

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **SEAN GILBERT,**

5 *Applicant,*

6 *vs.*

7 **OAKLAND RAIDERS; ACE USA,**
8 **Administered by ESIS,**

9 *Defendants.*

Case No. ADJ3711842 (ANA 0409880)

**OPINION AND DECISION
AFTER RECONSIDERATION**

10 On November 18, 2011, we granted reconsideration in this matter to provide an opportunity to
11 further study the legal and factual issues raised by the petition for reconsideration. Having completed our
12 review, we now issue our Decision After Reconsideration.

13 Defendant, ACE USA, on behalf of its insured, the Oakland Raiders, filed a petition seeking
14 reconsideration of the Findings, Award and Orders, issued August 24, 2011, in which a workers'
15 compensation administrative law judge (WCJ) found applicant, Sean Gilbert, sustained 100% permanent
16 disability as a result of a cumulative trauma injury to various parts of his body while employed as a
17 professional football player over the period 1992 through December 22, 2003, by various teams and
18 ending with the Oakland Raiders. The WCJ determined that applicant's last year of injurious exposure
19 was December 21, 2002 through and including December 22, 2003, and that the sole employer during the
20 last year of exposure, over which there is jurisdiction, was the Oakland Raiders.

21 Defendant contests the WCJ's finding that applicant is totally permanently disabled, contending
22 the medical evidence relied upon does not constitute substantial medical evidence. Defendant asserts that
23 the opinion of Dr. Styner fails to properly address issues of causation and apportionment between his
24 disability arising from his employment by the Raiders and his prior injuries. Defendant further contests
25 the total permanent disability rating in the absence of evidence establishing applicant's inability to
26 compete in the open labor market. Finally, defendant asserts the correct rate for permanent disability is
27 \$711.03 per week, and not the \$790.50 awarded by the WCJ. Applicant has filed an answer to

1 defendant's petition.

2 We have considered the allegations and arguments of the Petition for Reconsideration, as well as
3 the answer thereto, and have reviewed the record in this matter and the WCJ's Report and
4 Recommendation on Petition for Reconsideration of September 30, 2011, which considers, and responds
5 to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in
6 the WCJ's Report, which we adopt and incorporate as the decision of the Board, as well as for the
7 discussion set forth below, we will affirm the WCJ's Findings, Award and Orders, except with regard to
8 the rate the award of disability is to be paid. As to that issue, we shall follow the WCJ's recommendation
9 to amend Findings of Fact numbers 8 and 9 of the Findings, Award and Orders to award temporary
10 disability and permanent disability at the proper rate, taking into consideration the adjustments required
11 by Labor Code section 4659, but shall otherwise affirm the Findings, Award and Orders.

12 In finding no evidentiary basis to apportion any of applicant's disability from his cumulative
13 trauma injury to prior injury or non-industrial factors, the WCJ relied upon the opinion of applicant's
14 Qualified Medical Evaluator, Dr. Styner, who found no medical basis for apportioning applicant's
15 current level of disability to any previous injury.

16 In his December 1, 2008 Qualified Medical Evaluator (QME) report, Dr. Styner stated his
17 apportionment determination as follows:

18 Considering the patient's current symptoms and radiologic findings are the
19 result of trauma sustained throughout his pro football career, trauma which
20 cannot be reasonably apportioned as he was able to return to playing an
21 elite professional sport at a high level after being injured, and as there is no
22 reasonable way to determine a specific level of disability after sustaining
23 such an injury as he was able to return to a high level of play, and as there
24 is currently no evidence of non-industrial disability, it is my opinion, based
25 on the complete clinical picture including the history provided to me, my
26 examination of this patient, review of available medical records and
27 diagnostic studies, that 100% of the patient's permanent orthopedic
disability/impairment is a direct result of continuous trauma sustained
throughout his career as a professional football player and 0% of the
disability arose by other factors both before and subsequent to the
industrial injury. (12/1/08 Report of Dr. Styner, p. 23-24, App. Exh. 4.)

In a May 3, 2010 supplemental report, Dr. Styner reviewed and considered additional medical

1 records, and the report of defendant's Qualified Medical Evaluator, Dr. Morgan. In response to Dr.
2 Morgan's apportionment based upon the percentage of time applicant played for each football team, Dr.
3 Styner stated:

4 "He then apportions based on the percentage of time the patient played for
5 each team. This is logic by convenience and is really more of a legal
6 argument than a medical one. *This examiner would find it impossible to*
7 *state with medical reasonable probability that X-percentage of orthopedic*
8 *injury occurred because a player spent X-amount of time with any one*
9 *team, particularly in a violent contact sport such as professional football.*
10 While Dr. Morgan may have had access to the number of plays in which
11 Mr. Gilbert participated, one cannot reasonably assess the degree of
12 orthopedic injury the patient may have sustained from one play to the next.
13 Dr. Morgan also states that while the patient "...may have been cleared to
14 play professional football, it is noted that Mr. Gilbert has a very large pre-
15 injury work capacity and, therefore, this does not negate the fact that he
16 had prior disability that he continued to carry with him while was (sic)
17 picked up from team to team." Dr. Morgan is assuming disability, and
18 whether accurate or not, I am not aware of any specific limitations placed
19 on the patient at the time he was "cleared to play" professional football.
20 Again, Dr. Morgan and this examiner are in agreement that this patient has
21 sustained cumulative trauma resulting from his pro football career, but I
22 would have to leave it to the legal experts to determine whether such
23 trauma should be divided based on percentage of time spent playing for his
24 various teams.

25 (5/3/10 Report of Dr. Styner, p. 8., App. Exh. 1. Emphasis added.)

26 As the burden of proof to establish apportionment of applicant's permanent disability rests upon
27 defendant here (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71
Cal.Comp.Cases 1229]), and as Dr. Styner's opinion is based upon his familiarity with applicant's
medical history and his current physical condition, and expressed in accordance with the requirements of
Escobedo v Marshalls Inc. (2005) 70 Cal.Comp.Cases 604 [en banc], his determination that he cannot
state with reasonable medical probability that any of applicant's disability may be apportioned to prior
injuries while playing professional football, constitutes substantial medical evidence. Furthermore,
defendant could have, but did not, cross-examine Dr. Styner to challenge his apportionment
determination. On this evidence, we are persuaded that the WCJ correctly found defendant failed to meet
its burden of proof to establish apportionment of applicant's disability to prior injuries.

1 For the foregoing reasons,

2 **IT IS ORDERED** that as our Decision After Reconsideration, the Findings, Award and Orders,
3 issued August 24, 2011 is **AFFIRMED**, except that it is **AMENDED** as follows:

4 **FINDINGS OF FACT**

- 5 8) The applicant is entitled to temporary total disability for the period beginning December 29,
6 2003 to and including March 31, 2004 payable at the rate of \$602.00 per week, subject to
7 adjustments as provided by Labor Code section 4661.5, less credit for time worked and any
8 salary continuation.
- 9 9) The applicant is permanently and totally disabled and is entitled to a permanent disability award
10 of 100 percent, payable beginning April 1, 2004 at the weekly rate of \$602.00 per week, subject
11 to all cost of living adjustments as provided for by Labor Code section 4659(c) less credit for
12 sums previously paid, including any increases, pursuant to Labor Code section 4659(c) and
13 *Baker v. WCAB* (2011) 76 Cal.Comp.Cases 701. Defendants are ordered to withhold all accrued
14 benefits and advise the court within 15 days of the service of this Award as to the total sum of
15 accrued benefits. Defendants are further ordered to pay the applicant at the rate of \$602.00
16 subject to all cost of living adjustments as provided for by Labor Code section 4659(c), including
17 any increases, pursuant to Labor Code section 4659(c) for the ongoing permanent total disability
18 award, separate from the accrued benefits.

19 **AWARD**

20 **AWARD IS MADE** in favor of **SEAN GILBERT**, and against **OAKLAND RAIDERS**, as
21 follows:

- 22 a. Temporary Disability in accordance with paragraph No. 8.
23 b. Permanent Disability in accordance with paragraph No. 9.
24 c. Apportionment in accordance with paragraph No. 10.
25 d. Further Medical Treatment in accordance with paragraph No. 12.
26 e. Self-Procured and Medical Treatment and Medical Legal-Cost in accordance with paragraph No.
27 13.

1 f. Additional costs as to his deposition and travel to California to attend medical evaluations, to be
2 adjusted between the parties with jurisdiction reserved, in accordance with paragraph No. 14.

3 g. Attorney Fees in accordance with paragraph No. 17.

4 **ORDERS**

5 **IT IS ORDERED** that Applicant is to provide itemization as to the additional costs related to his
6 deposition and travel to California to attend medical examinations to his attorney who is to forward such
7 to defendants within 20 days and then paid by defendants within 30 days of receipt. Jurisdiction is
8 reserved as to any issues regarding such.

9 **IT IS ORDERED** that defendants withhold all accrued benefits and advise the court within 15
10 days of the service of this Findings, Award and Order as to the amount of accrued benefits.

11 **IT IS ORDERED** that applicant's counsel file a Petition for claimed reasonable attorney's fees
12 in connection with the permanent disability awarded, including the additional sums under Labor code
13 section 4659 (c). Applicant's counsel is to advise the court as to how he wishes the fees to be paid, either
14 from the accrued benefits, from the side of the award or some combination thereof. Such petition is to be
15 served on applicant as well as defendants within 25 days of the service of this Findings, Award and
16 Order.

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1 **IT IS ORDERED** that defendants pay permanent disability to the applicant on an ongoing basis,
2 for benefits at the statutory rate, including increases under Labor Code section 4659(c) and *Baker v.*
3 *Workers' Compensation Appeals Board* (2011) 76 Cal.Comp.Cases 701.


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5 **WORKERS' COMPENSATION APPEALS BOARD**

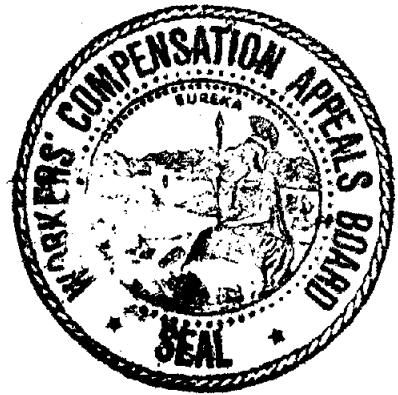
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8 **RONNIE G. CAPLANE**

9 **I CONCUR,**

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12 **DEPUTY**
13 **RICK DIETRICH**

14 **I DISSENT (See Dissenting Opinion)**

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17 **ALFONSO J. MORESI**



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

21 **NOV 22 2011**

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

25 **SEAN GILBERT**
26 **NAMANNY, BYRNES AND OWENS**
27 **WAI AND CONNOR**



SV/jp
GILBERT, Sean

1 **DISSENTING OPINION**

2 I respectfully dissent. I would return this matter to the trial level for further proceedings related to
3 the issue of apportionment of applicant's permanent disability. The reporting of Dr. Styner, upon whom
4 the WCJ relied to find no basis for apportionment, does not constitute substantial medical evidence in
5 view of the evidence of applicant's multiple injuries and medical treatment prior to his employment by
6 the Oakland Raiders. Dr. Styner's reports do not adequately address the issue of the causation of
7 applicant's current level of disability. *Escobedo v Marshalls Inc.* (2005) 70 Cal.Comp.Cases 604 [en
8 banc] requires a physician to determine what percentage of applicant's permanent disability was caused
9 by his industrial injury and what percentage was caused by other factors. However, in *Benson v.*
10 *Permanente Medical Group* (2007) 72 Cal.Comp.Cases 1620 [en banc], the Appeals Board noted that
11 under some circumstances it may be impossible for a physician to parcel out between successive injuries
12 the causative factors of a current level of disability. This may have been Dr. Styner's intent, but he does
13 not adequately address this issue. I would therefore return this matter for further development of the
14 medical record to clarify the issue of the causation of applicant's current disability.



21 **WORKERS' COMPENSATION APPEALS BOARD**

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ALFONSO J. MORESI, Commissioner

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

22 **NOV 22 2011**

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

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SV/jp

GILBERT, Sean