

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

DARLENE BATTLE,

Applicant,

vs.

STATE OF CALIFORNIA DEPARTMENT OF
CORRECTIONS, legally uninsured, adjusted by
STATE COMPENSATION INSURANCE
FUND,

Defendants.

Case No. ADJ10282606
ADJ10283736
(Van Nuys District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

The Appeals Board previously granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of October 16, 2018 in ADJ10282606, the Workers' Compensation Judge (WCJ) found that on January 28, 2016, applicant, while employed as a Correctional Officer by the State of California Department of Corrections, sustained injuries arising out of and in the course of employment to her low back, left shoulder and right knee, causing permanent disability of 13%.¹

Defendant filed a timely petition for reconsideration of the WCJ's decision in ADJ10282606. Defendant contended that the WCJ erred in determining impairment for applicant's right knee based on the medical opinion of the primary treating physician, Dr. Glousman, because in failing to state the section of the AMA Guides used to assess the rating, the doctor's medical opinion is not substantial evidence. Defendant further contended that the medical opinion of Dr. Friedman, the Panel Qualified Medical Evaluator (PQME), should be used to determine permanent disability of applicant's right knee because it cites the section of the AMA Guides used to assess impairment.

We did not receive an answer from applicant.

¹ As further discussed in the body of this opinion, the WCJ also issued a Findings and Award in ADJ10283736, which is consolidated with ADJ10282606.

1 The WCJ submitted a Report and Recommendation.

2 Based on our review of the record and applicable law, we conclude that the WCJ must revisit his
3 determination of permanent disability in ADJ10282606 and review his decision in ADJ10283736 for
4 possible error. Therefore, we will rescind the WCJ's decisions and return this matter to the trial level for
5 further proceedings and new decisions by the WCJ.

6 **THE PROCEDURAL POSTURE OF THESE TWO CONSOLIDATED CASES**

7 At trial on September 20, 2018, the WCJ issued an order consolidating ADJ10283736 (specific
8 injury of December 11, 2013, to the right knee) and ADJ10282606 (specific injury of January 28, 2016,
9 to the lower back, left shoulder, and right knee), designating the latter case as the master file. (WCAB
10 Rule 10589, Cal. Code Regs., tit. 8, § 10589.) The WCJ issued separate Findings and Awards in each
11 case, but both decisions were accompanied by a single "Joint Opinion on Decision."

12 Although reconsideration was not sought in ADJ10283736, we note that the WCJ found applicant
13 sustained industrial injury to her right knee on December 11, 2013, causing temporary disability from
14 December 13, 2013 through December 16, 2013, and permanent disability of 0%. In addition, the WCJ
15 followed the parties' trial stipulation in ADJ10283736 that applicant became permanent and stationary
16 (P&S) on March 15, 2017. However, the stipulation and finding that after the 2013 injury, applicant did
17 not become P&S until the remote date of March 15, 2017, makes no sense. It is contradicted by
18 applicant's trial testimony that she was off work for less than five days, and she returned to work with
19 full duties and no work restrictions. (Summary of Evidence, 9/20/18, 4:15-19.) The WCJ has the power
20 to disregard stipulations of fact made by the parties. (*Huston v. Workers' Comp. Appeals Bd.* (1979) 95
21 Cal.App.3d 856, 865 [44 Cal.Comp.Cases 798].)

22 We further note that the record suggests at least a possibility of apportionment of permanent
23 disability between the two injuries.² Although the WCJ found the 2013 injury resulted in no permanent
24 disability in the right knee, and Dr. Glousman found "no factors of apportionment" in his March 15, 2017
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27 ² We express no final opinion on this issue. In fact, apportionment of permanent disability between the two injuries seems doubtful given the fact that applicant returned to work without problems after the 2013 injury. Nevertheless, we cannot ignore the issue because it is raised by the present record.

1 permanent and stationary report, PQME Friedman estimated in his September 16, 2017 report that
2 applicant has 1% WPI for her right knee disability, while claiming that “100% of the patient’s right knee
3 disability is secondary to her 12/11/13 regarding her right knee [sic].”

4 We agree with the WCJ that Dr. Friedman’s medical opinion is not substantial evidence.
5 Contrary to the record, Dr. Friedman found only one industrial injury to the right knee, i.e., the 2013
6 injury, because he stated that second injury, on January 18, 2016, was a mere exacerbation of the 2013
7 injury. As a legal matter, this would mean that the 2016 injury was not an industrial injury, which is
8 contrary to the whole record (except Dr. Friedman). (*City of Los Angeles v. Workers’ Comp. Appeals Bd.*
9 (*Clark*) (2017) 82 Cal.Comp.Cases 1404 [writ den.].) Furthermore, though the 2016 injury resulted in
10 the need for right knee surgery, Dr. Friedman essentially ignored the 2016 injury, by apportioning 100%
11 of applicant’s right knee disability to the 2013 injury.

12 In short, although Dr. Friedman’s medical opinion is not substantial evidence, he has raised the
13 possibility of apportionment of permanent disability between the two injuries, and Dr. Glousman only
14 considered the issue in cryptic terms. Further, the WCJ must consider whether the parties’ stipulation in
15 ADJ10283736, that applicant did not become P&S after the 2013 right knee injury until March 15, 2017,
16 should be rejected because the record contradicts it.

17 Although reconsideration was sought and granted only in ADJ10282606, in light of the WCJ’s
18 consolidation order and the other unresolved issues discussed above, we deem our Order Granting
19 Reconsideration of December 17, 2018 to be applicable to both case numbers, in the interest of justice.
20 (See *General Ins. Co. of Am. v. Workers’ Comp. Appeals Bd. (Sale)* (1980) 104 Cal.App.3d 278, 283 [45
21 Cal.Comp.Cases 403] [Where reconsideration is granted as to some but not all parties, Board can reverse
22 entire judgment if necessary to do justice.])

23 **THE WCJ MUST REVISIT PERMANENT DISABILITY IN ADJ10282606**

24 In his Report, the WCJ explains how he determined permanent disability based on Dr.
25 Glousman’s permanent and stationary report:

26 [..] Petitioner objects to Dr. Glousman’s report because he gives
27 impairment for “quadriceps weakness” from this knee injury. Petitioner
maintains that there is no provision in the AMA Guides for muscle
weakness. Hence Petitioner maintains that Dr. Glousman’s analysis does

1 not comply with AMA Guides.

2 Dr. Glousman assessed 12% lower extremity impairment based upon
3 lower extremity weakness that was found on examination. The doctor
4 then used the conversion Table 17-3 (p. 527) that converts 12% lower
5 extremity impairment to 5% whole person impairment.

6 As to the findings on weakness in the lower extremity, reference is made
7 to Table 17-8, p. 532 of the AMA Guides in Chapter 17 dealing with
8 lower extremity injuries. Table 17-8 is entitled "Impairment Due to
9 Lower Extremity Muscle Weakness." In that table is located a 12% lower
10 extremity impairment for knee injuries which aligns to a 5% whole person
11 impairment. This is exactly the finding made by Dr. Glousman.

12 Consequently Dr. Glousman's assessment of whole person impairment is
13 directly within the AMA Guides.

14 In considering the WCJ's approach to determining permanent disability, we turn to an
15 examination of the relevant aspects of Dr. Glousman's permanent and stationary report dated March 15,
16 2017:

17 HISTORY

18 The patient returns for re-evaluation. On November 16, 2016, the patient
19 underwent arthroscopic partial lateral meniscectomy and debridement. At
20 the time of surgery, the patient was found to have degenerative arthrosis of
21 the patellofemoral compartment and medical compartment. The patient
22 completed initial round of physical therapy. Further physical therapy that
23 was recommended has been denied. The patient has continued with self-
24 directed exercises. The patient has been able to return back to her usual
25 and customary job activities. She continues to take Naprosyn on an
26 intermittent basis.

27 CURRENT SUBJECTIVE COMPLAINTS

While improved since the surgery without any mechanical symptoms, the
patient continues to have intermittent pain about the retropatellar region in
the lateral joint line of the right knee. Her pain is aggravated with
squatting, heavy lifting and twisting activities. Her pain tends to be
actively related. She has no mechanical symptoms of locking or catching.

OBJECTIVE FINDINGS: KNEE EXAMINATION: RIGHT

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GAIT:

Right Lower Extremity: Normal Gait without ambulatory assistive devices
Left Lower Extremity: Normal Gait without ambulatory assistive devices

INSPECTION, PALPATION, and ATROPHY:

BATTLE, Darlene

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Right Knee: There is no deformity or spasm
 There is no mal-alignment of the right knee
 There is no swelling or ecchymosis
There is 1 cm of right thigh quadriceps atrophy
[Bold lettering added.]
 There is no atrophy of the right calf

...
RANGE OF MOTION: Right knee Left knee Normal
 Extension: 5 0 0
 Flexion 130 135 135

...
MOTOR STRENGTH: (0-5 scale) Right Left Normal
 Quadriceps 4+ 5 5
 Hamstring 5 5 5

CLINICAL IMPRESSION

Previous arthroscopic meniscectomy and debridement of the right knee with residual symptomatic chondromalacia.

PERMANENT AND STATIONARY STATUS

The patient will be declared permanent and stationary with the above-noted subjective and objective findings. Future medical care should be provided.

Future medical care may include the need for physician visits, anti-inflammatory medications, and physical therapy. I do not anticipate the need for future surgery. There are no factors of apportionment. Per the Fifth Edition AMA Guideline to Permanent Impairment, the patient's residual quadriceps weakness would yield 12% lower extremity impairment, which is equivalent to 5% whole body impairment. **[Bold lettering added.]**

We note that "when a physician evaluates an injured employee's WPI(s), the physician must explain how he or she arrived at the WPI(s) so that the parties and the WCAB can determine whether the WPI(s) are consistent with the AMA Guides." (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 621 [Appeals Board en banc] ("*Blackledge*").)

In this case, Dr. Glousman failed to explain how he arrived at 12% lower extremity impairment for applicant's right knee, and we are unable to determine whether the doctor's impairment assessment is consistent with the AMA Guides. We therefore conclude that the WCJ erred in determining permanent

1 disability based upon Dr. Glousman's permanent and stationary report.

2 As noted above, the WCJ stated in his Report that Dr. Glousman assessed 12% lower extremity
3 impairment based upon lower extremity weakness, under Table 17-8, p. 532 of Chapter 17 of the AMA
4 Guides, pertaining to lower extremity injuries. According to the WCJ, Dr. Glousman then used the
5 conversion Table 17-3 (p. 527) of the AMA Guides, which converts 12% lower extremity impairment to
6 5% whole person impairment.

7 However, the above analysis provided by the WCJ is not found in Dr. Glousman's report. The
8 doctor reported that upon examination, he found one centimeter of right thigh quadriceps atrophy; he also
9 reported that on a scale of five, applicant had 4+ motor strength in her right quadriceps. However, Dr.
10 Glousman provided no discussion of how these findings of right thigh quadriceps atrophy and slightly
11 reduced motor strength translates to 12% lower extremity impairment and 5% WPI.

12 In addition, we note that Table 17-8, referenced by the WCJ, does not appear in Dr. Glousman's
13 report, which also does not clearly address quadriceps weakness. Although Dr. Glousman found that
14 applicant has 5 degrees decreased flexion and extension in her right knee, Dr. Glousman did not discuss
15 what "grade" of decreased ROM applicant has in light of the five "grades" of decreased Range of Motion
16 (ROM) found in Table 17-8 of the AMA Guides. Although the WCJ has special expertise in rating and
17 may rate permanent disability without a formal rating, it is outside the WCJ's expertise to insert his own
18 analysis of WPI into Dr. Glousman's P&S report and then follow that analysis to determine permanent
19 disability. (See *Blackledge, supra.*)

20 As stated by the Court of Appeal in *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001)
21 92 Cal.App.4th 1159, 1164, "the WCJ or the Board may not leave undeveloped matters which its
22 acquired specialized knowledge should identify as requiring further evidence." In this case, the WCJ
23 should further develop the medical record on permanent disability, in a manner consistent with *McDuffie*
24 *v. Los Angeles County Metropolitan Transit Authority (McDuffie)* (2002) 67 Cal.Comp.Cases 138
25 [Appeals Board en banc]. However, we conclude that no further resort to Dr. Friedman should be made,
26 as his opinion is not substantial evidence for the reasons already discussed. (*Heggin v. Workmen's*
27 *Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97].)