

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

LUIZ GOMEZ, *Applicant*

vs.

**SLAKEY BROTHERS, INC.; CYPRESS INSURANCE COMPANY, *adjusted by*
BERKSHIRE HATHAWAY HOME STATE COMPANIES, *Defendants***

**Adjudication Number: ADJ9752268
Oakland 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.

In the Findings and Award of March 10, 2020, the workers' compensation judge (WCJ) found, in relevant part, that on May 12, 2014, applicant, while employed as a truck driver and loader-unloader, occupational group number 460, sustained industrial injury to his psyche and left knee, including the tibial plateau, but not to his left hip or back, causing temporary disability from May 12, 2014 through May 10, 2016, permanent disability of 52%, and the need for further medical treatment. The WCJ also found that applicant's earnings at the time of injury were \$664.13 per week, warranting a temporary disability indemnity rate of \$442.75, and that defendant is liable for the expenses of applicant's vocational expert, Tom Linder.

Applicant filed a timely petition for reconsideration of the WCJ's decision. Applicant contends that the evidence justifies a finding that as a result of the admitted injury to his left knee, he also sustained industrial injury in the form of Complex Regional Pain Syndrome ("CRPS"), and to his left hip and low back, and that the WCJ erred in not awarding permanent and total disability. Applicant also contends that further development of the record is needed to evaluate his pain condition and its impact on his ability to be employed.

Defendant filed an answer.

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

Applicant requested permission to file two supplemental petitions, one in response to defendant's answer and one in response to the WCJ's Report. Applicant's requests have been approved, and his supplemental petitions have been considered. (Cal. Code Regs., tit. 8, former § 10848, now § 10964 (eff. Jan. 1, 2020).)

Preliminarily, we note that to be timely, a petition for reconsideration must be filed with (i.e., received by) the WCAB within 25 days from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, former § 10507(a)(1), now § 10605(a)(1), former § 10845(a), now § 10940(a); former § 10392(a), now § 10615(b) (eff. Jan. 1, 2020).) A petition for reconsideration of a final decision by a workers' compensation administrative law judge must be filed in the Electronic Adjudication Management System (EAMS) or with the district office having venue. (Cal. Code Regs., tit. 8, former § 10840(a), now § 10940(a) (eff. Jan. 1, 2020).)

The Division of Workers' Compensation (DWC) closed its district offices for filing as of March 17, 2020 in response to the spread of the novel coronavirus (COVID-19).¹ In light of the district offices' closure, the Appeals Board issued an en banc decision on March 18, 2020 stating that all filing deadlines are extended to the next day when the district offices reopen for filing. (*In re: COVID-19 State of Emergency En Banc* (2020) 85 Cal.Comp.Cases 296 (Appeals Board en banc).) The district offices reopened for filing on April 13, 2020.² The filing deadline for a petition for reconsideration that would have occurred during the district offices' closure was tolled until April 13, 2020. In this case, applicant's petition was submitted on April 6, 2020, but it is deemed filed on April 13, 2020.

As for the substance of applicant's petition, we find merit in his contention that further development of the record is needed to evaluate his pain condition and its impact on his ability to be employed. Specifically, we conclude that the medical record requires further development on the issues of whether applicant has the diagnosis of CRPS that is industrial, whether he sustained industrial injury to his left hip, and the extent of permanent impairment resulting from the left knee injury and the other conditions if they are industrial. We will amend the WCJ's decision

¹ The March 16, 2020 DWC Newsline may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-18.html>.

² The April 3, 2020 DWC Newsline regarding reopening the district offices for filing may be accessed here: <https://www.dir.ca.gov/DIRNews/2020/2020-29.html>.

accordingly and otherwise affirm it. In addition, we will return this matter to the trial for further proceedings and new decision by the WCJ on the outstanding issues.

APPLICANT'S CLAIMS OF LOW BACK, LEFT HIP AND CRPS INJURY

Dr. Alfredo F. Fernandez served as the Agreed Medical Evaluator (AME) in orthopedics. Dr. Fernandez authored a narrative report dated June 7, 2016 (exhibit 9), and the doctor's deposition was taken on June 13, 2017. (Exhibit 10.) Reviewing the doctor's report and deposition, we note that notwithstanding the severity of the May 12, 2014 injury to applicant's left knee and the possibility it caused injury to other body parts, Dr. Fernandez clearly opined that the left knee injury did not result in a compensable consequence injury to the low back. In his June 7, 2016 report, Dr. Fernandez never stated that applicant sustained a back injury. But applicant's attorney specifically questioned Dr. Fernandez on the claimed back injury during the doctor's deposition. Applicant's attorney referred to the fact that applicant had filled out pain diagrams showing that he had low back pain. Nonetheless, Dr. Fernandez clearly testified that applicant did not sustain an injury to his back. (Fernandez deposition, p. 31.) The remainder of the record does not demonstrate a basis to reject the AME's opinion that applicant did not injure his back as a result of the admitted industrial injury to his left knee.

Further, we are not persuaded by applicant's contention that his low back injury should be considered a compensable consequence injury because he received treatment in the form of lumbar pain blocks. The need for such treatment does not necessarily mean that applicant sustained a compensable consequence injury to his low back. As explained by our Supreme Court in *Granado v. Workers' Compensation Appeals Board* (1968) 69 Cal.2d 399, 405-406 [33 Cal.Comp.Cases 647], "[s]o long as the treatment is reasonably required to cure or relieve from the effects of the industrial injury, the employer is required to provide the treatment, and treatment for nonindustrial conditions may be required of the employer where it becomes essential in curing or relieving from the effects of the industrial injury itself."

On the other hand, we find merit in applicant's contention that his claim of left hip injury requires further medical inquiry. Dr. Mallavaram, applicant's treating pain management specialist since 2015, began documenting applicant's left hip disease and pain in a progress report dated April 7, 2016; the doctor believed the hip pain was related to the altered gait caused by applicant's left leg injury. (Exhibit 4.) Yet Dr. Fernandez, the AME, seems to have overlooked or seems to have been unaware of applicant's left hip problems. On pages 12 and 13 of his deposition, Dr.

Fernandez acknowledged that although he reviewed Dr. Mallavaram's reports, Dr. Fernandez was unaware of the left hip complaints documented therein. Dr. Fernandez further testified that although applicant did not mention left hip pain to Dr. Fernandez directly, it would be "very, very strange" if applicant did not have left hip pain in the aftermath of his severe left knee injury. Otherwise, Dr. Fernandez never gave a clear answer in his deposition as to why he did not include a permanent impairment rating for the left hip, which according to the doctor is not considered part of the left lower extremity.³ Because applicant's left hip problems are documented in the treatment records but Dr. Fernandez failed to address them, we conclude that further development of the medical record is required.

The same is true of applicant's claim that he suffers from CRPS as a result of the admitted injury to his left knee. Dr. Fernandez, in his report dated June 7, 2016, acknowledged Dr. Mallavaram as applicant's treating pain management specialist, and Dr. Fernandez stated that he reviewed Dr. Mallavaram's treatment reports from 2015 and 2016. Dr. Fernandez also noted that Dr. Mallavaram's April 23, 2015 report included a diagnosis of chronic pain syndrome. In evaluating permanent impairment, however, Dr. Fernandez failed to address or even mention the issue of chronic pain syndrome. As noted above, Dr. Fernandez testified in his deposition (pp. 12-13) that he performed a medical record review that purportedly included Dr. Mallavaram's treatment reports, which document applicant's left hip and chronic pain complaints. Again, however, Dr. Fernandez either overlooked or ignored them. This calls into question the reliability of Dr. Fernandez's medical record review, as well as the substantiality of his medical opinion. (*Heggin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 (36 Cal.Comp.Cases 93) [Medical reports and opinions are not substantial evidence if they are based on inadequate medical histories and examinations].)

We further note that Dr. Fernandez testified applicant could only do a job in which he was continuously sitting down, with intermittent breaks; but the doctor conceded that applicant would be in constant pain. Apparently disregarding Dr. Mallavaram's role as applicant's treating pain specialist, Dr. Fernandez recommended consultation with another pain specialist to evaluate the

³ Dr. Fernandez also suggested in his deposition that applicant's left knee injury was so severe it left him with a permanent impairment equivalent to that of an amputated left leg, which carries a Whole Person Impairment ("WPI") of 40%. However, Dr. Fernandez's reasons for "giving" applicant a WPI rating of only 35% remain unclear.

impairment resulting from applicant's chronic pain complaints, as Dr. Fernandez could not do so. (Exhibit 10, Fernandez deposition, pp. 28-32.)

We further observe that since Dr. Fernandez's deposition was taken in 2017, he could not have been aware of the treatment reports generated by Dr. Mallavaram after that time. But in all of his progress reports through June 5, 2019, Dr. Mallavaram diagnosed applicant with CRPS of the lower left extremity, type two. (Exhibit 7.) In his Report and Recommendation, the WCJ indicates that Dr. Mallavaram's diagnosis of CRPS cannot be considered substantial evidence, because the doctor has not "enumerated the battery of symptoms and findings that normally would support such a diagnosis." Rather than dismiss Dr. Mallavaram's repeated diagnosis of CRPS and AME Fernandez's recommendation to consult a pain specialist, we conclude it is necessary to pursue further medical inquiry. (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [The Board "may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence."]; *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 619-620 (Appeals Board en banc) [A physician's "impairment evaluation includes a discussion of the employee's history and symptoms, the results of the physician's examination, the results of various tests and diagnostic procedures, *the diagnosis*, the anticipated clinical course, the need for further treatment, and the residual functional capacity and ability to perform activities of daily living (ADLs)."]].)

APPLICANT'S CLAIM OF PERMANENT AND TOTAL DISABILITY

The WCJ relied on Dr. Fernandez, the AME in orthopedics, to find that applicant's left knee injury resulted in permanent disability of 52%. (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 (51 Cal.Comp.Cases 114) [AME's opinion ordinarily followed because AME chosen by parties for his or her expertise and neutrality].)

As discussed before, however, the reliability of Dr. Fernandez's medical record review is questionable, and this undermines his opinion on the issues of left hip injury and CRPS, as well as his opinion on permanent impairment. For instance, Dr. Fernandez never commented upon Dr. Mallavaram's opinion that applicant is permanently and totally disabled. Under these circumstances, where there is good reason to question the substantiality of the AME's opinion, we are not constrained to follow it. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 241 (58 Cal.Comp.Cases 323) [The WCAB is not bound by the opinion of an AME; rather, its only obligation is to give consideration to the AME's opinion.].)

On the other hand, applicant's claim of permanent and total disability depends on unquestioning acceptance of Dr. Mallavaram's opinion that applicant's supposed CRPS and use of pain medications have left him incapable of doing any kind of work. As discussed before, further development of the medical record is required in order to confirm whether or not applicant actually has the diagnosis of CRPS. Once that question is resolved (as with the claimed left hip injury), the issues of applicant's rehabilitation potential and permanent impairment must be revisited by the medical and vocational evaluators, and by the WCJ.⁴

In summary, we conclude that further development of the record is required on the issues of left hip injury, CRPS, and the extent of permanent impairment. In *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (en banc), the Appeals Board indicated a preference for supplemental opinions from physicians who have already reported in the case. In this instance, we will leave the manner of further developing the record to the discretion of the WCJ. We do note that Dr. Fernandez apparently refuses to address the issue of CRPS based on his own expertise. If the WCJ continues to use Dr. Fernandez, the doctor should carefully view all treatment records to evaluate whether or not the left hip and alleged CRPS are compensable consequence injuries, which should include evaluation of whether Dr. Mallavaram correctly diagnosed CRPS and found applicant incapable of working. Dr. Fernandez also should consult a pain specialist before offering any supplemental opinion, or the WCJ may select a new "regular physician" to evaluate the outstanding issues discussed above, including but not limited to whether or not applicant has the CRPS diagnosis.

We will affirm the WCJ's decision on all issues except left hip injury, CRPS and permanent impairment. We will return the latter issues to the trial level for further development of the record and new findings by the WCJ. We express no final opinion on the outstanding issues. When the WCJ issues new findings, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq.*

⁴ In its answer, defendant cites Labor Code section 4660.1 and contends that vocational evidence is irrelevant for purposes of evaluating permanent disability for injuries after 2013. We disagree. Vocational expert evidence remains admissible and may be considered by the Appeals Board in determining permanent disability for injuries after January 1, 2013. (*Conco Companies v. Workers' Comp. Appeals Bd. (Sandoval)* (2019) 84 Cal.Comp.Cases 1067 (writ den.).)

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of March 10, 2020 is **AFFIRMED**, except that paragraph (b) of the Award is **RESCINDED** and **DEFERRED**, and the Findings of Fact are **AMENDED** in the following particulars:

FINDINGS OF FACT

1. Luiz Gomez, while employed on May 12, 2014, in Milpitas, California, as a truck driver and loader-unloader, occupational group number 460, by Slakey Brothers, insured for workers' compensation by Cypress Insurance Company, adjusted by Berkshire Hathaway Homestate Companies, sustained injury arising out of and in the course of employment to his left knee, including the tibial plateau, and to his psyche, but not to his back. The issue of whether applicant sustained industrial injury to his left hip and/or in the form of Complex Regional Pain Syndrome is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
4. There is a need for further medical treatment to cure or relieve from the effects of the injury described in Finding 1.
6. The issue of permanent disability is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
7. The issue of attorney's fees is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this case is **RETURNED** to the trial level for further proceedings and new decision by the WCJ on the outstanding issues, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 7, 2021

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

**LUIZ GOMEZ
FINNEGAN MARKS THEOFEL & DESMOND
LAW OFFICES OF H. MAL CAMERON
OFFICE OF THE DIRECTOR-LEGAL UNIT
SUBSEQUENT INJURIES BENEFITS TRUST FUND**

JTL/bea

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