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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MICHAEL PERANI,

Petitioner,

v.

WORKERS' COMPENSATION  
APPEALS BOARD and ISLAND  
GRAPHICS, insured by NATIONAL  
SURETY COMPANY,

Respondents.

A159586

Case No. ADJ865776

Petitioner Michael Perani is a computer software engineer who sustained an industrial injury to his “upper extremities” while employed by respondent Island Graphics, which was the subject of a stipulated award that entitled him to future medical care. It is undisputed Perani suffers from a condition known as “thoracic outlet syndrome” (TOS). The question presented here is whether thoracic outlet syndrome is encompassed within the award. The Workers’ Compensation Appeals Board (Board) upheld a decision by the workers compensation judge (WCJ), which took the position that thoracic outlet syndrome involves a different part of the body than did the award. It consequently denied Perani’s application for expenses incurred to treat that condition. We annul the award.

## I. BACKGROUND

“TOS refers to a constellation of symptoms which arise due to compression of blood vessels or brachial plexus nerves in the space between the clavicle and the first rib (i.e., the thoracic outlet). Compression of the brachial plexus nerves causes a variety of symptoms, including pain in the shoulder and scapula area, pain, numbness, swelling and tingling in the arm or hand, reduced grip strength, and weakness when raising the arm. Thoracic outlet syndrome commonly arises in patients whose occupation requires repetitive motion, which causes inflammation, which in turn results in compression of the brachial plexus nerves.” (*Borrayo v. Avery* (2016) 2 Cal.App.5th 304, 307.)

Perani was employed from November 1988 until April of 1995 as a software engineer for Island Graphics, a job that required heavy keyboard use on a computer. In 1994, he filed a workers’ compensation claim after he began suffering from pain, inflammation, swelling and impaired range of motion in his hands, wrists and arms. He was not specifically diagnosed as having TOS, but his medical records describe symptoms consistent with TOS in the year following his claim. He was given physical therapy from 1994 to 1995 and was declared permanent and stationary in 1996. In 1997, a qualified medical examiner (QME) diagnosed him as having chronic repetitive strain injuries and reported a degradation of his fine motor capabilities.

In September 1998, Perani entered into a stipulated award with National Surety Corporation (Fireman’s Fund), the insurer of Island Graphics, which stated, “Perani. . . sustained injury arising out of and in the course of employment.” In the space labeled “(Parts of body injured),” the award stated, “bilateral upper extremities.” The award provided that the

injury caused 37.2 percent permanent disability and that “4. [t]here is need for medical treatment to cure or relieve from the effects of said injury.” It awarded Perani, “(A) Temporary disability in accordance with paragraph 2, above, as further set forth in paragraph 8; [¶] (B) Permanent disability indemnity in accordance with paragraph 3 above; . . . (C) Further medical treatment in accordance with Paragraph 4. . . .”

In February 1999, Perani consulted with neurologist Tracy Newkirk, M.D., who wrote a report stating, “Mr. Perani obviously has postural strain syndrome. The primary components are a bilateral myofascial thoracic outlet syndrome, with dystonia in the forearms, more on the right side than the left, and associated cervical and thoracic joint restrictions.” Although TOS can be a “controversial” diagnosis, it is not disputed that Perani suffers from TOS.

In 2001, Perani was involved in a non-industrial related automobile accident and suffered a cervical musculoligamentous strain which resulted in an increase in his upper extremity problems. He reported being “back to baseline” after a year. In 2002 to 2005, Perani did not use a computer for work and reported some improvement of his symptoms. From 2005 through 2009, he worked part time as a product manager for a software company called Autodesk, which had worker’s compensation coverage through Travelers. He has been unemployed since he was laid off from that position.

In 2009, Perani submitted medical bills for the treatment of his TOS to an adjustor for Fireman’s Fund, which was denied by letter. The letter noted, “Please note that Dr. Denkler has now also diagnosed you with [TOS]. Your claim is for wrists only[;] therefore this diagnosis is not covered.” In 2012, Fireman’s Fund sent Perani a letter stating, “we are issuing a DENIAL of liability ONLY for the claim of injury to THORACIC OUTLET SYNDROME because based on the medical reports in this file, this condition is non-

industrial and [un]related to the [worker's compensation] injury. In addition the Future Medical Award dated 09/03/1998 is only for the Bilateral wrists and hands.”

Neurologist Robert Ansell, M.D. was appointed as a QME. He examined and interviewed Perani in January 2013 and reviewed his medical records and reports. “For the most part, his symptoms, although fluctuating in severity, have been relatively similar over these many years. He has primarily pain in both upper extremities, at times left more so than right, at times right more than left. He describes the pain as ‘achy.’ Less frequently now, approximately once a month, he will have some numbness and tingling over the ring and small fingers. This is usually precipitated by repetitive activity.” During Dr. Ansell’s physical examination of Perani, he noted, “When he turned and twisted, there was a sense of ‘buzzing. . . tingling’ radiating down the small fingers of both hands. [¶] Both hands were cool, moist and hyperemic, i.e., dependent rubor, with some degree of venous distention.”

Dr. Ansell noted, “From the onset, as acknowledged within the reports of Dr. Denkler, Mr. Perani had bilateral upper extremity pain and discomfort, initially thought consistent with repetitive strain syndrome. [¶] He had transient improvement following physical therapy. [¶] These complaints were addressed in the First Report of Occupational Injury of Dr. Newmeyer back in September 1997, which led to the Stipulation with Request for Award. He was provided a 37.2 level of permanent disability and was provided ongoing medical treatment. [¶] Dr. Newkirk first saw Mr. Perani in February 1999. In his opinion, the symptoms and findings were consistent with a myofascial thoracic outlet syndrome. This led to a more aggressive course of physical therapy.” With respect to the diagnosis of TOS, Dr. Ansell had this to say: “It

is well-acknowledged that the diagnosis of ‘thoracic outlet,’ much less the treatment, is in substantial dispute. Indeed, there are many that ‘don’t believe it exists.’ Personally, I often am a skeptic. Nonetheless, Mr. Perani does, in my opinion, have clear objective findings on imaging studies and the provocative test performed by Drs. Braum and Glazener, of impaired vascularity to his upper extremities, left more so than right, that are precipitated by a variety of movements and relieved with rest and other positions. [¶] This, in my opinion, would be consistent with the appropriate diagnosis of thoracic outlet syndrome. [¶] The medical information and records would support the onset of these complaints, dating to Mr. Perani’s injurious occupational exposure at Island Graphics.” He found the injury to be 100 percent attributable to Perani’s work at Island Graphics.

Dr. Ansell was deposed on March 25, 2013. He indicated that he was skeptical TOS occurs as often as it is diagnosed, but Perani did have the condition. There is a considerable degree of overlap between patients with TOS and patients with repetitive strain injury. Patients with upper extremity overuse tend to have pain as a symptom, and TOS patients tend to have more numbness and tingling with color and temperature changes, but these symptoms can exist with either condition. Dr. Ansell indicated he would reconsider his conclusions regarding apportionment for Perani’s TOS.

In March and April of 2016, appellant, Autodesk and Travelers reached a compromise and release of a worker’s compensation claim brought by Perani against Autodesk. The compromise expressly was not an admission that the injury arose out of that employment or in the course of that employment (AOE/COE). It also stated that “[n]o part of this settlement is for the self-procured medical alleged against Fireman’s Fund.”

On July 5, 2016, Dr. Ansell prepared a supplemental report indicating that Perani suffered from TOS and the “diagnosis is not in question.” He indicated that there had been an increase of Perani’s symptoms of TOS after his automobile accident in 2001 and after he started working for AutoDesk in 2005. Accordingly, Dr. Ansell stated the need for future medical care should be apportioned as follows: Island Graphics: 40 percent for the original injurious exposure; automobile accident: 10 percent; Autodesk: 50 percent.<sup>1</sup>

On October 18, 2019, the WCJ issued an award in which he denied Perani’s claim for reimbursement of expenses related to TOS. “Having carefully analyzed the evidence, as well as the history of this case, I am compelled to find that the vast majority of treatment relating to applicant’s alleged TOS condition falls outside the scope of his award of medical care herein. The award, issued herein in 1998, is expressly limited to the upper extremities. There is no indication in the EAMS docket—nor is it alleged by applicant—that a petition to reopen was filed within five years of this 1995 industrial injury. Thus, I am not in a position to expand the existing award to new body parts. As explained below, while I do not doubt that Mr. Perani suffers from TOS, I do not view his condition as an injury to the upper extremities, but rather to the chest and shoulder girdle.” The award did reimburse Perani for aqua therapy, a result not at issue in this appeal.

Perani filed a petition for reconsideration, which the Board denied. Perani filed the instant petition for writ of review challenging the Board’s decision.

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<sup>1</sup> Based on Dr. Ansell’s apportionment, Island Graphics/Fireman’s Fund filed a petition against Autodesk indicating that it had paid Perani at least \$87,075.24 on two claims he had made (ADJ865776 and ADJ9232896) and seeking reimbursement of 50 percent from Autodesk and Travelers, its insurer.

## II. DISCUSSION

The Board concluded that TOS was not encompassed within the 1998 stipulated award because it did not involve an injury to the “bilateral upper extremities.” We disagree and annul the award.

### A. *Standard of Review*

When a considering a petition for a writ of review, we are governed by Labor Code section 5952, which provides, “The review by the court shall not be extended further than to determine, based upon the entire record which shall be certified by the appeals board, whether: [¶] (a) The appeals board acted without or in excess of its powers. [¶] (b) The order, decision, or award was procured by fraud. [¶] (c) The order, decision, or award was unreasonable. [¶] (d) The order, decision, or award was not supported by substantial evidence. [¶] (e) If findings of fact are made, such findings of fact support the order, decision, or award under review. [¶] Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence.”

“A decision based on factual findings, which is supported by substantial evidence, is affirmed by the reviewing court, unless the findings are erroneous, unreasonable, illogical, improbable, or inequitable when viewed in light of the entire record and statutory scheme. [Citation.] When the facts are undisputed. . . the issue presented is a question of law. [Citation.] The application of law to undisputed facts or the interpretation of a governing statute is decided de novo by the reviewing court, although the [Board’s] construction is entitled to great weight unless clearly erroneous. [Citation.]. (*Los Angeles County Fire Dept. v. Workers’ Comp. Appeals Bd.* (2010) 184 Cal.App.4th 1287, 1293 (*Los Angeles County Fire Dept.*)). The Board’s legal

decisions are reviewed de novo. (*City of Jackson v. Worker's Compensation Appeals Board* (2017) 11 Cal.App.5th 109, 114-115.)

In this case, although petitioner has argued the Board's award was unsupported by substantial evidence, and although the award might be said to involve the "factual" question of whether TOS is an injury to the upper extremities, we conclude a de novo standard of review is appropriate. First, the primary issue in this case is the interpretation of the 1998 stipulated award, and whether its reference to an injury to "bilateral upper extremities" encompasses TOS. The interpretation of a settlement agreement is a question of law that we review de novo when no extrinsic evidence is presented regarding the interpretation of the agreement. (*Abers v. Rounsavell* (2010) 189 Cal.App.4th 348, 357.) Second, the facts are undisputed that Perani suffers from TOS—what was at issue was whether that condition fell within the terms of the stipulated award. (*Los Angeles County Fire Dept., supra*, 184 Cal.App.4th at p. 1293.)

Even if the issue is couched as a factual one, we would annul the award. Although deference must be given to the Board's factual findings, the conclusion that TOS is excluded from an injury to the "upper extremities" is, as we explain below, unreasonable in light of the entire record. (*Los Angeles County Fire Dept., supra*, 184 Cal.App.4th at p. 1293.)

#### B. *TOS is an Injury Affecting the Upper Extremities*

"Upper extremity" includes the hand, wrist, elbow and the shoulder—in other words the entirety of the arm. (See *Smith v. Empire Pencil Company* (Tenn. S.C. 1989) 781 S.W.2d 833, 837.) The term can be defined even more expansively, to include the neck and shoulders; essentially, everything from the base of the skull down. (*M.C. Dean, Inc. v. District of Columbia Employment Services* (D.C. App. 2016) 146 A.3d 67, 72-73.)



TOS “a non specific label” for “upper extremity symptoms due to compression of the neurovascular bundle by various structures in the area just above the first rib and behind the clavicle.” (Sanders, Richard J. et al, *Diagnosis of thoracic outlet syndrome*, September 2007, Volume 46, Issue 3, *Journal of Vascular Surgery (JVS)*, pp. 601—604; available at <http://www.jvascsurg.org/article/S0741-5214%2807%2900734-3/abstract?cc=y> (last accessed June 4, 2020).) “The initial presentation of thoracic outlet syndrome is dependent on whether the compression is primarily vascular, neurogenic, or a combination of both.” (Daryl A. Rosenbaum, M.D., Medscape: Thoracic Outlet Syndrome Clinical Presentation (January 2019), <http://emedicine.medscape.com/article/96412-clinical> (updated January 10, 2019) (last accessed June 4, 2020).) “Vascular thoracic outlet syndrome is rare and can involve the subclavian artery or vein.” (*Ibid.*) Neurogenic thoracic outlet syndrome is more common. (*Ibid.*) Symptoms of neurogenic thoracic outlet syndrome include: “neck and shoulder discomfort, headache, and paresthesia and/or weakness of the upper extremity. Paresthesia, particularly at night, is common and symptoms are usually more pronounced with the arm in an elevated or overhead position. Sensory abnormalities will characteristically involve the ulnar aspect of the hand or the medial portion of the forearm. . . . (Jordan A. Gliedt, D.C. Clinton J. Daniels, D.C., M.S. Dennis E. Enix, DC, MBA, Clinical Brief: Neurogenic Thoracic Outlet Syndrome, , *Topics in Integrative Health Care* 2013, Vol. 4(3) ID: 4.3003; <http://www.tihcij.com/Articles/Clinical-Brief-Neurogenic-Thoracic-Outlet-Syndrome.aspx?id=0000405> (last accessed June 4, 2020).)

The Board concluded that because TOS involves a compression of the thoracic outlet, which is located in the upper torso, it was not an injury to the

upper extremities per se and was not subject to the 1998 stipulated award. While the thoracic outlet may be located in the upper torso rather than in the shoulders, arms, wrists or hands, its symptoms, and indeed, the symptoms experienced by Perani, manifest in those very body parts. To say it is not encompassed in an award for injuries to the upper extremities would be akin to saying an award for an injury to one's leg did not cover pain in that leg because pain originates in the brain and the award did not specify recovery for brain injuries. Perani was clearly symptomatic in his upper extremities as a result of his TOS.

We note that the 1998 stipulated award did not specify that future medical treatment was authorized only for a particular medical condition such as repetitive strain injury or carpal tunnel syndrome, which can be distinguished from TOS even when the symptoms overlap. Instead, the award broadly stated that the body parts injured were the "bilateral upper extremities," without specifying a particular medical condition, and that there was a need for further medical treatment of that injury. Had the parties wished to limit future medical treatment to treatment for particular conditions, they could have done so.

Because the Board concluded that TOS was not encompassed by the 1998 award at all, it did not consider issues regarding apportionment or industrial causation. We will therefore remand so that the Board can consider these issues in the first instance.<sup>2</sup> We note that Dr. Ansell's

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<sup>2</sup> Respondents have not filed a respondent's brief. We do not consider this to be a concession, and reach the merits of Perani's petition for writ of review. (*In re Marriage of Riddle* (2005) 125 Cal.App.4th 1075, 1078, fn. 1.) We have reached our conclusion that annulment of the award is required based on our review of the record in light of the petition. (Cal. Rules of Court, rule 8.220(a)(2).)

supplemental report of 2016 allocated the responsibility for Perani's TOS to three factors: his employment with Island Graphics (40 percent), the automobile accident (10 percent) and his subsequent employment with Autodesk (50 percent).

### III. DISPOSITION

The Board's opinion and decision is annulled, and the matter is remanded to the Board for further proceedings consistent with this opinion.

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NEEDHAM, J.

We concur.

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SIMONS, ACTING P.J.

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BURNS, J.

(A159585)