

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

TYLOR BUNDY, *Applicant*

vs.

**COUNTY OF SAN LUIS OBISPO, PERMISSIBLY SELF-INSURED;
ADMINISTERED BY INTERCARE, *Defendants***

**Adjudication Number: ADJ9708136
San Luis Obispo District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration¹ in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration (Petition). Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of the January 20, 2020 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that there was good cause to reopen applicant's April 3, 2017 Award; that applicant was in need of future medical care to the hip; and that applicant was entitled to a permanent disability award of 14 percent.

Applicant contends that the reporting of applicant's vocational expert establishes a greater diminished future earnings capacity (DFEC) than is reflected in the WCJ's ratings, and that the cost of the vocational reporting should be allowed.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations in the Petition, and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind

¹ Commissioner Sweeney, who was a member of the panel granting reconsideration to study the factual and legal issues in this case, no longer serves on the Workers' Compensation Appeals Board. Another panelist has been assigned in her place.

the F&A and return the matter to the trial level for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant sustained injury to the left knee while employed as a Sheriff's Correctional Deputy on January 24, 2014. The parties entered into a stipulated Award at 14 percent permanent disability, approved by the WCJ on April 3, 2017.

On September 14, 2017, applicant accepted a "voluntary reduction" from his pre-injury position of "Correctional Deputy" to that of a "Correctional technician." (Ex. 1, Memorandum of Understanding, August 4, 2017, p. 1.)

On September 29, 2017, applicant filed a Petition to Reopen, averring the injury caused new and further disability "in that applicant needs further medical care and attention and may have additional permanent disability beyond that which has already been determined." (Petition to Reopen, September 29, 2017, at p. 1:17.) Applicant further averred that since the stipulated Award, he had suffered "increased diminished earning capacity." (*Id.* at p. 1:23.)

On January 10, 2018, applicant was reevaluated by Agreed Medical Evaluator (AME) Jeffrey M. Lundeen, M.D. (Ex. 6, Report of Jeffrey Lundeen, M.D., January 10, 2018.) The AME diagnosed a left knee anterior cruciate ligament tear and lateral meniscus tear with arthroscopic repair, and left hip trochanteric bursitis. Dr. Lundeen opined that, to a reasonable medical probability, applicant's left hip trochanteric bursitis condition was "a compensable consequence of [applicant's] left knee injury and left knee treatment." (*Id.* at p. 14.)

On July 19, 2018, applicant's vocational expert P. Steven Ramirez issued a "Vocational Feasibility Report," confirming applicant to be amenable to vocational rehabilitation. (Ex. 2, Report of P. Steven Ramirez, July 19, 2018, p. 7.) Mr. Ramirez further calculated applicant's pre- and post-injury wage capacity, utilizing applicant's post-injury position of "Correctional Technician II," as the basis for the post-injury earning capacity. The report concluded that applicant sustained a 36 percent reduction in his post-injury earning capacity. (*Id.* at p. 10.)

On June 4, 2019, Mr. Ramirez issued a supplemental report updating his calculations of applicant's diminished future earning capacity, resulting in an increase of applicant's estimated DFEC to 40 percent. (Ex. 9, Report of P. Steven Ramirez, June 4, 2019, p. 3.)

On October 15, 2019, defense vocational expert Ray C. Largo issued a “Forensic Disability Evaluation Report,” confirming applicant’s amenability to vocational rehabilitation, and estimating applicant’s DFEC at 34.6 percent. (Ex. C, Report of Ray C. Largo, October 15, 2019, p. 25.)

On October 28, 2019, the parties proceeded to trial, framing issues of whether there was good cause to reopen applicant’s prior award, new and further permanent disability, need for further medical care to the hip, attorney fees, and costs associated with the vocational reporting. (Minutes of Hearing and Summary of Evidence (Minutes), October 28, 2019, at p. 1:25.) Applicant testified, and the parties submitted the matter for decision.

On November 20, 2019, the WCJ issued his Formal Rating, in which the combined knee and hip disability described in the January 10, 2018 report of AME Dr. Lundeen yielded 14 percent permanent disability. (Formal Rating, November 20, 2019, p. 1.)

On January 20, 2020, the WCJ issued his F&A, determining there to be good cause to reopen applicant’s Award (Finding of Fact No. 1), that there was need for future medical care to applicant’s hip (Finding of Fact No. 2), that applicant’s injuries including both the knee and hip injuries resulted in 14 percent disability (Finding of Fact No. 3), and that there was no basis for the award of attorney fees (Finding of Fact No. 4). In the accompanying Opinion on Decision, the WCJ noted that applicant’s Petition to Reopen “essentially...asked the undersigned to rely upon the report of Mr. Ramirez for constituting good cause to reopen.” (Opinion on Decision, p. 3.) The WCJ posited that applicant’s knowledge of an impending pay differential when he agreed to the initial Award on April 3, 2017 precluded his subsequent argument that he was unaware of the degree to which his earnings would be impacted. (*Id.* at pp. 3-4.) The WCJ opined:

It is also readily apparent that applicant knew beyond any doubt that he was going to continue to work for the county in different capacity. The only thing that might not have been known but was certainly readily ascertainable was the percent of applicant’s pay cut. These facts and their significance were certainly known and indeed, applicant was seeking an accommodation so he could continue at his former pay rate which was certainly not forth coming. It simply doesn’t constitute grounds for reopening the case, in reality, as a matter of law.

(Opinion on Decision, p. 4.)

Applicant’s Petition avers applicant requested an interactive accommodation process two days prior to the issuance of the April 3, 2017 Award, and that it was not until after the issuance

of the Award that the employer and applicant agreed to a permanent accommodation with a reduction in pay. (Petition, at p. 2:3.) Applicant contends there is good cause to reopen “permanent disability based upon a ‘change in circumstances,’ i.e. the reduction in pay and diminished earning capacity did not develop until after 4-3-17 Award.” (*Id.* at p. 4:26.)

Defendant’s Answer responds that the fact that the exact amount of wage loss was not finalized at the time of the Stipulations “does not relieve applicant of the clear knowledge that wage loss was an issue prior to entering the Stipulation.” (Answer, at 2:4.) Defendant concludes that applicant possessed knowledge of the impending wage loss prior to the stipulated Award, precluding the assertion of change in circumstances in support of good cause to reopen.

The WCJ’s report asserts that “the applicant was certainly very aware that he was not going back to his former position and that he would be going into a position that made significantly less,” and accordingly, “there is nothing new and there is nothing that was not and could not have been known at the time of the prior findings and award.” (Report, at p. 2.)

DISCUSSION

Applicant’s Petition to Reopen avers his industrial injuries have caused new and further disability “in that applicant needs further medical care and attention and may have additional permanent disability beyond that which has already been determined.” (Petition to Reopen, September 29, 2017, at p. 1:17.) Applicant further contends that since the stipulated Award, he has suffered “increased diminished earning capacity.” (*Id.* at p. 1:23.)

We begin our discussion by noting that applicant’s Petition to Reopen makes two factual allegations responsive to two different mechanisms for reopening a prior Award. A Petition for New and Further Disability pursuant to Labor Code² section 5410 derives from the Appeals Board’s authority “to make awards for new and further disability caused by an earlier industrial injury ...” (*Zurich Ins. Co. v. Workmen’s Comp. Appeals Bd. (Cairo)* (1973) 9 Cal.3d 848, 854-858 [109 Cal.Rptr. 211, 512 P.2d 843] (conc. opn. of Sullivan, J.)). On the other hand, sections 5803 and 5804, “together with section 5805 define the power of the Board to rescind, alter or amend previous awards of compensation where “good cause” is shown.” (*Ibid.*; see also *Sarabi v. Workers’ Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920 [72 Cal.Comp.Cases 778] (*Sarabi*);

² All further statutory references are to the Labor Code unless otherwise stated.

Nicky Blair's Rest. v. Workers' Comp. Appeals Bd. (Macias) (1980) 109 Cal.App.3d 941 [45 Cal.Comp.Cases 876] (*Macias*).

Here, the F&A makes the determination that there is good cause to reopen applicant's prior award. (Finding of Fact No. 1.) The F&A awards future medical care to applicant's hip, and awards 14 percent disability without provision for attorney fees. (Findings of Fact Nos. 2, 3 & 4.) The ratings in the F&A reflect the Formal Rating issued by the WCJ on November 20, 2019, and are in turn based on impairment identified by AME Dr. Lundeen in his report of January 10, 2018, based on injury to the left knee and left hip. (Formal Ratings, November 20, 2019, p. 1.)

However, notwithstanding the fact that the WCJ found good cause to reopen the prior Award, the WCJ's Opinion on Decision sets forth the WCJ's rationale for why applicant has not established good cause to reopen the award with respect to applicant's DFEC contentions. The Opinion on Decision notes that applicant knew of his likely reduction in pay at the time he entered into the April 30, 2017 Award, albeit not the precise amount or percentage of the reduction. (Opinion on Decision, pp. 3-4.) The WCJ concludes that because applicant knew of an impending reduction in pay prior to the Award, the actual confirmation of this reduction in pay following the Award is not newly discovered information, and does not constitute a reasonable basis to reopen the Award. (*Ibid.*)

It is well settled that, "in order to constitute 'good cause' for reopening, new evidence (a) must present some good ground, not previously known to the Appeals Board, which renders the original award inequitable, (b) must be more than merely cumulative or a restatement of the original evidence or contentions, and (c) must be accompanied by a showing that such evidence could not with reasonable diligence have been discovered and produced at the original hearing." (*Macias, supra*, at p. 956.) Here, applicant testified that although he knew the jobs available to him would likely pay less than his prior position, he was not actually offered a position with a fixed rate of pay until three months after the Award issued. (Minutes, at 3:8.) Thus, while applicant testified that he felt he was likely to receive a position with a lower salary following the accommodation process, the record reflects that defendant had not yet tendered any specific offer of an alternate position as of the April 30, 2017 Award. (Minutes, at 3:21.) In addition, had applicant raised the issue of reduced earning capacity based on a mere suspicion that he was likely to receive less pay in an alternate position, issues of ripeness and sufficiency of the evidence would likely have arisen, especially in the absence of a verified reduction in wages. Moreover, such a