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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

Case No. ADJ695479 (RIV 0055748)

JOSE MONTIEL,

Applicant,

vs.

CAL-TECH PRECISION, INC.

Defendant.

**OPINION AND ORDERS
DENYING PETITION FOR
RECONSIDERATION;
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Cal-Tech Precision and Highlands Insurance, seek reconsideration of the Findings and Award, issued April 19, 2016, in which a workers' compensation administrative law judge (WCJ) found applicant Jose Montiel to be totally permanently disabled as a result of an admitted May 8, 2003 injury to his back and compensable consequence injuries to his psyche, left knee, diabetes, gastritis, sleep disorder and sexual dysfunction, while employed as a machine operator by Cal-Tech Precision, then illegally uninsured. In reaching this determination, the WCJ found the psyche apportionment determination of Qualified Medical Evaluator (QME) Dr. David Brendel was not substantial medical evidence to justify apportioning his psyche disability to an August 29, 2001 injury to his left foot.

Defendant Cal-Tech Precision (Cal-Tech) contests the WCJ's finding that applicant is 100% permanently disabled, contending first that the finding is not supported by substantial evidence in the absence of expert vocational evidence that establishes applicant's inability to compete in the open labor market. Second, Cal-Tech asserts that applicant's failure to obtain vocational evidence of his diminished future earning capacity requires that his permanent disability be determined by a scheduled rating, and that a formal permanent disability rating must first be prepared to establish 100% permanent disability. Third, Cal-Tech argues that the WCJ improperly admitted Dr. Brendel's deposition testimony in violation of Labor Code section 5502(d)(3). Fourth, Cal-Tech contends the apportionment determination in Dr. Brendel's January 13, 2012 report does constitute substantial medical evidence to support apportioning 30% of applicant's psyche disability to his prior foot injury. Fifth, Cal-Tech argues that Dr.

1 Brendel's deposition testimony is not substantial evidence to support an unapportioned award of total
2 permanent disability. Finally, Cal-Tech argues that even if applicant is determined to be totally
3 permanently disabled, it should only be liable for the percentage of disability caused by his back injury
4 and not for the consequential psyche disability which Dr. Brendel had apportioned to his prior foot
5 injury.

6 Highland Insurance (Highland), the insurer of Cal-Tech Precision for applicant's unresolved
7 August 29, 2001 left foot injury in ADJ1858391, seeks reconsideration "to clarify ambiguities in the
8 Findings of Fact," as the ambiguities may effect that case. Highland seeks an amendment of the Findings
9 and Award to reflect that the 2001 injury in ADJ1858391 was not at issue in the determination of the
10 April 19, 2016 Findings and Award in ADJ695479, for which it was not the insurer of Cal-Tech.

11 Applicant has filed an answer to the petition filed by defendant Cal-Tech, and the WCJ has
12 prepared a Report and Recommendation on Petition for Reconsideration, in which she recommends that
13 the finding of total permanent disability be affirmed but agrees that there is an error in the finding of the
14 date of injury.

15 For the reasons set forth below, we will grant reconsideration of the Findings and Award for the
16 limited purpose of amending the Findings and Award to clarify that the findings relate solely to the claim
17 of injury in ADJ695479, and to order that Exhibit 4, Dr. Brendel's May 14, 2015 deposition transcript, be
18 admitted into the record. We shall otherwise affirm the WCJ's finding that applicant is totally
19 permanently disabled.

20 I.

21 Applicant filed claims for two industrial injuries while employed by Cal-Tech as a machine
22 operator. In ADJ1858391, he claimed he sustained an injury to his left foot on August 29, 2001. Cal-
23 Tech was insured by Highland Insurance at the time of this claimed injury.

24 In ADJ695479, applicant claimed he sustained an injury to his back on May 8, 2003, and
25 consequently, as a sequelae of that injury, he also sustained injury to multiple body parts including his
26 psyche. At the time of the second injury, his employer was uninsured for workers' compensation
27 purposes, and the Uninsured Employers Benefits Trust Fund paid temporary disability benefits through

1 June 7, 2010.

2 Applicant's treating physician, Dr. Lawrence Miller, reported that applicant injured his back and
3 left leg when he was lifting titanium material weighing 350 pounds. Dr. Miller referred applicant for
4 lumbar laminectomy surgery in 2009, and he reported applicant "has done poorly following surgery with
5 persistent severe back and radiating symptoms." (App. Exh. 2, Dr. Miller report dated 4/1/13.) He
6 referred applicant to Dr. Brendel for psychological treatment, as applicant was experiencing depression,
7 anxiety, mood swings, panic attacks and insomnia. Applicant also developed internal medical conditions
8 including hypertension and diabetes mellitus. Dr. Miller also noted that applicant's condition had
9 deteriorated and he "cannot ambulate without a walker." Dr. Miller calculated applicant's whole person
10 impairment rating of 91%, covering all of applicant's impairments, using the combined value chart. He
11 also opined that applicant is "permanently 100% disabled and will never return to the labor force." He
12 found no basis to apportion applicant's permanent disability to prior injuries or degenerative conditions.

13 Dr. Alexander Angerman, reporting as an Agreed Medical Examiner, essentially agreed with Dr.
14 Miller. In his August 27, 2012 report he indicated that, "[i]f one takes into account his emotional issues,
15 his pain, medication and internal medical problems then in all medical probability he cannot compete in
16 the open labor market." (Joint Exh. X, Dr. Angerman report dated 8/27/12.)

17 Dr. Brendel provided psychological treatment on referral from applicant's primary treating
18 physician, Dr. Miller, and prepared a permanent and stationary report dated January 13, 2012. (App. Exh.
19 1.) He diagnosed applicant with

20 Anxiety Disorder, NOS, DSM-IV-TR: 300.00; Major Depression, Single
21 Episode, Moderate, DSM-IV-TR: 296.22; Sleep Disorder Due to Chronic
22 Orthopedic Back Pain, Insomnia Type, DSM-IV-TR: 780.52; and Male
Hypoactive Sexual Desire Disorder Due to Back Pain, DSM-IV-TR:
302.71; in Partial Remission.

23 Dr. Brendel calculated applicant's GAF score as 53 and his whole person impairment at 26%.

24 He concluded that applicant's "emotional and psychological symptomatology are greater than 51
25 percent attributable to the work injuries of August 29, 2001, and May 8, 2003, while working at Cal Tech
26 Precision." Discussing apportionment, Dr. Brendel found no non-industrial factors contributed to his
27 disability, but found applicant's prior injury to his left foot was responsible for 30% of his permanent

1 disability. In apportioning to the 2001 foot injury, Dr. Brendel relied upon applicant's report that he had
2 returned to work after the injury due to his employer's threat of termination or bodily harm, stating:

3 the patient's injury of May 8, 2003, is responsible for 70 percent of the
4 patient's permanent psychological disability, while the injury of August 29,
5 2001, is responsible for 30 percent of the patient's permanent psychological
6 disability. The reasoning for this is that subsequent to his first injury, the
7 patient was admonished to return to work even if he returned on crutches.
8 Thus, he was threatened with termination if he did not return. When he
9 asked for medical attention, the reply from his employer or superior was to
10 shut up. Thus, he was threatened with termination if he did not return to
11 work no matter his physical condition. Therefore, it is opined that this
12 injury caused approximately 30 percent of the patient's permanent
13 psychological disability since he did continue working and did so until the
14 date of his second injury. The patient also asserted that he was threatened
15 with physical/bodily harm if he did not comply with demands. Please refer
16 to my Initial Psychological Pain Evaluation, dated December 12, 2006, for
17 a description of his superior's attitudes and quotes provided by the patient
18 which illustrate mistreatment and verbal abuse.

19 With regard to applicant's disability, Dr. Brendel found applicant had reached permanent and
20 stationary status as of the date of his report.

21 The degree of residual depression and anxiety is such that it limits the
22 patient's ability to engage in the goal-directed activities expected of any
23 employee. He sleeps poorly, and resulting fatigue will limit energy on
24 workdays. Anger, irritability, and social withdrawal will limit his ability to
25 interact effectively with coworkers, supervisors, and the public. Loss of
26 confidence and self-esteem will impede his ability to perform work duties
27 autonomously. Difficulties with concentration and memory will interfere
with his ability to work productively and follow instructions accurately and
efficiently in a variety of settings. Preoccupation with physical functioning
will detract from his ability to focus on tasks at hand.

28 The WCJ issued several final determinations, which were either vacated or rescinded by the
29 Appeals Board at the WCJ's request, due to issues related to the apportionment of applicant's permanent
30 disability. While the matter was still pending but not submitted for decision, applicant undertook to take
31 the deposition of Dr. Brendel on May 14, 2015. All parties participated in the deposition.

32 In his deposition testimony, Dr. Brendel changed his opinion on apportionment and stated that all
33 of applicant's psychological disability was caused by the effects of the 2003 back injury, and that none of
34 his current level of disability was caused by his maltreatment by his employer subsequent to the 2001 left
35 foot injury. He explained that the factors he cited in his report to justify apportionment were not relevant

1 to his ultimate apportionment determination.

2 There are several factors that altered my opinion. Number one is that he
3 was injured in 2001. He hurt his foot and returned to work on crutches.
4 Upon asking him about the contribution of that injury to his psyche, he
5 stated that he was threatened by his supervisor and so, you know -- and he
6 was admonished to return to work, regardless, or lose his job.

7 However, what I realized in reading it was that when I asked him that, I
8 wasn't really aware of the fact that he mentioned to me at another time that
9 the company was sold in 2002 and the new owners took over in 2003.

10 He said that the prior owners -- the original owners were very nice to him
11 and that the new ownership, those were the ones that terminated many
12 employees, that forced -- that overworked the remaining employees and
13 were trying to get rid of him and threatened him and, you know, said all
14 sorts of disparaging -- made many disparaging comments towards his race
15 and towards him individually. And so I realized that his injury was in 2001
16 during the time he was employed by people that he thought were nice to
17 him.

18 And so I then thought that -- so my thinking is that he conceived the dates
19 and occurrences in a mistaken fashion. So that, you know, I -- you know,
20 that was a confusing factor to me, and in taking all the factors into
21 consideration, I -- you know, I realize that not only was -- you know, and I
22 treated him -- that the back and the failed back syndrome, the failed
23 surgery and the increase in chronic pain and the desperation encountered
24 afterwards with a lack of what he called appropriate treatment and his
25 noncompliance with his medication regimen, those were the things that
26 caused -- that contributed in its entirety to his permanent psychological
27 disability.

(App. Exh. 4, Dr. Brendel Deposition, p12-13.)

18 When the matter returned for further hearing on October 27, 2015, applicant's offer of Dr.
19 Brendel's deposition testimony into evidence was subject to defendant's objection and was marked for
20 identification only.¹

21 In her subsequent Findings and Award, now pending before us on reconsideration, the WCJ
22 found Dr. Brendel's January 13, 2012 permanent and stationary report was not substantial medical
23 evidence on the issue of apportionment of applicant's permanent disability arising from the injury to his
24 psyche. The WCJ further stated that Dr. Brendel's deposition testimony would be considered as "the
25 record needed development so that a just and well-reasoned decision is rendered. Furthermore, not to
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27 ¹ The Minutes of Hearing on April 15, 2015 indicate that there was a joint request to take the matter off
calendar for further discovery by deposition.

1 allow further development of the record would be a denial of due process." (4/19/2016 Findings and
2 Award, Finding of Fact number 5.)

3
4 II.

5 Defendant Cal-Tech first contends that the finding that applicant is totally permanently disabled is
6 not supported by substantial medical evidence since the reporting physicians who concluded that
7 applicant was not capable of returning to the open labor market did not rely upon the findings of a
8 vocational expert. Defendant argues that only evidence from a vocation expert may justify an award of
9 100% permanent disability.

10 We disagree with this contention. A determination of an inability to compete in the open labor
11 market is not solely within the province of a vocational expert. Clearly, where there is substantial
12 evidence of significant impairment, a medical expert's opinion regarding a patient's vocational capacity
13 may be sufficient to establish total permanent disability. Particularly where the combined effects of
14 orthopedic, internal and psychiatric impairments, such as documented in the medical record here,
15 establish an applicant is not capable of returning to the labor market.

16 The Appeals Board has allowed awards of 100% permanent total disability based upon medical
17 opinion that an injured worker was unable to work in the open labor market, in the absence of evidence
18 of vocational feasibility. (See *Calif. Indemnity v. Workers' Comp. Appeals. Bd. (Marquez)* (2012) 77
19 Cal.Comp.Cases 82 [writ den.]; *City and County of San Francisco v. Workers' Comp. Appeals. Bd.*
20 (*Gebresilassie*) (2006) 71 Cal.Comp.Cases 1154 [writ den.]

21 The medical expertise of Dr. Miller, Dr. Angerman and Dr. Brendel in discerning applicant's
22 inability to engage in full time employment, in view of the physical and mental disabilities related to his
23 failed back condition, justifies the WCJ's reliance upon their opinions. (*Gebresilassie, supra.*) In the
24 absence of valid apportionment, the WCJ could reasonably find on this record that applicant is totally
25 permanently disabled "in accordance with the fact." (Labor Code section 4662.)

26 Cal-Tech next argues that applicant was required to establish the extent of his permanent
27 disability through a scheduled rating or make a showing, based upon vocational evidence, pursuant to

1 *Ogilvie*², that his diminished future earning capacity is greater than what would have been derived from a
2 scheduled rating. Defendant argues that a formal rating must be prepared based upon the reporting
3 physician's findings of applicant's whole person impairment and apportionment.

4 In response, we note that at the hearing on March 18, 2014, the parties expressly waived
5 obtaining a formal rating from the Disability Evaluation Unit. Defendant cannot now contend that a
6 formal rating must be obtained. Rather, the WCJ is considered to have special expertise in performing
7 permanent disability ratings and need not obtain a formal rating provided there is substantial evidence to
8 justify the WCJ's rating. (*Blackledge v. Bank of America* (2010) 75 Cal. Comp. Cases 613, 625 [Appeals
9 Board *en banc*].)

10 Defendant Cal-Tech further argues that the WCJ erred in relying upon Dr. Brendel's deposition
11 testimony, wherein he retracted his apportionment determination. Defendant argues that the WCJ
12 exceeded her authority in admitting evidence not listed at the time of the Mandatory Settlement
13 Conference (MSC) when discovery was closed, in violation of Labor Code section 5502(d)(3). Defendant
14 asserts that because applicant filed the Declaration of Readiness, he had declared his discovery was
15 complete and established his readiness for trial.

16 While Section 5502(d)(3) mandates the close of discovery at the MSC, the WCJ is empowered to
17 allow the further development of the medical record when she finds that the record as developed by the
18 parties is not adequate to base a final determination. (*Tyler v. Workers' Compensation Appeals Board*
19 (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Compensation Appeals*
20 *Board* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *San Bernardino Community Hospital v.*
21 *Workers' Compensation Appeals Board (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases
22 986]. The WCJ may direct the augmentation of the medical record where there are material deficiencies
23 or incompleteness in particular medical reports, and where none of the medical reports adequately
24 discuss the issue at hand. (See *McClune v. WCAB* (1998), *supra*, 63 Cal.Comp.Cases at 265.)

25 Here, the WCJ concluded that Dr. Brendel's initial apportionment determination was not
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27 ² (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624].)

1 adequate to support a finding on this issue and since he provided the sole evaluation of the extent of
2 applicant's permanent disability as a result of his injury to his psyche, further evidence was required.
3 After the WCJ issued several final determinations, we granted reconsideration of the previous Findings
4 and Award at her request so that the issue of the proper apportionment of applicant's psyche disability
5 could be resolved. It was evident that further clarification on this issue was necessary.

6 Under these circumstances, the WCJ was empowered to allow further discovery in the form of
7 Dr. Brendel's deposition to provide additional justification to support his apportionment determination.
8 The WCJ took the matter off calendar for this purpose at the joint request of the parties and without
9 objection by defendant.

10 Dr. Brendel's deposition testimony provided substantial medical evidence to support the WCJ's
11 determination that there should be no apportionment of applicant's permanent disability. We disagree
12 with defendant's characterization of Dr. Brendel's deposition testimony as speculative. He explained in
13 detail why his prior apportionment was inaccurate and that the circumstances surrounding applicant's left
14 foot injury were not relevant to the development of applicant's injury to his psyche from his failed back
15 condition. Since Dr. Brendel apportioned 100% of applicant's psyche disability to his 2003 injury, Cal-
16 Tech is responsible for all of the permanent disability caused by the 2003 injury.

17 III.

18 While we find the WCJ properly ordered the further development of the medical record to obtain
19 and consider Dr. Brendel's deposition testimony, we note that the WCJ did not formally admit Exhibit 4
20 into evidence. Therefore, we will grant reconsideration for this purpose.

21 IV.

22 Additionally, with regard to the Petition for Reconsideration filed by defendant Highland
23 Insurance, we concur that the Findings and Award should be amended to clarify that only the May 8,
24 2003 injury was at issue and that the final determination did not extend to the unresolved August 29,
25 2001 left foot injury in ADJ1858391.

26 Accordingly, we will grant reconsideration and amend the Findings and Award to admit Exhibit 4
27 and to make clear that the determination applies only to the injury in ADJ695479.

1 For the foregoing reasons,

2 **IT IS ORDERED** that defendant Cal-Tech Precision's Petition for Reconsideration of the
3 Findings and Award, issued April 19, 2016 is **DENIED**.

4 **IT IS FURTHER ORDERED** that defendant Highlands Insurance's Petition for
5 Reconsideration of the Findings and Award, issued April 19, 2016 is **GRANTED**, and as our Decision
6 After Reconsideration, the Findings and Award is **AMENDED** as follows:

7 **FINDINGS OF FACT**

- 8 1. Jose Montiel, born [redacted], while employed as a machine operator by Cal-Tech
9 Precision, Inc., sustained an admitted back injury May 8, 2003, (ADJ695479) with
10 sequelae in the form of a psyche component, left knee disability, diabetes, gastritis, sleep
11 disorder and sexual dysfunction.
- 12 2. At the time of injury the employer was uninsured.
- 13 3. The Uninsured Employers Benefits Trust Fund (UEBTF) has paid temporary disability
14 through June 7, 2010.
- 15 4. Dr. Brendel's opinion in his January 13, 2012 permanent and stationary report is not
16 substantial evidence on apportionment. He failed to provide a rationale for the conclusion
17 that the August 29, 2001 foot injury caused psychiatric disability.
- 18 5. Although Defendant and UEBTF have objected to the inclusion of the cross-examination
19 of Dr. Brendel, the Court found the record needed development to support a just and well-
20 reasoned decision. Furthermore, not to allow further development of the record would be a
21 denial of due process.
- 22 6. The combined effect of applicant's emotional, orthopedic and internal medicine
23 disabilities produces total permanent disability. Applicant is entitled to an un-apportioned
24 award of 100% payable from the permanent and stationary date.
- 25 7. The attorneys representing applicant has provided valuable services in a case of above
26 average complexity, which involved numerous conferences and trials, and will be entitled
27 to a fee calculated at 18% of the present values of the permanent disability indemnity
Awarded. The fees to be withheld pending agreement between applicant's current and
prior attorney. When agreement is reached, the parties are to obtain a commutation and
request an order.

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1 **AWARD**

2 **AWARD IS MADE** in favor of Jose Montiel against Cal-Tech Precision, of:

- 3 a. Applicant is entitled to an unapportioned award of 100% permanent disability in accordance with
4 paragraph 6 above,
5 b. Attorney fees in accordance with paragraph 7 above.

6 **ORDER**

7 **IT IS ORDERED** that Exhibit 4, the Deposition of David Brendel M.D. dated 5-14-2015, is
8 admitted into the record.

9 **WORKERS' COMPENSATION APPEALS BOARD**

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12 **I CONCUR,**

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14 **DEIDRA E. LOWE**

15 
16 **MARGUERITE SWEENEY**

17 **CONCURRING, BUT NOT SIGNING**
18 **FRANK M. BRASS**



20 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

21 **JUL 08 2016**

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

24 **ADELSON, TESTAN, BRUNDO, NOVELL & JIMENEZ**
25 **LAW OFFICES OF RICHARD T. FORT**
26 **GRAIWER & KAPLAN**
27 **OFFICE OF DIRECTOR LEGAL UNIT**
UNINSURED EMPLOYERS BENEFITS TRUST FUND

SV/pc

MONTIEL, Jose