of injury.
. . .
Temporary disability can be awarded before the actual date of injury is set under Cal. Lab. Code sec. 5412. *Arias v. City of Los Angeles* 2016 Cal. Wrk. Comp. P.D. LEXIS 83.
(Opinion on Decision, pp. 1-4.)

In the Report, the WCJ states:

The EDD records show that Kaiser took him off work on 11/18/2015 (EDD Ex. B). The EDD records from Kaiser note that this is due to bilateral knee pain. The Applicant then underwent a TKA of the left knee on 4/26/2016 (Ex. B, p.785) returning to work on 8/15/2016.

The Applicant stopped work again on 5/9/2017 under the care of Kaiser (EDD Ex. A). He underwent a right TKA. He continued in post-surgical rehabilitation thereafter (Df Ex. A). He continued to be off work until he returned to work on 10/20/2017 according to his testimony.

Dr. Robert Fields acts as the PQME in orthopedics having issued four reports (Exs. X-1 thru X-4) and had his deposition taken of 9/9/2022 (Ex. X-5).
. . .

Dr. Fields' opinion on apportionment concluded that 15% of the overall impairments were due to lifelong morbid obesity. He supported that opinion by pointing out the lifelong medical advice to lose weight coupled with the fact that the degenerative changes in both knees were essentially symmetrical.

. . .

Dr. Fields' deposition was taken on 4/15/2022. This testimony revealed that the Applicant's complaints, his need for a cane and the swelling in the knees warranted a change from a "good" result from surgery to a "fair" result instead. Hence the wpi in each knee was increased to 20% wpi (Table 17-33). The analysis was detailed utilizing the quantitative measurements set forth in Table 17-35 (pp. 28-30).

. . .

When questioned about the applicability of *Kite*, Dr. Fields agreed that there was a synergistic relationship between the two knee impairments. He states that the Applicant does not have a contralateral knee to rely upon to compensate for any weakness in one knee or the other. Hence, he felt that merely adding the impairments was a fair assessment of the disability herein. (Ex. X-5, pp.38-39).

According to Applicant he was off work from the time of his first surgery (4/26/2016) through 8/15/2016 when he returned to work with restrictions that were accommodated. He then went off work again on or about 5/9/2017 until 10/20/2017 when he again returned to work with employer accommodations. . . .

The EDD received a certification of disability commencing 11/10/2015 for bilateral knee pain. This appears to be supplied by a Dr. Kohl at Kaiser-Lancaster. MRIs of the knees were taken by Renaissance Imaging Center of 11/18/2015 (Ex. B). Those films were dispatched to Dr. Cordero who did the two TKA procedures per Applicant's testimony.

The Applicant testified that all his time off of work was covered by EDD, and there was no time that he was off work without benefits. No temporary disability was paid (Min/Hrg, 3/4/2024, p.7, line 7).

EDD provided benefits from 11/17/2015 to 8/14/206 and again from 5/10/217 to 9/5/2017.

. . .

Temporary Disability (11/20/2015 to 8/15/2016)

The EDD paid for this period of disability. The medical evidence from EDD shows that Kaiser doctors took him off of work at that time for bilateral knee pain which ultimately resulted in right knee total replacement surgery (TKA).

The period was authorized by EDD and based upon Kaiser medical reports to the EDD. The Applicant testified to this period of disability recovering from a total knee replacement on the right (Min/Hrg, 3/4/2024, p.6, line 7).

Petitioner claims that the period 11/20/2015 to 1/14/2016 was not even claimed by the Applicant. However, it was claimed by EDD. The claim is backed by medical reports from Kaiser and substantiated by Applicant's testimony.

Hence this period of temporary disability is valid (and payable to EDD).

Temporary Disability (5/9/2017 to 10/20/2017)

The Petitioner admits temporary disability 5/9/2017 to 9/7/2017. They claim that no additional temporary disability should have been awarded from 9/8/2017 to 10/20/2017.

Upon detailed review of the Kaiser records (Ex. A) the undersigned will agree with Petitioner and request an amended F&A to reflect same.

A very detailed review of the Kaiser records in Ex. A reveals ongoing post-surgical rehabilitation from the total knee replacement on the left commencing on or about 5/9/2017. However, on p.1148 on 8/14/2017 applicant claims that he is ready to return to work without restrictions. On that same page the notes show that some form of RTW forms have already been filled out in compliance with his wishes.

On p.1154 Applicant tells Kaiser that he is ready to RTW on 8/23/2017.

On p 1157 he states that he is going back to work on 8/30/2017.

On. p.1148 the doctors state that they will OK a RTW for 9/6/2017.

Finally, it is notice that Applicant testified that he was paid for all of his time off. EDD paid through 9/5/2017. Hence the end date of TTD of 9/5/2017 is supported by both medical and lay evidence.

There is no other evidence of any disability after that date. Hence Petitioner is correct that TTD should end 9/5/2017.

. . .

Permanent Disability

. . .

The permanent impairments herein were determined by Dr. Fields using Table 17-33 of the AMA Guides (p.546). He initially found that the TKA surgeries resulted in a "good" outcome resulting in 15% wpi (found on p.547). But it is important to note that Dr. Fields initially "gave" an

additional 15% due to a noticeable gait impairment "for the cane." (Ex. X-2, p.26).

In deposition (X-5) it is determined by the doctor that a gait impairment cannot be added to the Table 17-33 findings. He cites p.529 of the Guides. So, in order to merge the swelling and gait impairment into the Table 17-33 findings, he changed his opinion in deposition to 20% wpi in both knees. Those impairments then stand-alone (which is what the undersigned dispatched to the D.E.U.).

The undersigned believed that the testimony coupled with the evidence of the use of a cane most days suggests strongly that the surgeries in question definitely were not a "good" result. Based on Dr. Fields' testimony there is no doubt that he did not feel the result was "good" either. That is why he originally added a 15% "add-on" for gait impairment and pain.

The change to 20% wpi in each knee was simply complying with the Guides. In short, the gait impairment rendered the surgical results from "good" to "fair." Hence 20% wpi for each knee makes perfect sense.

The Petitioner asks that this increase be limited to the right knee since the symptoms seem more intense than in the left.

Dr. Fields indicates in Ex. X-2 at p.26:

"I am going to rate *both knees as I found their exams to be similar* though there was swelling on the right." (emphasis added).

He then gives measurements which (according to his testimony on p.28) then equates to 20% wpi. Since he is evaluating both knees and finding both knees similar in evaluation, it is obvious that the 20% wpi applies to both knees.

On p.34 of his deposition, he clearly repeats that he is rating both knees and finding them both to have a 20% wpi impairment.[fn]

Use of Kite

. . .

In this case Dr. Fields stated in deposition at p.34 that he is combining impairments when states his final rating of "20 plus 20 plus 3 = 43%." This response implies the use of Kite rather than the CVC.

When asked to clarify or explain this statement at p.39, he states:

"So there is some kind of synergistic effect of he can't (sic) use one knee to compensate for the other because they are both affected."

There was no rebuttal.
(Report, pp. 2-9.)

DISCUSSION

We turn first to defendant's contention that WCJ erroneously found that defendant did not meet its burden of proof as to apportionment.

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (en banc), 70 Cal.Comp.Cases 1506 (writ den.), the Appeals Board held that (1) Labor Code section 4663 requires the reporting physician to make an apportionment determination; (2) apportionment to other factors allows apportionment to causation, including pathology, prior conditions, and retroactive work restrictions; (3) applicant holds the initial burden to prove industrial injury and also has the added burden of establishing the approximate percentage of permanent disability directly related to the industrial injury; (4) defendant has the burden of establishing the approximate permanent disability caused by other factors; and (5) a medical report addressing apportionment may not be relied upon unless it constitutes substantial evidence. (*Escobedo*, *supra*.)

To be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. Furthermore, if a physician opines that a percentage of disability is caused by a degenerative disease, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Id*.)

In this case, QME Dr. Fields first addressed apportionment in his report dated November 10, 2021, when he stated that he would apportion 15 percent of applicant's permanent disability to his morbid obesity. (X2, QME Report of Dr. Fields, November 10, 2021, p. 26.) He based his opinion upon the fact that the degenerative changes in both knees was "fairly symmetrical." (X2, QME Report of Dr. Fields, November 10, 202, p. 26.) Although he testified in deposition that applicant's high body weight increased the impact of each step upon his knees, QME Dr. Fields

did not report how or why he assigned 15 percent of applicant's permanent disability to his morbid obesity. (Report, p. 4; X2, QME Report of Dr. Fields, November 10, 2021.)

In a September 9, 2022 supplemental report, QME Dr. Fields referred to applicant's history of falls following his knee replacement surgeries, stating that "they basically add to his level of pain but considering that he is morbidly obese, his knees are working harder than they have to so I do not know that the post total knee falls actually made a difference as CT and bone scans have not shown any evidence of loosening and the patient does not have signs of infection." (Ex. X4, QME Report of Robert Fields, M.D., (Supplemental), September 9, 2022, p. 11.) He then increased the apportionment of applicant's permanent disability to morbid obesity to 25 percent because it was "such a large factor as . . . he had been gaining weight throughout." (*Id*.) Once again, however, QME Dr. Fields did not indicate how or why he assigned this extra ten percent of applicant's permanent disability to his morbid obesity.

Not only does QME Dr. Fields' discussion of apportionment fail to address how and why non-industrial pathology caused the extent of the disability he indicated, but it is not framed in terms of reasonable medical probability and appears to be based on surmise, conjecture or guess." (See *Escobedo*, *supra*; *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].) In the absence of medical reporting constituting substantial medical evidence on the issue of apportionment, there is no basis to conclude that applicant's permanent disability may be apportioned to non-industrial factors.

Accordingly, we will not disturb finding number 10 indicating that defendant failed to meet its burden of proof on apportionment.

We next address defendant's contention that the WCJ erroneously calculated permanent disability by adding impairments instead of combining them using the CVC.

In *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court of Appeals found that the impairments "are generally combined" using the CVC, though the "scheduled rating [under the CVC] is not absolute" and other methodologies may be used to calculate permanent disability. (*Id*., p. 614.) Thus, while the scheduled rating is prima facie evidence of an employee's permanent disability, the scheduled rating is rebuttable. (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist.* (*Almaraz-Guzman II*) (2009) 74 Cal.Comp.Cases 1084, 1106 (Appeals Board en banc); see *Blackledge v. Bank of America* (2010)

75 Cal.Comp.Cases 613 (Appeals Board en banc)*; City of Sacramento v. Workers' Comp. Appeals Bd.* (*Cannon*) (2013) 222 Cal.App.4th 1360.) The overarching goal of rating permanent impairment is to achieve accuracy. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Almaraz-Guzman III*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) (*Almaraz-Guzman III*, *supra,* at p. 822.)

For example, in *Athens Administrators v. Workers' Comp. Appeals. Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied), the Court concluded that impairments resulting from cumulative injury to the bilateral hips may be added where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating of the level of disability than the rating that results from using the CVC. (See also *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ den.) (stating that a physician's opinion as to the most accurate rating method should be followed if she or he provides a reasonably articulated medical basis for doing so); *Johnson v. Wayman Ranches*, 2016 Cal.Wrk.Comp. P.D. LEXIS 235.)

In *Vigil v. County of Kern*, 2024 Cal. Wrk. Comp. LEXIS __ (June 10, 2024) (En Banc), 89 Cal.Comp.Cases __ , the Appeals Board recently held that application of the CVC may be rebutted where the medical evidence shows that there is no overlap between the effects on the activities of daily living (ADLs) between the rated body parts, or, if there is overlap, where the overlap increases or amplifies the impact of the overlapping ADLs.

In the present case, QME Dr. Fields deemed adding impairments to be the more accurate method to rate the level of disability because applicant's knee impairments precluded the use of the opposite knee to compensate for the impairment to the other. (Report, p. 8.) Given the absence of an uninjured opposite and corresponding knee to compensate for the impairment of the other, it is clear that the impact of applicant's knee impairments on his ADLs has been amplified, satisfying the second *Vigil* standard for rebutting the CVC.

On this record, the WCJ concluded that QME Dr. Fields' opinion in this regard constituted substantial medical evidence and instructed the DEU to use *Kite* to determine applicant's permanent disability rating. (Formal Rating Instructions and Rating, March 14, 2024, p. 1.) The DEU then set applicant's level of permanent disability at 86 percent before apportionment. (*Id*., p. 2.) Because we previously explained that the medical record does not support apportionment, it follows that applicant's level of permanent disability is 86 percent. Accordingly, we will substitute a finding that applicant's injury caused permanent disability of 86 percent, equating to

689.25 weeks of indemnity, thereafter a life pension, payable from October 21, 2017, at a weekly rate and for a total to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute.

We next address defendant's argument that the WCJ erroneously found right knee impairment of 20 percent on the grounds that applicant's subjective pain complaints were higher for the left knee than the right.

To constitute substantial evidence "a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo*, *supra*.) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories." (*Hegglin, supra,* at p. 169.)

Here, as the WCJ states in the Report, QME Dr. Fields's reporting reveals that his medical evaluation of each knee yielded similar results on the level of impairment, irrespective of applicant's subjective complaints of knee pain. (Report, p. 8.) That applicant may have experienced a higher degree of subjective pain in the left knee than the right is thus not an adequate basis to conclude that QME DR. Fields' reporting resulted from error or was based upon ungermane facts. Accordingly, we are unable to discern error in the WCJ's finding of 20 percent impairment to the right knee.

We next address defendant's contention that the WCJ erroneously found applicant entitled to temporary total disability for the periods of November 20, 2015 through August 15, 2016, and September 6, 2017 through October 20, 2017.

As to the period of November 20, 2015 through August 15, 2016, the WCJ states in the Report that the record shows that applicant's Kaiser doctors took him off of work during this time for bilateral knee pain which ultimately resulted in right knee total replacement surgery. (Report, p. 6.)

As to the period of September 8, 2017 to October 20, 2017, the WCJ states that the record fails to support a finding that applicant is entitled to temporary disability benefits after September 5, 2017. (*Id*.)

We agree with the WCJ's evaluations of the evidence as to the periods of applicant's temporary disability. Accordingly, we will substitute a finding that the injury caused temporary

disability for the periods November 20, 2015 through August 15, 2016, and May 9, 2017 through September 5, 2017.

We next address defendant's contention that the WCJ erroneously awarded reimbursement to EDD for the period of November 15, 2015 through January 13, 2016, on the grounds that the medical evidence fails to show that applicant was disabled from work during this period as a result of his injury.

Here, we have explained that applicant's Kaiser doctors took him off work during this time for bilateral knee pain. Additionally, as stated by the WCJ in the Opinion on Decision, the record reveals that the EDD received a certification of disability for bilateral knee pain commencing November 10, 2015, MRIs of the knees were taken on November 18, 2015, and the MRIs resulted in applicant's two total knee replacement procedures. (Opinion on Decision, p. 3.)

Hence, because the "EDD paid for the period 11/20215 to 1/14/2016, and . . . the medical evidence supports a finding of temporary disability during that time," it follows that EDD established its lien claim. (Report, p. 7.) Accordingly, we are unable to discern error in the finding that the EDD lien is allowed in its entirety.

Upon grant of reconsideration, the Appeals Board has the authority to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223 [2006 Cal. Wrk. Comp. LEXIS 35, 51-17] (Appeals Bd. en banc).)

Here, although applicant claimed cumulative injury for the period of December 1, 2008 through October 6, 2017, the WCJ determined applicant's Labor Code section 5412 date of injury was December 10, 2021, the last date on which he worked. (Opinion on Decision, p. 4.)

Under Labor Code section 5412, however, the period of exposure to cumulative injury is separate and distinct from the date of injury. Specifically, where permanent disability results from cumulative trauma, the injury occurs not at the time of exposure, but at the time the cumulative effect of the injury resulting from the exposure has ripened into disability. (See *Federal Insurance Co. v. Workers' Comp. Appeals Bd*. (*Johnson*) 221 Cal.App.4th 1116 [78 Cal.Comp.Cases 1257].)

Because the record before us reveals that QME Dr. Fields found that applicant sustained cumulative injury upon his medical examination of November 10, 2021, the end date of applicant's cumulative injury is November 10, 2021. (X2, QME Report of Dr. Fields, November 10, 2021.)

Accordingly, we will substitute a finding that the cumulative injury period is December 1, 2008 through November 10, 2021.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that (1) applicant's injury caused permanent disability of 86 percent, equating to 689.25 weeks of indemnity, thereafter a life pension, payable from October 21, 2017, at a weekly rate and for a total to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute; (2) applicant is entitled to temporary disability benefits as to the periods of November 20, 2015 through August 15, 2016, and May 9, 2017 through September 5, 2017; and (3) the cumulative injury period is from December 1, 2008 through November 10, 2021.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on March 27, 2024 is **GRANTED**.

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Award issued on March 27, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Jimmy Young, born _____, while employed as a plumber during the period December 1, 2008 through November 10, 2021, Occupational Group Number 481, at Valencia, California, by Magic Mountain LLC, sustained injuries arising out of and in the course of his employment to his bilateral knees.

2. Applicant did not sustain injury to his back or ankles.

3. At the time of injury, the employer's workers' compensation insurance carrier was Hartford Property and Casualty Insurance Company.

4. At the time of injury, applicant's average weekly wage was $1,284.40 per week, warranting temporary disability benefits of $856.27 per week.

5. The injury caused temporary disability for the periods of November 20, 2015 through August 15, 2016, and May 9, 2017 through September 5, 2017, payable at the rate of $856.27 per week.

6. The EDD lien is allowed in its entirety.

7. EDD is entitled to interest under Unemployment Insurance Code section 2629.1.

8. The injury became permanent and stationary on November 10, 2021.

9. The injury caused permanent disability of 86 percent, equating to 689.25 weeks of indemnity, thereafter a life pension, payable from October 21, 2017, at a rate and for a total to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute.

10. Defendant failed to meet its burden of proof on apportionment.

11. 100 percent of the disability herein is apportioned to this case.

12. The injury caused a need for future medical care.

13. The value of applicant's attorney's services is assessed at 15 percent of the permanent disability benefits and life pension set forth above, and 15 percent of any net temporary disability benefits due applicant as set forth above after credit for the EDD lien.

14. Defendant's motion to strike the formal rating is denied.

AWARD

AWARD IS MADE in favor of JIMMY YOUNG against HARTFORD PROPERTY AND CASUALTY INS. CO. of:

1. Temporary Disability as set forth in Paragraph 5 above,

2. Permanent Disability as set forth in Paragraph 9 above,

3. Future medical care as set forth in Paragraph 12 above,

4. Attorneys' fees as set forth in Paragraph 13 above.

ORDERS

1. The EDD lien is allowed in its entirety plus interest under Unemployment Insurance Code section 2629.1.

2. Defendant is allowed full credit for the EDD lien against temporary disability benefits awarded herein.

3. The case is ordered off calendar.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 13, 2024

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

JIMMY YOUNG
LAW OFFICES OF RON NOLAN
FLOYD, SKEREN, MANUKIAN & LANGEVIN
EMPLOYMENT DEVELOPMENT DEPARTMENT

SRO/*cs*

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