Clarissa M. Rodriguez
Chair

ADMINISTRATIVE REVIEW DIVISION
WORKERS' COMPENSATION BOARD
PO BOX 5205
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State of New York - Workers' Compensation Board

In regard to **WCB Case #G134 2161**

MEMORANDUM OF BOARD PANEL DECISION

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Opinion By: Fredrick M. Ausili
Ellen O. Paprocki
Mark R. Stasko

* This decision also pertains to the following case(s): 80403897.

The self-insured employer represented by FCS Administrators (FCS) requests review of the Workers' Compensation Law Judge (WCLJ) decision filed on December 12, 2016. The administrator in Workers' Compensation Case No. 80403897, PMA Management (PMA), and the claimant each filed a timely rebuttal.

ISSUES

The issues presented for administrative review are whether the current knee problems are an aggravation of a prior knee injury, and if the case is ripe for an apportionment finding.

FACTS

This case (WCB Case No. G1342161) was established in the contested decision for a work related injury to the claimant's right knee from an accident that took place on October 8, 2015. The average weekly wage (AWW) was set at $1,029.42. The claimant has an associated case (80403897) which is also established for an injury to the claimant's right knee from an accident on March 8, 2004. The AWW in WCB # 80403897 is $795.49.

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Claimant -		Employer -	Hamburg Central School
Social Security No. -		Carrier -	Erie #2 Schools Self-Funded
WCB Case No. -	G134 2161	Carrier ID No. -	
Date of Accident -	10/08/2015	Carrier Case No. -	
District Office -	Buffalo	Date of Filing of this Decision– 03/23/2018	

ATENCION:

Puede llamar a la oficina de la Junta de Compensacion Obrera, en su area correspondiente, cuyo numero de telefono aparece al principio de la pagina y pida informacion acerca de su reclamacion(caso).

In WCB 80403897, the claimant injured his right knee on March 8, 2004, and was originally awarded a 30% SLU of the right leg in a decision filed on May 15, 2007. The claimant then had a non-work related motor vehicle accident in March 2008, when he injured his right knee. In the decision filed August 12, 2009, surgery was authorized (total knee replacement) as apportioned, 80% causally related and 20% not causally related. The claimant then had the surgery and lost time from work. In the decision filed September 19, 2013 the claimant was found to have a total SLU of 52.5% for the 2004 work related accident and the motor vehicle accident in 2008. This meant the SLU increased by 22.5% (52.5 - 30). As the case had been apportioned, 80% causally related and 20% not causally related, the claimant was awarded another 18% SLU (80% x 22.5 = 18%).

The claimant was awarded temporary total disability benefits in the 2004 case for the period of October 14, 2013, to February 21, 2014, subject to apportionment, with a continuing award of $400 per week, in the amended decision filed March 14, 2014. In a decision filed on May 29, 2014, the claimant was awarded temporary total disability benefits from February 21, 2014, to May 23, 2014, at the weekly rate of $400, and continuing awards at the tentative rate of $397.75. The carrier had submitted an IME-4 that found the claimant had a marked disability. The parties were directed to submit depositions.

In the reserved decision filed on November 4, 2014, the claimant was found to have a temporary total disability from May 23, 2014, to August 26, 2014, an 80% temporary disability from August 26, 2014, to September 23, 2014 ($320.00 rate), and then a 65% temporary disability from September 23, 2014, to October 29, 2014 ($260.00). The carrier was directed to continue payments at the weekly rate of $260.00. All awards were subject to apportionment.

In the EC-4.2 filed by the claimant's treating orthopedist on November 11, 2014, from treatment on November 4, 2014, the doctor found the claimant had no disability. In the Administrative Decision filed on November 20, 2014, awards were directed at the temporary partial disability weekly rate of $260.00 from October 29, 2014, to November 3, 2014. Continuing awards were not directed.

In G1342161, the claimant injured his right knee when suctioning up water in the boys' bathroom on October 8, 2015. He saw his orthopedist, which was the same doctor as in 2004 case. Records from treatment on October 8, 2015, indicate that the claimant was at work when he twisted his right knee and felt a significant snap. The claimant was having trouble bearing weight on his knee despite the use of his cane, and had been icing his knee. Dr. Ostempowski found the claimant temporarily totally disabled. In a subsequent report for the exam on

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November 24, 2015, (filed in case 80403897) Dr. Ostempowski found the claimant had no impairment and the claimant then returned to work.

At a hearing held on October 18, 2016, the claimant testified that on October 8, 2015, he was working for the SIE as a custodian, as he had done since August of 1985. The claimant had returned to work full duty, full time since his previous accident and surgeries. On the day of the current accident, there was a flood in the boys' bathroom caused by the boys covering the drain and letting the sinks run. The claimant suctioned up the water. While dumping the bucket outside, the claimant took a step backward and heard a crack in his right knee, which was the screw coming out of the prior knee replacement. He used the water suction machine as a walker to help him get back inside the building.

The claimant had read Dr. Ostempowski's report stating that he had twisted his knee, and called Dr. Ostempowski to correct him. The claimant also had to correct another aspect of a report which stated that he had returned to baseline functioning in December of 2015. He had only improved 50% from the new symptoms caused by the new accident. The claimant immediately sought medical treatment and lost 6 weeks of time from the accident. Dr. Ostempowski told the claimant his knee looked stable in the x-rays, and should get better. The claimant told Dr. Ostempowski that his knee was not alright, and that he could feel there was something wrong. The knee condition kept getting worse. Prior to the current accident, the claimant had returned to work without a cane or a brace and everything was fine. Up until October 8, 2015, the claimant would have some pain and swelling in his knee but it was not disabling. Since the accident the claimant can't walk, has trouble sitting and standing, and does not sleep well. In March of 2016, the claimant's right knee just gave out while walking to his truck, after which the claimant started using a walker regularly. He had been using a cane on and off since the accident in October. The claimant had 3 surgeries from his prior accident, including an ACL replacement and total knee replacement, but was back at work by November 3, 2014. He was discussing the possibility of bariatric surgery at this time, after which he would have the knee replaced again. The claimant stated that the crack he heard during the current accident was the screw coming out of the prior knee replacement. He returned to work, then went back out of work in August of 2016.

An IME-4 was filed by Dr. Ellingson on October 19, 2016. He notes that the claimant stated a subsequent x-ray showed a loose component, and the claimant was consulting with a surgeon. Dr. Ellingson felt the claimant had a soft tissue injury from the current accident. Dr. Ellingson testified on October 28, 2016, in accordance with the findings in his report. The radiographs from August 18, 2016, showed a loose metallic body from the previous total knee arthroplasty. The claimant also had left knee osteoarthritis. He did not believe the need for future surgeries

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was causally related to the more recent accident based on the claimant returning to baseline by December of 2015. Had the claimant actually only recovered 50% by December of 2015, such an improvement may have changed Dr. Ellingson's opinion.

Dr. Ostempowski, testified that the current condition was caused by a combination of the knee replacement surgery (due to the 2004 accident and the 2008 motor vehicle accident) on a relatively young man in a high stress job, and the claimant's obesity and the current accident. Dr. Ostempowski testified on November 8, 2016, that he had treated the claimant for a number of years before the current accident from the claimant's prior accident. The claimant suffered a mechanical failure of an implant from a prior surgery in the current accident. The initial x-rays did not show the failure of the implant, but it was indicated on the later x-rays. The current condition was caused by the knee replacement surgery on a relatively young man in a high stress job, the claimant's obesity, and the current accident. The report from treatment on August 30, 2016, notes that the femoral component from his right knee replacement was fractured so he should not work.

At a hearing held on December 6, 2016, the claimant asked for awards at the temporary total rate based on the new accident from August of 2016, forward. The claimant noted a report commenting on apportionment from Dr. Chiaramonte, but argued the apportionment was premature at this time. FCS conceded that the case be established from the accident on October 8, 2015, and that lost time awards from October 9, 2015 to November 26, 2015, should be directed at the total rate based on the AWW from the October 8, 2015, accident. FCS further argued, however, that the claimant only had an aggravation of his previous injury, and that there was no lost time causally related to the October 8, 2015, accident after November 26, 2015. The x-rays and lost time after that date indicate the claimant injured his knee in the fall walking to his car in March of 2016. FCS also argued that any further liability be apportioned only 10% to the accident of October 8, 2015. PMA argued that the case should be established for a new injury. It was undisputed that there was a new accident, and the claimant had returned to work full time, full duty from the prior accident and surgeries. Apportionment was not appropriate until the record had been developed on permanency. The claimant concurred that apportionment was premature.

In a decision filed on December 12, 2016, the case was established for an injury to the right knee. The average weekly wage was set at $1,029.42. Temporary disability awards were directed from the date of the accident, October 9, 2015, to November 26, 2015. The claimant then returned to work, and awards were subsequently directed from August 31, 2016, to December 7, 2016, and continued at the temporary total disability weekly rate of $686.28. Apportionment was found premature.

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LEGAL ANALYSIS

FCS argues on appeal that this is an aggravation of the 2004 injury, which has resolved, or that it is only liable for 10% of the ongoing treatment or disability due to an IME who found 60% due to the 2004 case, 30% due to the 2008 motor vehicle accident, and 10% due to the 2015 accident. FCS also argues that if there is liability to the current case, it should only be apportioned at 10% of that liability. FCS points out that in the report from November 24, 2015 (in the 2004 file), Dr. Ostempowski found that the claimant felt he was back to baseline as compared to before his recent work related accident

PMA maintains in the rebuttal that any determination on apportionment is premature as the claimant is not at maximum medical improvement (MMI). The cause of all the claimant's lost time since August 31, 2016, is the more recent accident.

The claimant also maintains that current lost time is caused by the current accident, and a final determination on permanency is premature. The claimant continues to assert that he was only back to 50% of baseline in November of 2015, but still returned to work.

The Board Panel notes that apportionment is a factual issue for the Board to resolve (*Matter of McCloskey v Marriott Corporation*, 290 AD2d 671 [2002]; *Matter of August v Chromalloy R & T*, 240 AD2d 966 [1997]), *lv. dismissed*, 90 NY2d 1007 [1997]).

In evaluating the medical evidence presented, the Board is not bound to accept the testimony or reports of any one expert, either in whole or in part, but is free to choose those it credits and reject those it does not credit (*see Matter of Morrell v Onondaga County*, 238 AD2d 805 [1997], *lv denied* 90 NY2d 808 [1997]; *Matter of Wood v Leaseway Transp. Corp.*, 195 AD2d 622 [1993]). Thus, questions of credibility, reasonableness, and relative weight to be accorded to conflicting evidence are questions of fact that come within the exclusive province of the Board (*see Matter of Berkley v Irving Trust Co.*, 15 AD3d 750 [2005]).

"It is well settled that where causally related injuries from a claimant's employment precipitate, aggravate or accelerate a preexisting infirmity or disease, the resulting disability is compensable" (*Matter of Johannesen v New York City Dept. of Hous. Preserv. & Dev.*, 84 NY2d 129 [1994] [citations omitted]).

In this case, apportionment does not need to wait for a finding of MMI as both cases are work related. This is not the situation where apportionment is taking place between a work related

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accident and non-work related accident. The issue at this time is apportionment between the two work related accidents.

The consultant of PMA in WCB # 80403897, Dr. Chiaramonte, filed an IME-4 on October 17, 2016, finding 60% apportionment to the March 8, 2004, accident, 30% to a later motor vehicle accident and 10% to the accident on October 15, 2015. The claimant is contemplating bariatric surgery, followed by a knee replacement based on the damage to the current implant. The other parties must be given the opportunity to file their own reports and develop the record on the issue of apportionment for the awards and medical care. Issues still also exist regarding the degree to which the claimant returned to baseline functioning in November of 2015, when he returned to work, and whether the claimant fell in March of 2016 because of a problem with his right knee, or had a slip and fall which injured his knee. These issues can be explored along with development of the record regarding apportionment.

Therefore, the Board Panel finds, upon review of the record and based upon the preponderance of the evidence, that the claimant is suffering causally related lost time because of the current accident, at least in part, and the record must be developed regarding apportionment.

CONCLUSION

ACCORDINGLY, the WCLJ decision filed on December 12, 2016, is MODIFIED to make awards and medical care subject to a determination on apportionment. A determination on apportionment does not require a finding of MMI. Awards from August 31, 2016, to December 7, 2016, and continuing are to be paid by the SIE under WCL § 25(1)(f) in G1342161, pending the outcome of litigation on apportionment. The case is returned to the trial calendar for further development of the record.

All concur.

Fredrick M. Ausili — Fredrick M. Ausili

Ellen O. Paprocki — Ellen O. Paprocki

Mark R. Stasko — Mark R. Stasko

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