WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARVIN THOMPSON, *Applicant*

vs.

ABF FREIGHT SYSTEMS, INC.; Permissibly Self-Insured, Administered by ATHENS, *Defendants*

Adjudication Number: ADJ8043045
San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings, Award and Order of April 17, 2020, the Workers' Compensation Administrative Law Judge ("WCJ") found that applicant, while employed on August 30, 2010 as an operations supervisor of motor transport by ABF Freight Systems, Inc., sustained injury arising out of and in the course of employment ("industrial injury") to his right ankle, to his right lower extremity including bones, veins, arteries, nerves and tendons, and to his psyche, causing permanent and total disability and the need for further medical treatment.

Defendant filed a timely petition for reconsideration of the WCJ's decision. Defendant contends that the medical evidence justifies a finding that applicant only sustained injury to his right ankle, including the peroneal nerve and anterior tibial artery, and to his psyche. Defendant further contends that substantial medical evidence does not justify the WCJ's finding of permanent and total disability, and that the WCJ erred in relying upon the medical report of Dr. Houts because the report is the inadmissible product of "impermissibly self-procured doctor-shopping."

The Board did not receive an answer from applicant.

The WCJ submitted a Report and Recommendation ("Report").

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[1] Commissioners Marguerite Sweeney and Craig Snellings signed the Opinion and Order Granting Petition for Reconsideration dated June 15, 2020. Commissioner Sweeney is no longer a member of the Appeals Board, and Craig Snellings is not available to participate in this matter. New panel members have been substituted in their place.

We have considered the allegations of defendant's petition for reconsideration, the contents of the WCJ's Report with respect thereto, and the contents of the WCJ's Opinion on Decision. Based on our review of the record, and for the reasons stated below and in the WCJ's Report and Opinion on Decision, both of which are adopted and incorporated to the extent indicated in the attachment to this opinion, we will affirm the Findings, Award and Order of April 17, 2020.

In affirming the WCJ's decision, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the trial witnesses. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determinations. (*Id*.)

In addition, we reject defendant's allegation that the October 1, 2018 medical report of Dr. Houts, a psychiatrist, is inadmissible and therefore the WCJ erred in relying upon it. (Applicant's Exhibit 18.) In making this allegation, it appears that defendant relies upon Labor Code section 4062.2(a), which provides: "Whenever a comprehensive medical evaluation is required to resolve any dispute arising out of an injury or a claimed injury occurring on or after January 1, 2005, and the employee is represented by an attorney, the evaluation shall be obtained only as provided in this section."

As explained by the Court of Appeal in *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009, 1016 (80 Cal.Comp.Cases 1256) ("*Batten*"), Labor Code section 4605 permits the admission of a report by a consulting or attending physician, and Labor Code section 4061(i) permits the admission of an evaluation prepared by a treating physician. The Court also explained that neither section permits the admission of a report by an expert who is retained solely for the purpose of rebutting the opinion of the panel qualified medical expert's opinion.

In this case, Dr. Houts was not retained solely to rebut the opinion of Dr. Shahla, the PQME in psychiatry. This conclusion is supported by the fact that when Dr. Houts issued his report of October 1, 2018, Dr. Shahla had not been selected as the PQME in psychiatry. Dr. Shahla first examined applicant on June 24, 2019 and issued the accompanying report on July 20, 2019. (Defense Exhibit AAAA.)

Further, applicant's Exhibit 14 establishes that Dr. Houts's report is admissible under section 4061(i), as an evaluation prepared by a treating physician.[2] The exhibit is a letter dated September 5, 2018 from applicant's attorney to defense counsel, wherein it is noted that in Dr. Magpile's deposition, defense counsel raised the issue of Dr. Magpile's qualifications to provide treatment or opinions regarding applicant's "mental status." In response to this, applicant's attorney informed defense counsel that Dr. Magpile was designating Dr. Houts to conduct an evaluation and prepare a comprehensive report on applicant's psychiatric condition. Thus, Dr. Houts was retained as a secondary treating physician after defendant challenged the primary treating physician's ability to comment on the nature of and treatment for applicant's psychiatric condition. Accordingly, we do not find merit in defendant's allegation that Dr. Houts's report is inadmissible. (See *Losurdo (Sally) v. United Parcel Service* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 331, citing in 8 Cal. Code Regs. § 9785(a)(2).)

Defendant further contends that in addressing the issue of permanent disability, the WCJ erred in determining that applicant sustained permanent and total disability "in accordance with the fact" under Labor Code section 4662(b). In so contending, defendant relies upon *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680]. Therein the Court of Appeal held that section 4662(b) does not provide an independent basis to find permanent and total disability "in accordance with the fact," where the medical record justifies a scheduled rating of less than 100% and the scheduled rating is not rebutted.

However, defendant's reliance upon *Fitzpatrick* is misplaced. In this case, defendant did not offer a proposed rating at trial. Assuming without deciding that the medical record justifies a scheduled rating of less than 100%, as asserted by defendant, *Fitzpatrick* does not help defendant. This is because here, unlike *Fitzpatrick*, applicant obtained admissible vocational evidence from Mr. Remas to rebut what defendant claims is a scheduled rating between 77 and 84 percent permanent disability. (Petition for Reconsideration, p. 10.)

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[2] Section 4061(i) states in full: "No issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator. With the exception of an evaluation or evaluations prepared by the treating physician or physicians, no evaluation of permanent impairment and limitations resulting from the injury shall be obtained, except in accordance with Section 4062.1 or 4062.2. Evaluations obtained in violation of this prohibition shall not be admissible in any proceeding before the appeals board."

We further note it is settled that for all dates of injury, vocational evidence may be offered to rebut the permanent disability rating schedule. (See *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741, 750 Fn. 8 [Appeals Board en banc].) Here, we agree with the WCJ that the medical and vocational evidence, considered together, justify a finding that applicant's industrial injury resulted in permanent and total disability. As discussed by the WCJ, defendant offered no vocational evidence of its own in rebuttal.

For the reasons discussed in the WCJ's Opinion on Decision and Report, we also reject defendant's allegation that the evidence relied upon by the WCJ is insubstantial. As explained by the WCJ, this well-developed record already includes substantial evidence in support of her Findings and Award. Accordingly, we reject defendant's allegation further development of the record is justified.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Order of April 17, 2020 is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAY 14, 2024

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

MARVIN THOMPSON
H. WILLIAM COLLINS, ATTORNEY AT LAW
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP

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

FACTUAL BACKGROUND

Applicant, Marvin Thompson…while employed on August 30, 2010, as an operations supervisor motor transport, at San Diego, California, by ABF Freight Systems, Inc., sustained injury arising out of and in the course of employment to his right ankle, and claims to have sustained injury arising out of and in the course of employment to his psyche, right lower extremity, including bones, veins, arteries, nerves and tendons.

The employer was permissibly self-insured. At the time of injury the employee's earnings were $1,313.08 per week warranting indemnity rates of $875.38 for temporary disability and the statutory rate for permanent disability. The employer has paid compensation as follows:

Temporary disability indemnity, broken periods between September 3, 2010 to February 3, 2015 totaling $83,855.43.

Permanent disability indemnity at a rate of $230 a week for the period of February 3, 2015 through April 11, 2016 for a total of $17,182.64.

The employer has furnished some medical treatment.

PARTS OF BODY INJURED

Applicant alleges industrial injury to his right lower extremity inclusive of bones, veins, arteries, nerves and tendons as well as his psyche. Defendant has denied these body parts.

By way of history, applicant's injury occurred while jumping off the back of a trailer approximately 4 feet high and landing on his feet; wherein he notes most of the impact was on his right ankle. He felt immediate onset of pain and proceeded to go to the industrial clinic. At such time it was determined he had a spiral fracture of his tibia. This is a bone in the applicant's leg. This diagnosis was determined within the first treatment given to the applicant at US Healthworks and the orthopedic surgeon, Dr. Theodore Levine in accordance with medical reporting. (Defendant's Exhibits A and B) In addition, in this initial reporting, US Healthworks notes problems with applicant's Achilles tendon. (Defendant Exhibit A) Furthermore, in the. initial reporting of Dr. Theodore Levine, the day after the injury, he confirmed a comminuted fracture of the distal tibia on the right which was causally related to employment. (Joint Exhibit 142, page 4)

Because the initial evaluation included objective findings wherein it was determined applicant actually fractured his tibia, applicant has met his burden of proof to establish industrial injury to his bones. In addition, inclusive in the voluminous exhibits, there has never been a determination by any of the examining physicians that applicant did not fracture his tibia which resulted in the immediate casting of applicant's right lower extremity. Although it is clearly the applicant's burden to establish industrial injury, this WCJ has yet to see any medical evidence that the defendant has relied upon to deny injury to applicant's bones. There has been no medical-legal reporting stating otherwise.

After applicant was casted for seven weeks, he developed [popliteal deep vein thrombosis (DVT)]. (Defendant's Exhibit D) The parties presented to Dr. Isaac Baskt in the capacity of a Panel QME in neurology. (Joint Exhibit 1.46) Dr. Baskt reported a thorough background of the industrial injury wherein he noted that during the initial casting applicant had accumulated swelling above the area of the cast. (Joint Exhibit 146, page 1) Dr. Baskt noted that Dr. Serocki also indicated the swelling and concern that the applicant might have [DVT] which was confirmed. (Joint Exhibit 146, page 2)

Applicant was treated for his DVT and referred for an MR imaging of his ankle which revealed a fracture. Applicant, at such time, was being treated by Dr. Sharon Dreeben for his ankle area.[1] During treatment for his ankle, applicant underwent surgery which included a bone graft as well as removal of a large cyst. However, during recovery applicant developed a pseudoaneurysm resulting in the bottom of his foot turning bluish-purple. (Joint Exhibit 146, page 2) Applicant was referred to Dr. Vincent Guzzetta to have the aneurysm removed. Further treatment to applicant's ankle injury included multiple MRI's as well as multiple Doppler ultrasounds of the right lower extremity and nerve conduction studies. These objective studies revealed and confirmed the diagnoses of DVT, the pseudoanuerysm, right anterior tibial artery, and a diagnosis of complex regional pain syndrome, type I (reflex sympathetic dystrophy) [RSD]. These findings are again confirmed in the reporting of Dr. Baskt who indicates that the CRPS type I is 100 percent apportionable to the August 30, 2010 ankle injury. (Joint Exhibit 146, page 34) This WCJ finds the reporting of Dr. Isaac Baskt to be substantial medical evidence and gives great weight to his findings. It should be noted that Dr. Baskt did issue a supplemental report wherein he reviewed the surveillance video obtained by defendant. (Joint Exhibit 148) After review of the video, Dr. Baskt did not change his opinion as to diagnosis of RSD or causation. As a result of the surgical intervention from his original tibia and ankle fracture, applicant developed severe consequences resulting in the diagnosis of the popliteal DVT, the pseudoaneurysm over the distal anterior tibial artery, and the final diagnosis of CRPS. Based on the reporting of Dr. Baskt, this WCJ now finds that applicant has met his burden of proof in establishing industrial injury to his veins, arteries, nerves and tendons.

During the course and scope of applicant's treatment, applicant began to experience anxiety and depression. This is further confirmed in applicant's credible testimony. Applicant testified of going to the hospital on two different occasions due to his concerns about the clots. (MOH/SOE, 2/24/20 page 10, lines 22-25) Applicant further confirmed that up until his surgery with Dr. Guzzetta he was becoming more worried and concerned. He was becoming more depressed. (MOH/SOE, 2/24/20, pages 12-13, lines 20-2) Due to the psyche complaints, applicant presented to Dr. Don Houts in his capacity as a psychiatrist from a referral from his PCP, Dr. Magpile. (Applicant's Exhibit 18)[2]

Dr. Houts' evaluation took place on September 19, 2018. Dr. Houts noticed applicant to be physically uncomfortable. (Applicant Exhibit 18, page 2) Applicant admitted to daily fantasies of

[1] Defendant has accepted the right ankle as industrial in nature, Therefore, no further discussion regarding AOE/COE will be done with regards to the ankle.

[2] Defendant in their brief argues that this medical report is not admissible. However, this objection was overruled at trial and this report has been designated as evidence in this matter.

suicide. Dr. Houts reviewed all prior medical reports as well as the vocational rehabilitation reporting from both Mark Remas as well as Katie Powers. He reviewed prior reporting from Dr. Magpile who indicated psychiatric diagnoses of chronic major depression, generalized anxiety disorder, and chronic pain syndrome. (Applicant Exhibit 18, page 23) In his reporting, Dr. Houts delineates all of the applicant's diagnoses, including major depression, generalized anxiety disorder, somatic symptom disorder with predominant pain, severe, possible panic attack and CRPS along with other diagnoses. (Applicant Exhibit 18, pages 30- 31) Dr. Houts administered testing and concluded that due to the complications from applicant's accepted industrial injury to the ankle, there was no doubt that the applicant developed symptoms of both depression and anxiety, and pain. Furthermore, Dr. Houts states that the patient's claim of having suffered a psychiatric injury in response to his industrial injuries is entirely consistent with the findings in the course of his psychiatric examination. (Applicant's Exhibit J 8, page 34)

In addition to Dr. Houts' determination of a psyche injury on an industrial basis, applicant presented to Dr. Ramin Shahla in the capacity of a Panel QME in psychiatry. Dr. Shahla noted that prior to this industrial injury applicant did not have any history of psychiatric treatment. (Defendant Exhibit AAAA, page 4) Dr. Shahla reviewed multiple medical records along with sub rosa videos of the applicant. Dr. Shahla examined the applicant in person and administered multiple psyche tests. Dr. Shahla noted treatment that the applicant had been receiving in the form of cognitive behavior therapy due to this industrial injury. Dr. Shahla further noted the pharmacotherapy medications applicant had been taking on an industrial basis prescribed by Dr. Magpile. Dr. Shahla indicated the severity of applicant's highly serious thoughts of suicide. (Defendant Exhibit AAAA, page 104) Under causation, this PQME indicates that "in summary, his psychiatric symptoms started after he felt hopeless and helpless after he knew that he would not be able to return to work because of complications of his fracture and the pain." (Defendant's Exhibit AAAA, page 113) Dr. Shahla concludes that due to unsuccessful treatment and his inability to return to work there is a reasonable probability that the psychiatric illnesses that the applicant is suffering from now are predominantly industrially caused by the injury he suffered on the date of injury while he was performing his job. (Defendant's Exhibit AAAA, page 114) This WCJ finds the reporting of this PQME to be substantial medical evidence and gives great weight to this PQME's findings. Based on the reporting of both Dr. Houts and Dr. Shahla, this WCJ finds that the applicant has met his burden of proof to establish industrial injury to applicant's psyche. Again, it must be noted that despite the reporting of both Dr. Houts and Dr. Shahla, defendant chose to deny this body part but fails to offer any evidence to the contrary. This is quite disconcerting especially during times in which the applicant was quite suicidal.

TEMPORARY DISABILITY INDEMNITY

Applicant contends he is entitled to temporary disability from February 3, 2015 for an additional eight weeks until the statutory maximum of 104 weeks of benefits has been reached at a rate of $875.38. Defendant alleges that no further benefits are owed.

The medical evidence establishes that applicant suffered industrial injury to the right ankle, bones, nerves, tendons, arteries as well as psyche. Although Dr. Jain states that applicant has reached maximum medical improvement on January 15, 2015, it is through not only her reporting, but her

deposition transcript that Dr. Jain's opinions are limited to her area of expertise; orthopedics. She does not address maximum medical improvement for any other body parts.

However, the medical evidence clearly establishes that as it pertains to applicant's diagnosis of CRPS as well as his psychiatric condition, applicant is not found permanent and stationary until Dr. Magpile finds his conditions have plateaued on September 22, 2016. This is only because the applicant had no desire to obtain further treatment for his psychiatric injury, otherwise until a treating psychologist or psychiatrist found him permanent and stationary would his TTD have ended or he received the 104-week statutory cap.

Therefore, based on the medical evidence as it pertains to all of applicant's body parts which are industrial in nature, applicant is entitled to an additional eight weeks of temporary total disability indemnity from February 3, 2015 to the statutory maximum of 104 weeks. Parties to adjust benefits accordingly with this WCJ to retain jurisdiction over this issue if future issues arise.

PERMANENT AND STATIONARY DATE

Applicant alleges a permanent and stationary date of September 22, 2016 based on the reporting of Dr. Michael Magpile. (Defendant's Exhibit Q) Defendant contends the proper date of maximum medical improvement is January 15, 2015 based on the PQME reporting of Dr. Rina Jain. (Joint Exhibit 137)

As stated in her report dated June 22, 2015, Dr. Jain was limited in her scope of evaluation to just the underlying orthopedic injury. (Joint Exhibit 142) Although she does indicate that the applicant needs treatment in other areas, such as pain management and for his CRPS, Dr. Jain was limited in addressing the applicant's orthopedic complaints only. Therefore, while applicant may have been found permanent and stationary for the underlying orthopedic injury to his right ankle and tibia at the re-evaluation performed by Dr. Jain on January 15, 2015, this does not establish maximum medical improvement for his other underlying conditions of CRPS, psych, and peripheral neuropathy in which applicant suffers. Rather it is not until he is declared permanent and stationary by Dr. Magpile for all other conditions on September 22, 2016 that applicant has reached maximum medical improvement. It shall be noted, though, that applicant was not declared permanent and stationary until October 1, 2018 by Dr. Houts for his psychiatric injury. However, applicant did not explore treatment for his psychiatric injury despite medical determinations made that this condition was industrial in nature. Therefore, since Dr. Magpile and Dr. Verdolin were treating applicant for his underlying pain issues, the proper date for maximum medical improvement in accordance with the medical evidence is September 22, 2016.

OCCUPATIONAL GROUP NUMBER

Applicant alleges the proper occupational group number is 110, based on his supervisory role. Defendant alleges that the prior occupational group number is 350, truck driver.

Applicant testified at trial that he managed teamsters who loaded and unloaded the freight. (MOH/SOE, 2/24/20, page 3, lines 23-24) He further testified he designed and coordinated the loading and unloading for expediency. He reviewed line-haul reports and determined what drivers

were going where and bringing what items. He had to quickly redesign routes for new freight. He did customer service work, driver dispatch, and ensured late arrivals had their freight removed expeditiously for trailers to sometimes deliver the same day. (MOH/SOE, 2/24/20, page 4) It was a lot of thought process and phone work. Physically, his job was between 15 to 20 percent and mentally his job was 80-85 percent. (MOH/SOE, 2/24/20, page 5, lines 1-2) Applicant's job was occasionally to get on the trucks/trailers but he would not assist the Teamsters in loading and unloading. Sometimes it occurred that he would do his own loading and unloading up to 200 pounds. (MOH/SOE, 2/24/20, page 24, lines 5-8) Applicant testified that of the 85% that is mental, 100% of the mental is done sitting and standing. This is due to the fact that sometimes he is on the phone and therefore he would be primarily sitting. If there were decisions that needed to be made on the docks, he would be standing. (MOH/SOE, 2/24/20, page 29, lines 17-21) He is not a Teamster, he is not part of that union, he has no pension, and his employer had no pension for him. Applicant testified that he reviewed the job analysis along with its addendum and agrees with its analysis. (Applicant Exhibit 6) This analysis was performed with Mr. McNabb, the Branch Manager, the vocational specialist, Cynthia Bryan and the applicant. In the job analysis, applicant's position is listed as operations supervisor. The general description indicates that applicant is to directly supervise and coordinate activities of transportation and material-moving machines and vehicle operators and helpers. (Applicant Exhibit 6) As the supervisor, he oversees the operation of the on-site docking area, as well as coordinates the incoming/outgoing shipments of freight. In addition, his non-essential job duties involved driving the forklift to move pallets of freight and carrying packages to the will-call area on rare occasions and only when another employee was unavailable to perform the task. Defendant contends applicant's position is more aligned of that of a truck driver. However, there has been no evidence submitted to substantiate such allegations. Although applicant may have, on rare occasion driven a forklift, this was not his job title or an essential function of his job.

Based on the applicant's testimony along the evidence submitted, this WCJ now finds the proper Occupational Group number for applicant is 110.

PERMANENT DISABILITY

Applicant contends that he is permanently totally disabled based on the medical evidence of Dr. Magpile and Dr. Houts as well as the reporting of the vocational expert, Mr. Mark Remas in accordance with *LeBeouf*.

Defendant alleges that applicant's disability should be in accordance with the reporting of Dr. Rina Jain because the only accepted body part is the ankle.

In this case applicant suffered an industrial injury to his right ankle and tibia on the day of injury. Due to the fracture he suffered on the date of injury, applicant underwent surgery. However, the surgery did not go well such that applicant was diagnosed with popliteal DVT. In addition, during his recovery he developed a pseudoaneurysm on the bottom of his foot. After treatment for these additional body parts, applicant further developed CRPS as documented throughout the medical records from the neurologists, psychiatrists, orthopedists, and pain management specialists.

As a result of complications from the underlying injury, applicant's permanent disability is best represented by findings of the specialists along with the findings made by the vocational experts. Applicant presented to Mr. Mark Remas, vocational expert for applicant (Applicant's Exhibits 7 & 8) as well as Ms. Katie Powers for the defendant. Defendant has chosen not to produce the report prepared by their expert, however, it appears her results are documented within the reporting of Mr. Remas as well as the medical experts.

A permanent disability is one, which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the labor market [*Franklin v. WCAB*, 1978 Cal. App. LEXIS 1377]. It is Applicant's burden to prove the extent of her disability [Labor Code sections 3202.5 and 5705]. Where permanent disability is not conclusively presumed to be total, it may be determined to be so "in accordance with the fact" [Labor Code section 4662(b)]. […] Such a finding must be supported by substantial evidence. [*Lamb v. WCAB*, 1974 Cal. LEXIS 297; *LeVesque v. WCAB*, 1970 Cal. LEXIS 338].

In accordance with the findings in *Hikida v. WCAB* (2017) 12 Cal. App. 5th 1249, an employer is responsible for both the medical treatment and disability arising directly from unsuccessful medical intervention, without apportionment.

Here, applicant's primary treating physician, Dr. Magpile diagnosed the following conditions contributable to his industrial injury of August 30, 2010:

1. Comminuted fracture of the right distal tibia
2. Right popliteal deep venous thrombosis
3. Pseudoaneurysm of the Posterior Tibial Artery
4. Complex Regional Pain Syndrome
5. Chronic Pain Syndrome
6. Severe chronic major depression
7. Generalized anxiety disorder
8. Sleep disorder
9. Right ankle osteoarthritis

Dr. Magpile supports the above diagnoses after reviewing and incorporating the findings of Drs. Houts, Jain, Verdolin and Baskt. Dr. Magpile, in his medical opinion, further finds that the above diagnoses are 100% apportioned to the industrial injury of August 30, 2010. Based on the above diagnoses, Dr. Magpile opined that the applicant is incapable of returning to work, better known as permanent total disability. (Applicant's Exhibit 19, pages 19-20) Dr. Magpile's position is in agreement with the opinions of Dr. Houts (Applicant's Exhibit 18, page 37), Dr. Jain-(Joint Exhibit 142, pages 4-5), Dr. Verdolin (Joint Exhibit 143, page 2) and the Rehabilitation Specialist, Mark Remas (Applicant's Exhibit 7, page 17, and Applicant's Exhibit 8). This WCJ finds the reporting of Dr. Magpile to be substantial medical evidence. Even if this WCJ removes any disability for the sleep disorder, in accordance with the determinations made by all of the medical providers in this case as well as the vocational specialist, applicant is still found to be permanently totally disabled. Further review of Mr. Mark Remas' vocational expert report indicates that the applicant's profile is consistent with that group of workers who do not return to work and are unable to function in the open labor market. (Applicant's Exhibit 7, page 16) Mr. Remas concluded that as a

consequence of the industrial injury of 08/30/2010, the applicant has required treatment and now has severe restrictions impairing his ability to perform his activities of daily living and prevents him from competing for or engaging in suitable gainful employment. Mr. Remas determined that based on the medical record and the opinion of Dr. Jain, the applicant would be unable to sustain employment and would meet the criteria of total permanent disability due to his inability to compete for work, sustain work or engage in routine work activity. Finally, Mr. Remas concludes that based on the literature research, review of medical records and the interview with the applicant and his wife, the applicant has a 100% loss of future earning capacity, is unable to compete for employment, and cannot sustain employment on a reliable or consistent basis. (Applicant's Exhibit 7, page 17) Mr. Remas concluded that based on the facts of the case as outlined in his report, the applicant would meet the criteria of total permanent disability pursuant to Labor Code section 4660(b)(2), Labor Code section 4662, and *LeBeouf*.

A second report was generated by Mr. Remas wherein he had the opportunity to review the findings of Ms. Katie Powers. (Applicant's Exhibit 8) In Mr. Remas' review of Ms. Powers' reporting, he notes that she found applicant would potentially have the capacity of unskilled to semi-skilled sedentary jobs, on a full or part-time basis, assuming strictly the orthopedic work restrictions clarified by the QME Dr. Jain, in her deposition wherein she stated that applicant was capable of deskwork. (Applicant's Exhibit 8, page 7) Mr. Remas also received further medical reporting for his review. Mr. Remas reviewed the deposition of panel QME Dr. Jain. (Applicant Exhibit 8, page 5; Defendant's Exhibit EEEE, page 45) Mr. Remas noted and the evidence shows that Dr. Jain addressed the orthopedic nature of applicant's condition wherein, on an orthopedic basis, applicant could sit at a desk and perform some standing and walking. Mr. Remas further reiterates Dr. Jain's findings wherein Dr. Jain states that the sub rosa video does not give enough evidence that suggests the applicant can even work a full 8-hour day. Mr. Remas further notes the reporting from Dr. Verdolin. (Applicant Exhibit 8, page 6; Joint Exhibit 135) In such report, Dr. Verdolin states that in his 20 years, this is one of the most stark examples of complex regional pain syndrome he had seen. Mr. Remas' final determination in his supplemental reporting was that even after review of the supplemental reports, Mr. Remas did not change his opinion, and in fact was only more confident, to find the applicant 100% totally disabled pursuant to Labor Code §4662 and *LeBoeuf*.

This WCJ finds the reports of Mr. Remas to be substantial vocational evidence and gives great weight to his findings. There is no report from any other vocational expert in evidence. Based on all the medical reporting in this case, along with the vocational reporting, this WCJ finds the applicant to be permanently totally disabled.

NEED FOR FURTHER MEDICAL TREATMENT

Pursuant to Dr. Magpile, Dr. Verdolin, the panel QME Dr. Jain, and panel QME Dr. Shahla, applicant is in need of further medical treatment to cure or relieve the effects of the injury.

ATTORNEY'S FEES

The reasonable value of services of the Applicant's Attorney is 15% of the permanent disability indemnity, which equates to a fee of $130,790.44, in accordance with the Commutation attached hereto. The Court to maintain jurisdiction over any disputes arising out of the amount of attorney's fees to be awarded.

DATE: April 17, 2020

Alicia D. Hawthorne
WORKERS' COMPENSATION JUDGE

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

On May 4, 2020, defendant, ABF Freight System, Inc,, permissibly self-insured, administered by Athens Administrators[1] by and through their attorney of record, Hanna, Brophy, MacLean, McAleer & Jensen, LLP, filed a timely, verified petition for reconsideration on the standard statutory grounds, from the court's Findings and Award, dated April 17, 2020, pleading that:

(1) The WCJ acted in excess of her power.
(2) That the evidence does not justify the findings of fact.
(3) Specifically that this judge accepted into evidence reports of Dr. Houts, that the evidence does not justify accepting certain body parts injured, and that applicant is totally disabled. Furthermore, the Petitioner prays for the Appeals Board to Order development of the record by assigning an Independent Medical Evaluator's assessment of applicant's condition(s).

FACTUAL BACKGROUND

Applicant, Marvin Thompson…while employed on August 30, 2010, as an operations supervisor motor transport, at San Diego, California, by ABF Freight Systems, Inc., sustained injury arising out of and in the course of employment to his right ankle, his psyche, right lower extremity, including bones, veins, arteries, nerves and tendons.

The employer was permissibly self-insured. At the time of injury the employee's earnings were $1,313.08 per week warranting indemnity rates of $875.38 for temporary disability and statutory for permanent disability. The employer has paid compensation as follows:

Temporary disability indemnity, broken periods between September 3, 2010 to February 3, 2015 totaling $83,855.43.

Permanent disability indemnity at a rate of $230 a week for the period of February 3, 2015 through April 11, 2016 for a total of $17,182.64.

This matter proceeded to trial on December 11, 2019 and February 24, 2020. This matter stood submitted on March 25, 2020 to allow the parties time to submit trial briefs. It should be noted that the parties and this WCJ did spend an extraordinary amount of time organizing proposed exhibits, including both Applicant, Defendant and Joint Exhibits. There are a copious amount of records in this matter spanning almost 10 years from the date of injury.

DISCUSSION

Petitioner takes issue with the findings of an industrial injury to applicant's bones, veins, arteries, nerves or tendons in Applicant's entire right lower extremity. Petitioner argues that the medical

[1] Defendant's petition indicates defendant Arkansas Best Corp., however, the proper defendant is ABF Freight System, Inc., permissibly self-insured, administered by Athens Administrators.

evidence supports a finding of industrial injury specifically to Applicant's right ankle including the peroneal nerve and anterior tibial artery as well as Applicant's psyche. Despite this representation in the Petition for Reconsideration (Petition for Reconsideration, page 2, lines 17-19), this is in direct contrast to the stipulations and issues completed at trial wherein Petitioner only stipulated to injury to applicant's right ankle and left all other body parts at issue for this WCJ to decide. (MOH/SOE, dated 12/11/19, page 2, lines 6-10 and page 2-3, lines 24-2) Petitioners confirmed that multiple body parts were disputed when asked if the WCJ correctly recited the issues, and stated, "yes." In addition, on the second date of trial, the parties were given an opportunity to amend the MOH/SOE from the first day of trial. At such time, the parties amended certain issues, exhibits, and clarifications. At no time did defendant request an amendment to body parts at issue, nor did they stipulate to any additional body parts. (See MOH/SOE, dated 2/24/2020, page 2, lines 2-13)

For the sake of clarity, it should be noted that the medical evidence establishes that at the time of injury, the objective findings show a comminuted fracture of the distal tibia. (Joint Exhibit 102, page 4)

After the initial treatment for the fracture, applicant developed DVT. (Defendant's Exhibit D) The parties utilized a Panel QME in neurology who confirmed the applicant had developed DVT on an industrial basis. (Joint Exhibit 146, page 2) In fact, there was no medical evidence to the contrary, but Petitioner failed to accept any nerve, artery, tendon, vein or bone throughout the two-day trial of the applicant. Petitioner acknowledges in their Petition for Reconsideration that the medical evidence supports a finding of industrial injury to the peroneal nerve and anterior tibial artery. (Petition for Reconsideration, page 2, lines 17-18) The partial transcript indicates that Petitioner was asked if the issues had been properly stated, wherein they indicated "yes". (See partial transcript, page 4 lines 13-15 and page 5, lines 4-6) The parties filled out the pre-trial conference statement indicating "parts of body inured: bones, including veins, arteries, knees, tendons within applicant's right lower extremity, and psych." This was what was read into the record. At any time prior to answering "yes" Petitioner could have indicated their concern to the alleged overly broad body parts. They did not. The medical evidence substantiates industrial injury to applicant's right lower extremity including veins, arteries, tendons, nerves, and bones.

In addition, it should be noted that Petitioner proceeded to trial on the compensability of applicant's alleged psychiatric injury with no medical evidence to establish this body part was non-industrial. In fact, in their petition for reconsideration they acknowledge that the medical evidence establishes such injury, but moved forward to litigate this issue as a denied body party. (See Petition for Reconsideration, page 2, lines 17-19)

Petitioner contends that applicant is not permanently totally disabled based on their allegations that the medical evidence is either stale or not substantial medical evidence. It should be noted that despite Labor Code §5502(d)(3), Petitioner failed to propose any rating. (MOH/SOE, page 3, lines 15-18) Applicant proposed 100% permanent total disability. Petitioner would like this WCJ to address applicant's permanent disability in accordance with Dr. Rina Jain, Dr. Baskt and Dr. Shahla only. Dr. Jain is a doctor in orthopedics and only addresses applicant's orthopedic condition. Further, Dr. Jain acknowledges this limitation and defers to other specialists. (Defendant's Exhibit EEEE, page 11, lines 3-22) Again, at the time of trial and during the period in which this WCJ

wrote the Opinion on Decision, Petitioner only accepted the right ankle despite undisputed medical evidence establishing industrial injury to additional body parts. At the time of the Petition for Reconsideration, Petitioner concedes that the medical evidence supports injuries to applicant's peroneal nerve, anterior tibial artery and psyche.

Dr. Baskt acted in the capacity as the Panel QME in neurology. However, despite determining industrial injury to applicant's neurological issues, Petitioner still denied these body parts. It is not until this Petition for Reconsideration that Petitioner is now proposing a rating inclusive of this body part.

Petitioner argues that the reports relied upon to determine total disability are stale, inadmissible evidence or not substantial medical evidence. This WCJ disagrees. It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence to support an award of workers' compensation benefits. (See *Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal. 3d 372 [35 Cal.Comp.Cases 525].) It has also been determined that *LeBeouf* is still reliable and instructive. Based on *LeBeouf*, and in support of the determination of total disability, this WCJ relied upon the reporting of Mr. Mark Remas as the vocational expert. Again, Petitioner was given the opportunity to submit their own reporting by their vocational expert, but chose not to submit such report. Mr. Remas did have an opportunity to review Petitioner's vocational rehabilitation report and summarized such in his reporting. In addition, Mr. Mark Remas had an opportunity to review all the medical evidence in this matter. Petitioner argues that the reporting of the vocational expert is stale. However, as the applicant credibly testified, he only sees his primary physician once every six months. Petitioner attempts to argue that Mr. Remas has not had the opportunity to review the current medical records. The evidence in the case finds to the contrary. Applicant already established that there is not much in the way of current medical records and no medical-legal reporting would have been generated since he saw the vocational expert. His condition has not changed since such time. Moreover, the medical reporting has established he is permanent and stationary. By definition, applicant's condition has plateaued. Applicant's condition had not changed since September of 2016. Petitioner indicates applicant has had treatment for skin cancer and other chronic conditions, however at no time has applicant alleged skin cancer as industrial in nature and in fact credibly testified that all treatment for this condition ended in 2020. Furthermore, Petitioner does not elaborate on what other "chronic conditions" applicant may have nor how they may relate to this claim. Although it may have taken time to get this matter to fruition in the court system, this does not make the medical or vocational evidence stale due to the date of the reports alone.

[…]

In conclusion, as previously stated in the Opinion on Decision, a permanent disability is one, which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the labor market [*Franklin v. WCAB*, 1978 Cal. App. LEXIS 1377]. It is Applicant's burden to prove the extent of her disability [Labor Code sections 3202.5 and 5705]. Where permanent disability is not conclusively presumed to be total, it may be determined to be so "in accordance with the fact" [Labor Code section 4662(b)]. […] Such a finding must be supported by substantial evidence. [*Lamb v. WCAB*, 1974 Cal. LEXIS 297; *LeVesque v. WCAB*, 1970 Cal. LEXIS 338].

In accordance with the findings in *Hikida v. WCAB* (2017) 12 Cal. App. 5th 1249, an employer is responsible for both the medical treatment and disability arising directly from unsuccessful medical intervention, without apportionment.

Again, applicant's multiple conditions as delineated by Dr. Magpile and incorporated by the vocational expert, Mr. Remas, establish that the applicant in this matter can no longer compete in the open labor market and he is permanently totally disabled.

RECOMMENDATION

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

DATE: May 14, 2020

Alicia D. Hawthorne
WORKERS' COMPENSATION JUDGE