WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHELDON BOWMAN, *Applicant*

vs.

NUMMI, SAFETY NATIONAL INSURANCE COMPANY, administered by GALLAGHER BASSETT SERVICES, *Defendants*

Adjudication Number: ADJ7984952

Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration of the Findings, Award, & Order with Opinion on Decision (F&A) issued on August 12, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration[1].

The WCJ found, in pertinent part, that applicant sustained industrial injury to his left elbow, bilateral wrists, right middle finger, and in the form of carpal tunnel syndrome. The WCJ followed the opinions of the agreed medical evaluator (AME) and awarded applicant 19% permanent partial disability.

Applicant contends that the WCJ erred in following the opinions of the AME because the AME did not spend sufficient face-to-face time with applicant during the examination.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and or the reasons discussed

[1] Commissioners Marguerite Sweeney and Deidra E. Lowe, who signed the Opinion and Order Granting Petition for Reconsideration dated May 31, 2022, are no longer with the WCAB. Accordingly, new panel members have been substituted in their place.

below, and for the reasons stated by the WCJ in the Report, which we adopt and incorporate, as our Decision After Reconsideration we will affirm the August 12, 2021 F&A.

The Appeals Board may not ignore due process for the sake of expediency. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 469 [83 Cal.Comp.Cases 1643] [claimants in workers' compensation proceedings are not denied due process when proceedings are delayed in order to ensure compliance with the mandate to accomplish substantial justice]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] [all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions].) "Even though workers' compensation matters are to be handled expeditiously by the Board and its trial judges, administrative efficiency at the expense of due process is not permissible." (*Fremont Indem. Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [49 Cal.Comp.Cases 288]; see *Ogden Entertainment Services v. Workers' Comp. Appeals Bd.* (*Von Ritzhoff*) (2014) 233 Cal.App.4th 970, 985 [80 Cal.Comp.Cases 1].)

The Appeals Board's constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] ["essence of due process is . . . notice and the opportunity to be heard"]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) In fact, "a denial of due process renders the appeals board's decision unreasonable..." and therefore vulnerable to a writ of review. (*Von Ritzhoff, supra,* 233 Cal.App.4th at p. 985 citing Lab. Code, § 5952(a), (c).) Thus, due process requires a meaningful consideration of the merits of every case de novo with a well-reasoned decision based on the evidentiary record and the relevant law.

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was equitable tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) Pursuant to the holding in *Shipley* allowing equitable tolling of the 60-day time

period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits. Here, applicant timely filed the Petition for Reconsideration at the district office on September 7, 2021, however the WCJ admits error in that a report was not generated and the petition was not transmitted to the Appeals Board until April 26, 2022. Thus, we conclude that our time to act on the Petition was equitably tolled.

Although the time to act on the petition was tolled, for the reasons stated by the WCJ in the Report, we agree that it was not error for the WCJ to rely upon the AME's reporting. Accordingly, as our Decision After Reconsideration we will affirm the August 12, 2021 F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award, & Order with Opinion on Decision issued on August 12, 2021, is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 8, 2024

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

SHELDON BOWMAN
BOXER & GERSON
PATRICO, HERMANSON & GUZMAN

EDL/mc

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

REPORT AND RECOMMENDATION ON
APPLICANT ATTORNEY'S PETITION FOR RECONSIDERATION

INTRODUCTION

By a timely[2] and verified Petition for Reconsideration (Petition) dated and e-filed on September 7, 2021, Applicant's attorney, Bert Arnold, seeks reconsideration of the Findings, Award, and Order with Opinion on Decision (FA&O) dated and served on August 12, 2021, which found injury AOE/COE on a cumulative basis through January 18, 2007 to Applicant's left elbow, bilateral wrists, in the form of carpal tunnel syndrome, and to his right long/middle finger, which resulted in permanent partial disability (PD) of 19% based on what I found were the substantial medical opinions of the parties' AME, Leonard Gordon, M.D., along with a need for future medical treatment and a 15% attorney fee award. I apologize for the delay in this Report and Recommendation, which was entirely my fault.

Applicant attorney's Petition alleges generally that: 1) the evidence does not justify the Findings of Fact; and 2) the Findings of Fact do not support the order, decision, or award. (Petition at p. 1.) In substance, Applicant's attorney asserts and argues I improperly characterized the AME evaluation as uncomplicated and that my finding and conclusion that the AME spent sufficient face-to-face time with the Applicant during his evaluation/examination under the requirements of Rule 49.2 to render the AME's report substantial medical evidence was in error, and that either the AME report should not be the basis for findings and an award and that the AME should be replaced as the medical-legal evaluator. (***Id.*** at pp. 3-4.)

Defense counsel e-filed an Answer to the Petition on September 21, 2021, which argues the FA&O was not in excess of the Board or judge's powers, that the evidence justifies the FA&O, and that the Findings of Fact support the FA&O. (Answer at pp. 1-2.) More specifically, it argues that the total time of one hour for the evaluation reported by the AME in his report of October 19, 2020 (Joint 101), which includes the taking of the history by his staff

[2] Since the 25th day fell on a holiday when the WCAB was closed, Labor Day, September 6, 2021, filing by the next day, September 7, 2021 makes it timely. See DWC Rule 10600(b), Tit. 8, Cal.Code.Regs. §10600(b). All future references to DWC Rules will be to the applicable rule only.

and his personal face-to-face examination and time with the Applicant, is more than sufficient to satisfy regulatory requirements for a medical/legal evaluation and constitutes substantial medical evidence and a legal basis for the FA&O. (***Id.*** at p. 5.) To this end, the Answer cites the detailed physical exam summary from Dr. Gordon on page 5 of his report, the summary of the medical records reviewed beginning at p. 6, and the explanation of his opinions and conclusions. (***Id.*** at pp. 5-6.)

BACKGROUND

In his report of October 19, 2020, Dr. Gordon also found the Applicant to be P&S and provided impairment ratings of 3 WPI for left sided carpal tunnel syndrome, 3 WPI for left sided cubital tunnel syndrome, and provided an *Almaraz/Guzman*[3] rating by analogy of 6 WPI, for a total of 12 WPI for the left upper extremity, and 2 WPI for the right middle finger. A summary of the relevant facts follows; which is an abridged version of the facts outlined in the Opinion on Decision (Opinion) at pages 4-7. Applicant sustained an accepted cumulative injury from April 12, 1999 through January 18, 2007, to his left elbow, bilateral wrists in the form of carpal tunnel syndrome and to his right middle finger as a result of his employment as an auto assembler at NUMMI. (***Id.*** at p. 3, Minutes of Hearing and Summary of Evidence (MOH/SOE) dated 5/17/21 at p. 2.) The parties utilized orthopedist and upper extremity specialist, Leonard Gordon, M.D., as the AME. He issued one 17-page report dated October 19, 2020, plus attachments, based on an exam of the same date, which found the Applicant to be P&S, and provided opinions on impairment, apportionment, and future medical treatment. (Joint 101.)

Prior to this exam, the Applicant had undergone a left elbow surgery, a second left elbow/cubital tunnel surgery with Dr. Mathias Masem on August 26, 2009, a left carpal tunnel surgery by Dr. Masem, and a right long trigger finger release with Dr. Masem on August 28, 2019. (Opinion at p. 4.) The Applicant subsequently had a QME evaluation with orthopedist Jack Piasecki, M.D., who in his report after a re-exam dated April 22, 2010, noted significant continuing subjective complaints seemingly "not borne out" by the objective findings, despite

[3] See *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist.* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), and *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 75 Cal.Comp.Cases 837.

what was referenced as three surgeries by that point, found the Applicant to be P&S, and provided a standard rating of 12 WPI, with no apportionment and a need for further medical treatment. (Opinion at p. 5, QME report summarized in Joint 101 at pp. 8-9.) Evidently, Dr. Piasecki became unavailable and/or for some reason the parties agreed to use Dr. Gordon in his stead as the AME.

(Opinion at p. 5, Joint 101 at p. 16.) He found no apportionment to non-industrial factors (Joint 101 at p. 14), and noted that an incidentally reported and diagnosed hand tremor was a non-industrial central nervous system issue. (Id. at p. 15.) He also commented that there was "some exaggeration of symptomatology" and that it was a "nonanatomic examination." (Opinion at p. 5, Joint 101 at p. 15.) He provided work restrictions of no lifting of more than 10 pounds on a repetitive basis, or 20 pounds intermittently, and no forceful gripping with the left hand. (Joint 101 at p. 16.) He did not feel any further surgeries were indicated, and future medical was projected to include pain medications, occasional doctor visits, and advice regarding hand use and ergonomics. (***Id.*** at p. 17.)

As to the exam itself, the AME report (Joint 101) at p. 1, indicates, "The preliminary facts were obtained from the patient by my assistant, Leticia Soto, Medical Assistant. I then went over the details of the history with this patient and performed an examination of the upper extremities. The records were abstracted by my assistant, Maggie Ward. I then reviewed the records and the abstract. Subsequently, the conduction of the examination and dictation of this report in its entirety were performed solely by myself [me]." On page two an itemized breakdown of the time taken reads,

> Time spent on this evaluation is as follows: Interview and examination of patient: 1 hour. Review of 504 pages of records: 4-3/4 hours. Organization and preparation of report including addressing the complex issues of causation, apportionment, and future treatment: 2 hours.

(Joint 101 at p. 2.)

At the end of the report on page 17, and just prior to Dr. Gordon's signature is boilerplate language declaring under penalty of perjury that the contents of this report are true and correct to the best of his knowledge, and the second paragraph reads[:]

> I further declare under penalty of perjury that I personally performed the evaluation of the patient on ____ (left blank) at _____ (left blank) and that, except as otherwise stated herein, the evaluation was performed and the time spent performing the evaluation was in compliance with the guidelines, if any, established by the Industrial Medical Council of the administrative director pursuant to paragraph (5) of subdivision (J) of Section 5307.6 of the California Labor Code.

(***Id.*** at p. 17.)

Oddly, and despite the requirement in Rule 49.2, there is no declaration or any indication in the report as to exactly how much time Dr. Gordon spent face-to-face with the Applicant.

The Applicant testified at trial. (MOH/SOE at pp. 4-7.) With respect to the key issue of face-to-face time spent with Dr. Gordon, he testified that on arrival and while waiting, he filled out a multi-page questionnaire, and thereafter he was taken to a room where he spent "about 30 minutes" with two nurses who asked him questions about his medical history and took notes. (Opinion at p. 6, MOH/SOE at p. 6.) He then was taken to another room where he waited for an hour for the doctor to appear. On his arrival, he showed Dr. Gordon how he does his hand stretches and Dr. Gordon told him he did not have carpal tunnel since he did not see any surgical scar "and they kind of argued about this," but the doctor in the end saw the scar and agreed he had undergone carpal tunnel surgery. (Opinion at p. 7, MOH/SOE at pp. 6-7.) The Applicant repeatedly testified that he spent a total of "20 to 30 minutes" face-to face with Dr. Gordon. (Opinion at p. 7, MOH/SOE at p. 6, lines 42-43 and 46-47.) He obviously was not happy with Dr. Gordon, given the apparent argument, and he also complained it was his perception that the doctor had not reviewed the questionnaire he had filled out and did not know about him when he came into the room. (Opinion at p. 7, and MOH/SOE at pp. 6-7.) He also testified that because the doctor was wearing a mask and face shield, that there was no literal eye-to-eye contact, and that it seemed to him that although the doctor was writing the entire time they talked, it seemed "he was not really listening" to him.

DISCUSSION

The basic allegation in Applicant's Petition is that Applicant's case involved a complex medical-legal evaluation and that the face to face examination time of 20 to 30 minutes with the AME Dr. Gordon, as testified to by the Applicant, is insufficient under the standard specified in Rule 49.2 for neuromusculoskeletal evaluations, with the result that the resulting report is not substantial medical evidence, cannot be the basis of an award, and that the AME should be replaced. The alleged error is my finding that the time spent with the Applicant by the AME was sufficient under the law and regulations, and that accordingly, Dr. Gordon's report is substantial medical evidence, and was the proper basis for the FA&O, and that it was not necessary to replace the AME.

I agree with the Petition that the only direct evidence in the record *as to the specific amount* of face to face time between the Applicant and Dr. Gordon comes from the Applicant's trial testimony. Unfortunately, the time declaration in Dr. Gordon's report combines the time of the interview conducted by his staff with the face to face time he personally spent with the Applicant, i.e., a total of 1 hour, and does not specify or break out the specific amount of face to face time. It is clear from Rule 49(b) that face to face time for purposes of these rules only includes time spent with the actual evaluator; "Face to face time means only that time the evaluator is present with an injured worker. To the extent that the Applicant testified that he spent about 30 minutes with Dr. Gordon's nurses providing a history (Opinion at 6, MOH/SOE at p. 6), if you take the AME's sworn declaration of one hour total time spent with the Applicant, the inference is that Dr. Gordon's actual face to face time was closer to the high end of the 30 minutes referenced in the range offered by the Applicant in his testimony, rather than the lower 20 minute end of his estimate.

Are these facts enough to invalidate the opinions of the AME as substantial medical evidence and warrant his replacement as the AME and medical-legal evaluator in this case as alleged in the Petition? Considering all of the evidence in this case, I do not think so. Dr. Gordon is an experienced, long-time medical-legal evaluator, who is well known in the Bay Area workers' compensation community as an upper extremity orthopedic specialist, and is frequently used as an AME because of his reputation and expertise. In fact, it is my understanding that he limits his practice to the upper extremities and will not agree to act as a QME and/or AME for anything above the elbows.

It is evident from the Applicant's testimony that at a minimum, Dr. Gordon's staff provided him with a long questionnaire to complete upon arrival at the office, which he did, and that his staff took a detailed history from the Applicant, which by the Applicant's own trial testimony lasted approximately 30 minutes. The declaration from the AME in his report was that he "went over the details of that history" with the Applicant and performed a physical exam of the Applicant. (Joint 101 at p. 1.) His report summarizes a detailed history from the Applicant (***Id.*** at p. 3-4), summarizes 504 pages of medical records at pages 6-12 (***Id.*** at p. 2), documents the physical exam (***Id.*** at pp. 5-6), and provides his assessment and opinions which include diagnosis, P&S status, impairment, apportionment, and future medical treatment. (***Id.*** at pp. 13-17.) In short, I found Dr. Gordon's report to be a detailed and complete medical-legal evaluation, which explained the reasons for its conclusions, and as indicated in the Opinion, I found it to be substantial medical evidence. Having reviewed the evidence and that report again in preparing this Report & Recommendation, my opinion has The Petition is correct in that the Opinion at page 9, I stated that I did not believe this was "a complicated evaluation" that required more than the minimum face to face time under Rule 49.2. In retrospect, I meant the phrase "complicated evaluation" in a larger and more general context beyond that of Rules 49 and 49.2 et seq. Although the Applicant had multiple upper extremity surgeries, his underlying orthopedic conditions and diagnoses were not that complicated, namely lateral epicondylitis, bilateral carpal tunnel syndrome, and trigger finger of the right middle finger. (Joint 101 at p. 13.) While Dr. Gordon reviewed and summarized 504 pages of medical records, in my judgment and experience as both a judge and previously as a defense attorney, this was not a particularly complicated evaluation either medically and/or medical-legally for the AME, who has decades of experience in evaluating and assessing these types of conditions in a medical-legal context. However, in fairness to the Applicant, I note that Rule 49(h) explicitly defines an uncomplicated evaluation as a "face to face evaluation in which all of the following are recorded in the medical report: Minimal or no review of records, minimal or no diagnostic studies or laboratory testing, minimal or no research, and minimal or no medical history taking." It is evident that Dr. Gordon's report does not meet that definition. As a practical matter though, almost no medical-legal evaluation meets that standard, and frankly a report without a review of medical records, assuming they exist, or one that lacks a medical history, it itself probably not substantial medical evidence. The problem and conundrum, is that the Rule 49.2 and the related rules inexplicably do

not indicate what the minimum face to face time requirement is for something other than an uncomplicated evaluation, which is a curious and inexplicable omission given the fact that almost no case would meet the criteria for something other than an uncomplicated evaluation. What is a judge to do given this poor and/or incomplete regulatory scheme with respect to minimum face to face time requirements for most cases, i.e., something other than an uncomplicated evaluation? For big picture guidance, I would look to Section Article XIV, section 4 of the California Constitution, which provides that the Board and its judges shall administer the statutory and regulatory workers' compensation scheme to accomplish "substantial justice in all cases expeditiously, inexpensively, and without encumbrance of any character." Under that standard, and reading the rules as a whole and considering the extensive 30 minutes history taken by Dr. Gordon's staff, the fact that the definition of face to face time in Rule 49(b) appears to assume that such a history would be taken by the doctor himself during that face to face time, and the fact it does appear likely that the actual face to face time was an additional 30 minutes when considering the AME report's declaration and the Applicant's testimony together, I do not think that the facts in this case violate the spirit of the rules, render Dr. Gordon's AME opinions non-substantial, invalidate the award, or warrant the replacement of the AME.

To the extent that the Petition also references the AME's report as being billed as an ML104-94, an Extraordinarily Complex Comprehensive Agreed Medical-Legal Evaluation, I would say this is an entirely separate set of criteria established by the Medical Unit for billing purposes, and has nothing to do with the definition of an uncomplicated evaluation in Rule 49(h). In my multiple years as a judge, I cannot recall off the top of my head any AME who has billed an evaluation as anything but an Extraordinary Complex evaluation, since they seek to be paid at the maximum rate, given the relatively low medical-legal reimbursement rates established by the Medical Unit. In daily practice, even straightforward and relatively uncomplicated evaluations in my experience are billed as extraordinary exams, so I do not think this is dispositive on the issue of whether the AME's face to face time with the Applicant was insufficient in this particular case.

I also cannot help but think that Applicant's challenge to the AME's reporting is to some extent an opportunistic technical challenge because he is not happy with and disagrees with the AME's impairment ratings and opinions. To the extent that the Applicant testified as to an argument with the doctor at the exam, it is evident they did not get off on the right foot, although the report itself makes no such reference to such an incident. The AME's report certainly

documents some concerns with the Applicant's credibility, noting the nonanatomic exam, and exaggerated subjective complaints relative to objective factors, which he pointed out had been observed and commented on by the prior QME, Dr. Piasecki in the report he summarized. Finally, it is also worth noting, as I did in the Opinion at p. 10, that the total impairment found by Dr. Gordon of 12 WPI and 2 WPI, before adjustment, was greater than the QME's standard impairment rating of 12 WPI.

RECOMMENDATION

Accordingly, and for the reasons outlined above, I recommend that Applicant attorney's Petition for Reconsideration be **DENIED**.

Dated: April 22, 2022

Thomas J. Russell, Jr.
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE