WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT DEAN, ***Applicant,*** **vs.** **GLEN PYE VENDING CO.; PENNSYLVANIA MANUFACTURERS' INSURANCE COMPANY; VIRGINIA SURETY,** ***Defendants.***	**Case No. ADJ529322 (RDG 0128527)** **OPINION AND ORDER GRANTING PETITIONS FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Applicant and defendant Pennsylvania Manufacturers' Insurance Company[1] each seek reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of April 2, 2015, wherein it was found that, while employed as a vending machine technician during a cumulative period ending on October 1, 2007, applicant sustained admitted industrial injury to his back, neck, right hip, shoulders and wrists, causing permanent disability of 74% and the need for further medical treatment. In finding permanent disability of 74%, the WCJ found that applicant sustained 43% cervical spine permanent disability, 10% lumbar spine permanent disability, 4% left arm carpal tunnel permanent disability, 20% left shoulder permanent disability, 4% right arm carpal tunnel permanent disability, 29% right shoulder permanent disability, and 5% right hip permanent disability. In finding that applicant sustained 10% lumbar spine permanent disability, it was found that 20% of the lumbar spine disability was caused by factors other than the instant industrial injury. Similarly, in finding 20% left shoulder permanent disability, it was found that 25% of the left shoulder permanent disability was caused by factors other than the instant industrial injury.

In making her permanent disability findings, the WCJ relied upon the reporting of agreed medical evaluator orthopedist Joel Renbaum, M.D. In addition to providing impairment ratings under the strict

[1] Pennsylvania Manufacturers Insurance Company provided coverage for a portion of the cumulative injury period, and co-defendant Virginia Surety provided coverage for the other portion.

interpretation of the AMA Guides, Dr. Renbaum gave alternate ratings pursuant to *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] pertaining to the lumbar spine and the shoulders. In *Guzman*, the Court of Appeal held that an evaluator is not locked into any specific paradigm for evaluating permanent impairment under the AMA Guides and that the evaluator may utilize any method in the AMA Guides that most accurately reflects the injured worker's impairment. The WCJ based her findings regarding bilateral shoulder impairment on the alternate *Guzman* analysis, but rejected Dr. Renbaum's *Guzman* impairment analysis with regard to the lumbar spine.

Defendant contends that the WCJ erred in finding 74% permanent disability, arguing that in calculating the final permanent disability rating, the WCJ erred in (1) attributing a 2% whole person impairment (WPI) pain add-on to the cervical spine instead of the lumbar spine, (2) finding right hip permanent impairment, (3) finding 16% WPI to the right shoulder instead of 15% WPI, and in (4) finding 15% WPI to the left shoulder instead of 10% WPI.

Applicant contends in his petition that the WCJ erred in (1) apportioning the lumbar spine permanent disability and the left shoulder permanent disability to factors other than the instant industrial injury, arguing that the defendant failed to raise the issue of apportionment, in (2) not adopting Dr. Renbaum's alternate *Guzman* analysis with regard to the lumbar spine impairment and in (3) failing to award a life pension to the applicant.

Applicant and defendant have each filed answers to the respective petitions and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (report). With regard to the defendant's petition for reconsideration, the WCJ agrees that she erred in finding a 16% WPI with regard to the right shoulder instead of 15% WPI. With regard to the applicant's petition, the WCJ recommends that permanent disability be re-rated without consideration of apportionment because apportionment was not raised as an issue by the defendant. The WCJ also agrees that she erred in not awarding a life pension pursuant to Labor Code section 4659. With regard to the applicant's left shoulder, the WCJ admits that Dr. Renbaum "opined 16% upper extremity impairment for the left shoulder, which converts to 10% whole person impairment." However, she recommends that an additional 10% upper extremity

impairment be added for "distal clavical resection" which "would bring total upper extremity impairment to the left shoulder to 26%" which converts to 16% WPI.

We will grant reconsideration and amend the Findings and Award of April 2, 2015 to defer the issue of permanent disability. We agree with the WCJ's report that the 2% WPI add-on to the lumbar spine and the findings regarding impairment in the right hip should be affirmed. However, with regard to the shoulders, further proceedings are necessary. The WCJ agrees in her report that the 16% WPI should be reduced to 15% WPI. Dr. Renbaum originally assigned 16% WPI to the right shoulder in his January 17, 2013 report. However, at his November 5, 2014 deposition, Dr. Renbaum testified that "on Page 14 of my January 2013 report, I see that there's a 26 upper extremity right shoulder impairment. I want to change that to 25, because I think the 26 exceeds a limit that shouldn't be exceeded, and that I believe converts to a 15 percent whole person impairment, so that would be a change on that report." (November 5, 2014 deposition at p. 39.)

In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal. Comp. Cases 660].) Additionally, there must be a solid and reasonable basis for the physician's final conclusion. It is not sufficient for the WCJ to blindly accept a medical opinion that lacks a solid underlying basis. (*National Convenience Stores v. Workers' Comp. Appeals Bd.* (*Kessler*) (1981) 121 Cal.App.3d 420, 427 [46 Cal.Comp.Cases 783].) Here, Dr. Renbaum does not sufficiently explain the "limit that shouldn't be exceeded" and "I think" and "I believe" is speculative.

Additionally, since Dr. Renbaum finds the same impairment in both shoulders, it is unclear if this limitation applies to the left shoulder as well. Moreover, although the WCJ recommends in her Report that we re-rate permanent disability adding a 10% upper extremity impairment with regard to the left shoulder, the parties have not had an opportunity to be heard on this sua sponte recommendation. The parties should have an opportunity to be heard on this issue prior to the incorporation of an additional 10% upper extremity impairment with regard to the left shoulder. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805]; *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

In her report, the WCJ recommends not taking apportionment into account because the defendant failed to specifically raise the issue of apportionment by not checking off the "apportionment" box in the pre-trial conference statement. However, we find that apportionment is included within the issue of permanent disability and does not have to be separately raised. (*Petersen v. Pacific Earth Research, Inc.* (2010) 2010 Cal. Wrk. Comp. PD LEXIS 496, *2-3 [Appeals Bd. panel]; *Oakland Unified Sch. Dist. v. Workers' Comp. Appeals Bd.* (*Oler*) (1991) 56 Cal.Comp.Cases 139 [writ den.].) Accordingly, in the further proceedings, the WCJ should take Dr. Renbaum's apportionment determination into account when rating the applicant's permanent disability.

To the extent applicable, any future decision should comply with Labor Code section 4659. Since we defer the issue of permanent disability, we necessarily defer the issue of attorney's fees. We note that there was an inconsistency in the WCJ's decision, with the Finding No. 6 stating that the attorney's fee would be commuted using the uniform reduction method, and the Award stating that "attorney fees to be commuted from the far end of the award." The preferred method in cases of over 70% permanent disability is to order commutation using the uniform reduction method, so that there is no break in payments between the cessation of permanent disability indemnity and the commencement of the life pension.

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For the foregoing reasons,

IT IS ORDERED that reconsideration of the Findings and Award of April 2, 2015 is hereby **GRANTED**.

IT IS FURTHER ORDERED as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of April 2, 2015 is hereby **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

1. ROBERT DEAN born on January 6, 1962, while employed during the period October 2, 2006 through October 1, 2007 as a Vending Machine Technician at Chico, California, by GLYN PYE VENDING CO, whose workers' compensation insurance carrier was Virginia Surety for the period through May 29, 2007 and Pennsylvania Manufacturers' Association Insurance Company for the period May 29, 2007 through October 1, 2007, sustained injury arising out of and occurring in the course and scope of employment to his back, neck, right hip, bilateral shoulders and bilateral wrists.

2. Applicant's earnings at the time of injury were $470.00 per week producing a temporary disability rate of $313.33 per week and a permanent disability indemnity rate of either $230.00 or $270.00 per week.

3. Applicant's injury caused temporary disability for which he has been adequately compensated.

4. The issue of permanent disability is deferred with jurisdiction reserved.

5. Applicant will require further medical treatment to cure or relieve from the effects of this injury.

6. The issue of attorney's fees is deferred, with jurisdiction reserved.

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AWARD

AWARD IS MADE in favor of ROBERT DEAN against VIRGINIA SURETY and PENNSYLVANIA MANUFACTURERS' ASSOCIATION INSURANCE COMPANY, jointly and severally, of:

a. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

RONNIE G. CAPLANE

CONCURRING, BUT NOT SIGNING

ANNE SCHMITZ DEPUTY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 23 2015

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

BRADFORD & BARTHEL (2)
MULLEN & FILIPPI
ROBERT DEAN
SILES & FOSTER
SHARON COHEN

DW:bgr