WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

WILLIAM SHEPHERD, ***Applicant***

vs.

MEMPHIS SOUNDS; TRAVELERS INDEMNITY COMPANY, ***Defendants***

Adjudication Number: ADJ8828773
Santa Ana District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration[1] in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant and defendant both seek reconsideration of the October 15, 2021 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a professional athlete from April 1, 1972 to July 1, 1975, sustained industrial injury to his back, neck, hips, knees, ankles, feet, toes, fingers wrists, elbows, hands, and shoulders. The WCJ found in relevant part that applicant's date of injury pursuant to Labor Code[2] section 5412 was March 24, 2014; that the claim was not barred under the statute of limitations of section 5405; that applicant sustained permanent partial disability of 87 percent; and that 5 percent of applicant's right knee disability was apportioned to a 1972 specific injury.

Applicant contends that the F&A omitted the stipulated permanent and stationary date of July 13, 1975; that applicant is entitled to temporary total disability from April 13, 1975 to July 13, 1975; and that permanent disability indemnity payments should commence July 13, 1975.

Defendant contends that the finding that the applicant was first aware of a cumulative trauma injury from applicant's medical legal evaluator is not supported by the facts or by everyday

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[1] Commissioner Lowe, who was previously a member of this panel, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been selected in her place.

[2] All further references are to the Labor Code unless otherwise noted.

experience; that the WCJ's finding of 87 percent permanent unapportioned disability for a 3-year basketball career ending in 1975, is unreasonable; and that the claim is barred by the statute of limitations.

We have not received an answer from any party. The WCJ prepared a separate Report and Recommendation on Petition for Reconsideration for each petition, and in both instances recommended that the Petitions be denied.

We have considered both Petitions for Reconsideration, and the contents of both of the Reports, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the F&A.

FACTS

Applicant claimed injury to his head, jaw, neck, back, shoulders, elbows, wrists, hands, fingers, hips, knees, ankles, feet, toes, neurological, and sleep while employed as a professional athlete by defendant Memphis Sounds from April 13, 1974 to April 13, 1975. (Transcript of Proceedings, dated July 20, 2021, at p. 5:1.) Defendant denies injury liability for the claimed injury.

Applicant has obtained medical-legal reporting from Michael Einbund, M.D., in orthopedic medicine, and Kenneth Nudleman, M.D., in neurology. Defendant has obtained medical-legal reporting from Sara Watkin, M.D., in psychiatry, Jonathan Green, M.D., in internal medicine, Stephen Gold, D.D.S., in dentistry, Charles Glatstein, M.D., in neurology, and Steven Nagelberg, M.D., in orthopedic medicine.

On July 20, 2021, the parties proceeded to trial and framed for decision, in relevant part, injury arising out of and in the course of employment (AOE/COE), earnings, temporary disability, permanent disability, apportionment, attorney fees, the date of injury under section 5412, and whether compensation was barred by the applicable statute of limitations of section 5405. (Transcript of Proceedings, dated July 20, 2021, at p. 6:3.) The parties stipulated that applicant's permanent and stationary date was July 13, 1975. (*Id.* at p. 5:24.) The WCJ heard testimony from applicant, and ordered the matter submitted for decision as of August 2, 2021.

On October 15, 2021, the WCJ issued the F&A, determining in relevant part that applicant had met his burden of establishing injury AOE/COE. (Finding of Fact No. 3.) The WCJ determined that the date of injury was March 24, 2014, and that compensation was not barred by the statute of

limitations. (Findings of Fact, Nos. 4, 5.) The WCJ determined that applicant's injuries caused 87 percent permanent partial disability after apportionment of 5 percent of applicant's right knee disability to a prior injury, and that permanent disability indemnity payments commenced on March 24, 2014. (Findings of Fact, Nos. 8, 9.) The WCJ's Opinion on Decision explained that the conclusions reached by applicant's orthopedic evaluator were not substantial evidence to support the award of temporary disability. (Opinion on Decision, at p. 12.) The WCJ reviewed the submitted medical record and ultimately determined that the reports of Drs. Einbund and Glatstein were the most persuasive. Based thereon, the WCJ determined that applicant sustained 87 percent permanent disability with 5 percent apportionment of applicant's right knee disability. (*Id.* at pp. 15-16.)

DISCUSSION

Both applicant and defendant seek reconsideration of the WCJ's October 15, 2021 F&A. For purposes of continuity in our analysis, we begin with defendant's petition.

Defendant challenges the WCJ's determination that the date of injury pursuant to section 5412 was March 24, 2014. (Finding of Fact No. 4.) This date of injury corresponds to the date of applicant's first report on evaluation by orthopedic medical-legal evaluator Dr. Einbund. (Exhibit 1, Report of Michael Einbund, M.D., dated March 24, 2014.) Defendant contends that applicant, in the exercise of reasonable diligence, should have known that his complaints were industrially related in 1975, and that type of injury sustained by applicant requires no expert medical opinion to identify either the disability or its causation. (Defendant's Petition, at p. 5:9.) Because the date of injury occurred more than one year prior to the filing of the claim in this matter, defendant concludes that compensation is barred by the statute of limitations. (*Id.* at p. 7:3.)

Section 5405 limits the time in which an employee may commence proceedings for the collection of California workers' compensation benefits. Section 5405 provides:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
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> (a) The date of injury.
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> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.

> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

(Lab. Code, § 5405.)

Thus, an applicant must commence proceedings with the WCAB within one year of (1) the date of injury or (2) the expiration of the period covered by the employer's last payment of disability indemnity or (3) the date of the last furnishing by the employer of medical, surgical or hospital treatment. (*J.T. Thorp, Inc. v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327 [49 Cal.Comp.Cases 224, 229] (*Butler*).)

In cases involving an alleged cumulative injury, the date of injury is governed by section 5412, which holds:

> The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

(Lab. Code, § 5412.)

The court of appeal has defined "disability" per section 5412 as "either compensable temporary disability or permanent disability," noting that "medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion." (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579] (*Rodarte*).)

Regarding the "knowledge" component of section 5412, whether an employee knew or should have known his disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd.* (*Johnson*) (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53] (*Johnson*).) An employee is not charged with knowledge that his or her disability is job-related without medical advice to that effect, unless the nature of the disability and the applicant's training, intelligence and qualifications are such that he should have recognized the relationship between the known adverse factors involved in his employment and his disability. (*Id.* at p. 473; *Newton v. Workers' Co. Appeals Bd.* (1993) 17 Cal.App.4th 147 [58 Cal.Comp.Cases 395].)

Here, the March 24, 2014 report of Dr. Einbund identifies the existence of permanent disability across multiple body parts and systems. (Ex. 1, Report of Michael Einbund, M.D., dated

March 24, 2014, at pp. 11-12.) Dr. Einbund further opines that "all of this patient's current symptoms and disability are secondary to the continuous trauma which he sustained during the course of his career as a professional basketball player." (*Id.* at p. 18.) The WCJ thus determined that the March 24, 2014 report established the existence of compensable disability and conferred the requisite knowledge of its industrial etiology sufficient to establish the section 5412 date of injury. The WCJ writes:

> This finding was based on applicant's testimony at trial that he did not know what a cumulative trauma injury was or that he sustained a cumulative trauma injury until the time of his appointment with Dr. Einbund. (Summary of Evidence dated July 20, 2021 pages 5 and 15.) The applicant could not have been give notice by the employer for this date of injury.
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> Knowledge of what a cumulative trauma injury is not generally known by injured workers or employers for that matter until a physician advises as much. An injured worker is not charged with knowledge that his or her disability is job-related without medical advice to that effect. (*Freuhauf Corp. v. WCAB* (1968) 33 CCC 300)
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> An additional layer in this case is whether applicant knew or should have known that he could file a cumulative trauma claim for injury in the State of California for play with a team in Tennessee. Based on applicant's testimony, he had no idea he had such a right until he saw Dr. Einbund. These athlete cases present unique factual scenarios and applicants generally lack the legal knowledge to know they may have a right to file a claim in another state.

(Report on Defendant's Petition, at p. 4.)

Defendant contends, however, that the relationship between applicant's physical ailments and his career as a professional athlete through 1975 were plainly evident. Defendant contends that applicant "knew he was wearing down" and that "no other activities contributed to his physical condition." (Defendant's Petition, at p. 4:11.)

However, the burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew he had some symptoms. (*Johnson, supra*, 163 Cal.App.3d 467, 471.)

Indeed, the perils of lay diagnosis of complaints as quotidian as low back pain were discussed by the court of appeal in *Pieter Kiewit Sons v. Industrial Acci. Comm.* (*McLaughlin*) (1965) 234 Cal.App.2d 831 [30 Cal.Comp.Cases 188]). Therein, applicant claimed a low back injury while working for Kiewit, the last of three employers for whom applicant had worked in

four years. Despite applicant describing similar low back complaints arising out of all three employments, the IAC assessed liability to the terminal employer alone. In granting review of the IAC decision, however, the Court of Appeal found "[t]hat issue may run a gamut from the blatantly obvious to the scientifically obscure," and that expert testimony would be necessary. "Back disabilities in particular shout loudly for expert advice … [i]n a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation." (*Id.* at pp. 839-840.) Accordingly, "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188].)

Here, applicant testified that prior to filing his claim in 2014, he did not know what a cumulative injury was. (Transcript of Proceedings, dated July 20, 2021, at p.11:23.) Consequently, applicant was unaware that his current problems arose out of a cumulative injury. (*Id.* at p. 12:1.) On the other hand, applicant acknowledged that over his career in professional sports between 1972 and 1975, he "knew he was wearing down," but also that "I don't know if I would call it injured." (*Id.* at p. 66:5.) Applicant testified that toward the end of his professional sports career that he "couldn't have played at a level that I wanted to play at." (*Id.* at p. 64:18.) During his time playing professional basketball, applicant experienced aches and pains, but that "I'd recover and, like I said earlier, I recovered. I felt fine for a while and then gradually, you know, the wear and tear made it worse." (*Id.* at p. 66:13.) When asked whether he thought contemporaneously that he had sustained an injury to his low back, applicant testified "You know, I had aches and pains, but I didn't think of it as being a severe injury." When asked if he knew his worsening was because of his basketball career, applicant testified "I thought it was more of my pain tolerance." (*Id.* at p. 66:16.)

As the Court of Appeal has observed in *Johnson, supra*, the ability to distinguish between aches and pain inherent to the level of physical exertion required in professional sports and the existence of compensable disability arising out of cumulative injury often requires medical advice, "unless the nature of the disability and the applicant's training, intelligence and qualifications are such that he should have recognized the relationship between the known adverse factors involved in his employment and his disability." (*Johnson, supra,* at p. 473.) Here, we are not persuaded that applicant, a professional athlete who transitioned into working as a coach, realtor, and

salesperson, had the requisite knowledge, experience or training to recognize the existence of a cumulative injury, or the relationship between his professional sports career and the cumulative injury. Nor does defendant, who has the affirmative of the issue, identify any medical advice to applicant prior to 2014 which would have conferred the requisite knowledge under section 5412 sufficient to establish an earlier date of injury. (Lab. Code, § 5705; *Johnson, supra,* at p. 473.)

Accordingly, we concur with the WCJ's determination that the first concurrence of compensable disability and knowledge that such disability was work-related was the initial report of Dr. Einbund of March 24, 2014. (Ex. 1, Report of Michael Einbund, M.D., dated March 24, 2014.) Applicant filed an Application for Adjudication of Claim on January 22, 2013. Because applicant did not commence proceedings for the collection of benefits more than one year after the date of injury on March 24, 2014, compensation is not barred under section 5405.

Defendant further challenges the WCJ's finding of permanent partial disability and apportionment, averring that "a finding of 87% permanent disability for a 3 year basketball career ending in 1975, with no apportionment to nonindustrial factors, is unreasonable." (Defendant's Petition, at p. 6:1.) We observe in the first instance, however, that the WCJ did apportion 5 percent of applicant's right knee disability to a specific injury in 1972. (Finding of Fact No. 9; Ex. 3, Report of Michael Einbund, M.D., dated November 13, 2019, at p. 17.)

Moreover, while applicant bears the burden of establishing the approximate percentage of permanent disability caused by the industrial injury, it is defendant that bears the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Bd. en banc).) In addition, the WCJ and the Appeals Board are empowered to choose among conflicting medical and vocational reports and rely on that which is deemed most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476 [33 Cal.Comp.Cases 221].)

Here, the WCJ has relied upon the reporting of applicant's evaluating orthopedist Dr. Einbund and defendant's evaluating neurologist Dr. Glatstein, and based thereon, entered an award of permanent disability. (Finding of Fact No. 8.) The WCJ has further determined that aside from the right knee apportionment, defendant has not met its burden of establishing apportionment to factors other than the industrial injury. (Finding of Fact No. 9.) Other than asserting that the lack of apportionment is per se "unreasonable," Defendant's Petition cites to no medical reporting in evidence that adequately addresses or supports apportionment to prior industrial or nonindustrial

factors. (Defendant's Petition, at p. 6:23.) And following our independent review of the entire evidentiary record occasioned by defendant's petition, including the November 14, 2019 reporting of defense QME Dr. Nagelberg, we also discern none. (Ex. F, Report of Steven Nagelberg, M.D., dated November 15, 2019, at p. 36.) We therefore decline to disturb the WCJ's determination with respect to both permanent disability and apportionment.

Accordingly, we will affirm the WCJ's determinations with respect to the date of injury, the inapplicability of the statute of limitations, and the award of permanent disability.

Turning to Applicant's Petition, applicant contends that his industrial injury resulted in a period of temporary total disability for three months. (Applicant's Petition, at p. 3:23.) In support of this contention, applicant cites to trial testimony reflecting a period of unemployment with concomitant wage loss following his separation from defendant in April, 1975. (*Id.* at p. 4:8.) In addition, applicant's evaluating orthopedist Dr. Einbund opined that applicant's "condition became permanent and stationary approximately two to three months following his retirement from professional basketball." (Ex. 1, Report of Michael Einbund, M.D., dated March 24, 2014, at p. 13.) Based on the period of unemployment to which applicant testified and Dr. Einbund's opinion that applicant would have sustained a period of temporary disability following his retirement from professional sports, applicant asserts entitlement to temporary total disability through the stipulated permanent and stationary date of July 13, 1975. (Applicant's Petition, at p. 4:21.)

Decisions of the WCJ and the Workers' Compensation Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) 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 v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Not all expert medical opinion constitutes substantial evidence. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97]*; Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) To constitute substantial evidence, a medical opinion must be predicated on reasonable medical

probability. (*Escobedo, supra,* at p. *611; McAllister, supra*, at pp. 413, 416-417; *Rosas, supra*, at pp. 1700-1702, 1705.) Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin, supra*, 4 Cal.3d 162.) Whether a physician's opinion constitutes substantial evidence "must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion." (*Ibid*.)

Here, the WCJ has determined that the evidentiary record does not support the award of temporary disability. The WCJ writes:

> With regard to the claim of temporary total disability for the period April 14, 1975 through July 13, 1975, the Court found the opinions by Applicant QME to be speculative and not based on substantial medical evidence. The applicant testified that while he was off work with the Memphis Sound, he received salary continuation. (Summary of Evidence dated July 20, 2021 page 8) It is unclear what period of time he received salary continuation.
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> In the same year of 1975, applicant began work with Converse. There was no evidence presented as to what month applicant began this subsequent employment. Applicant also testified that had he been offered a contract by another team to play basketball, he would have continued to play. (Summary of Evidence dated July 20, 2021 page 10) This testimony conflicts with Dr. Einbund's opinion that applicant was temporarily totally disabled.
>
> Applicant testified if the Sounds offered him another contract, he would have played. Again this conflicts with the opinion of Dr. Einbund regarding applicant being temporarily totally disabled.
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> The above testimony coupled with the fact that there was no medical evidence demonstrating applicant was disabled during the period April 14, 1975 – July 13, 1975 led the Court to find that Dr. Einbund's opinion on temporary disability was speculative.

(Opinion on Decision, at p. 6.)

Following our review of the record, we concur with the WCJ's analysis and conclusion that applicant has not met the burden of establishing a period of temporary total disability. (Lab. Code, § 5705.)

Next, applicant contends that the WCJ erred in awarding permanent disability benefits commencing March 24, 2014. (Finding of Fact No. 8.) Applicant observes that the parties have stipulated to a permanent and stationary date of July 13, 1975. (Applicant's Petition, at p. 2:3.)

Accordingly, applicant asserts that permanent partial disability indemnity should commence on July 13, 1975. (Applicant's Petition, at p. 5:17.)

The WCJ's Report on Applicant's Petition observes, however that while the parties may stipulate to material facts germane to the issues at bar, neither the WCJ nor the WCAB are bound by those stipulations. Section 5702 provides:

> The parties to a controversy may stipulate the facts relative thereto in writing and file such stipulation with the appeals board. The appeals board may thereupon make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy.

(Lab. Code, § 5702, italics added.)

The WCJ and the WCAB are thus authorized to reject the stipulation of the parties and to determine the underlying issues by directing investigation or in supplemental proceedings.

Here, the WCJ has exercised her authority to reject the stipulations of the parties as unfounded in the medical record. The WCJ notes that the reporting of Dr. Einbund, upon which the court relied in the assessment of permanent disability, also documented interval change in applicant's condition. In his 2019 reevaluation of applicant, Dr. Einbund noted that despite his previous opinion in 2014 that applicant's "condition became permanent and stationary within approximately two to three months following his retirement from professional basketball," applicant's condition had "continued to worsen" through 2019. Accordingly, Dr. Einbund determined that as of November 13, 2019, applicant had once again "reached maximum medical improvement and his condition can again be considered permanent and stationary." (Ex. 3, Report of Michael Einbund, M.D., dated November 13, 2019, at p. 13.) Thus, the WCJ determined the medical evidence was inconsistent with applicant having reached a permanent and stationary date in 1975. (Report on Applicant's Petition, at p. 2.)

In addition to the WCJ's determination that the parties' stipulation is not supported in the medical record, we also observe that pursuant to section 4650, "[i]f the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity," except in cases involving a return to work not applicable here. (Lab. Code, § 4650(b)(1).) Here, the WCJ has determined that there is insufficient evidence to support the award of temporary total disability. (Finding of Fact No. 7.) Accordingly, the commencement of permanent disability benefits in 1975 is not otherwise mandated by section

4650(b)(1). Moreover, the absence of temporary disability mitigates any legislative concern regarding the preservation of "an uninterrupted flow of timed benefits during the transition from temporary disability indemnity to permanent disability indemnity." (*Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550, 561 (Appeals Bd. en banc).)

Accordingly, we decline to disturb the WCJ's findings that permanent disability indemnity payments began as of the March 14, 2014. (Finding of Fact No. 8.)

In summary, we concur with the WCJ's determination that the date of injury herein under section 5412 was March 14, 2014, and that compensation is not barred by the statute of limitations. We further agree that defendant has not met its affirmative burden of establishing apportionment to prior industrial or nonindustrial factors beyond that which is identified in the F&A. Further, we discern no error in the WCJ's determination that the medical record does not support a discrete period of temporary total disability in 1975, and that permanent disability indemnity payments should commence on March 14, 2014.

We will affirm the F&A, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the October 15, 2021 Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 15, 2025

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

WILLIAM SHEPHERD
GLENN, STUCKEY & PARTNERS
DIMACULANGAN & ASSOCIATES

SAR/abs

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