WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA FRAIRE, ***Applicants,*** **vs.** **CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, Legally Uninsured; and STATE COMPENSATION INSURANCE FUND (Claims Administrator),** ***Defendants.***	**Case Nos. ADJ3465394 (MON0339945) MF** **ADJ115935 (MON0346985)** **ADJ9431954** **(Los Angeles District Office)** **OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration to further study the factual and legal issues. This is our Decision After Reconsideration.

Defendant, the California Department of Corrections and Rehabilitation (CDCR), by and through its claims administrator, State Compensation Insurance Fund (SCIF), seeks reconsideration of three decisions issued by the workers' compensation administrative law judge (WCJ) on July 19, 2018.

In the Findings and Award in Case No. ADJ3465394, the WCJ found that applicant, Maria Fraire, sustained industrial injury to her right hand and fingers, cervical spine, bilateral knees, cervical spine, lumbar spine and head on May 23, 2005, while employed as a Program Tech by CDCR. In relevant part, the WCJ further found that the permanent disability for applicant's May 23, 2005 injury "will be addressed in the Findings and Award in the companion cases ADJ115935 and ADJ9431945 [*sic* (actually, Case No. ADJ9431954)]."

In the Findings and Award in Case No. ADJ115935, the WCJ found that applicant sustained industrial injury to her bilateral knees, internal organs, both eyes, left shoulder, diabetes, cardiovascular system, psyche, and hypertension on September 11, 2006, while employed as a Program Tech by CDCR. In relevant part, the WCJ further found that applicant's September 11, 2006 injury caused permanent

total disability (i.e., 100%) based on the provision of Labor Code section 4662(a)(1)[1] that the loss of both eyes or the sight thereof is conclusively presumed to have resulted in permanent total disability. Additionally, the WCJ found that although the medical evidence establishes that only half of applicant's permanent total disability was caused by her September 11, 2006 industrial injury, the conclusive presumption of section 4662(a)(1) precludes the apportionment of applicant's permanent total disability.[2] In light of the finding of 100% permanent disability without apportionment, the WCJ awarded lifetime permanent total disability indemnity at the rate of $442.62 per week. Finally, the WCJ determined that the reasonable value of the services of applicant's attorney's "is set forth in the Findings and Award in case ADJ8431954 [*sic* (actually, Case No. ADJ9431954)]."

In the Findings and Award in Case No. ADJ9431954, the WCJ found that applicant sustained industrial injury to her eyes, psyche, and cardiovascular system on June 28, 2012, while employed as a computer program tech by CDCR. In relevant part, the WCJ further found that applicant's June 28, 2012 injury caused permanent total disability (i.e., 100%) based on the provision of section 4662(a)(1) that the loss of both eyes or the sight thereof is conclusively presumed to have caused permanent total disability. Additionally, the WCJ found that although the medical evidence establishes that only half of applicant's permanent total disability was caused by her June 28, 2012 industrial injury, the conclusive presumption of section 4662(a)(1) precludes the apportionment of applicant's permanent total disability. In light of the finding of 100% permanent disability without apportionment, the WCJ awarded lifetime permanent total disability indemnity at the rate of $442.62 per week.[3] The WCJ allowed an attorney's fee of $75,403.43 to be commuted from applicant's permanent total disability indemnity award using the Uniform Reduction Method.

In both Case No. ADJ115935 and Case No. ADJ9431954, the WCJ also determined that "[a]pplicant's earnings at the time of injury were $663.92 per week producing a temporary disability rate

---

[1] All further statutory references are to the Labor Code.

[2] The WCJ also determined that "[a]pplicant's earnings at the time of injury were $663.92 per week producing a temporary disability rate of $442.62 per week and a permanent disability indemnity rate of $290.00 per week."

[3] See fn. 2, *supra*.

of $442.62 per week and a permanent disability indemnity rate of $290.00 per week."

SCIF's petition for reconsideration contends that: (1) injuries involving the loss of both eyes or the sight thereof under section 4662(a)(l) are subject to apportionment under section 4663; and (2) applicant's permanent disability indemnity rate was incorrectly found to be $290.00 per week.

Applicant filed an answer to SCIF's petition for reconsideration.[4]

The WCJ did not file a Report and Recommendation on Petition for Reconsideration (Report).

We have reviewed the record and the allegations of SCIF's petition for reconsideration and applicant's answer. For the reasons that follow, we will rescind all three decisions on July 19, 2018 in Case Nos. ADJ3465394, ADJ115935, and ADJ9431954 and return these matters to the WCJ for further proceedings, if he in his discretion deems them appropriate, and for new decisions that apply apportionment to causation principles under sections 4663 and 4664(a).

I. BACKGROUND

The issues before us are largely legal, not factual. Indeed, the factual issues appear to be essentially undisputed. We will, however, give a brief summary of the facts relevant to the legal issues before us.

The parties utilized the following medical evaluators: (1) Robert A. Weissman, M.D., the agreed medical evaluator (AME) in internal medicine; (2) Marshall J. Keyes, M.D., the AME in ophthalmology; (3) Katalin Bassett, M.D., the AME in psychiatry; (4) Scott Haldeman, M.D., the AME in neurology; and (5) Brian D. Rothi, M.D., the qualified medical evaluator (QME) in orthopedics.

---

[4] Applicant's answer contends that SCIF's petition for reconsideration should be dismissed because it was not served on applicant herself — only her counsel — and it was not served on CDCR. (Answer, at 2:22-3:2.)

Applicant is correct that, at the time SCIF served its petition for reconsideration, former WCAB Rule 10850 (former Cal. Code Regs., tit. 8, § 10850) provided that "[s]ervice of copies of any petition for reconsideration ... shall be made ... on all parties to the case." (*NOTE: Effective January 1, 2020, the service provisions of former WCAB Rule 10850 are now WCAB Rule 10625.*)

What applicant neglects to recognize, however, is that at the time SCIF served its petition for reconsideration, former WCAB Rule 10510(b) (former Cal. Code Regs., tit. 8, § 10510(b)) provided that "[s]ervice by any party ... shall be made on the attorney(s) or agent(s) a record of each other affected party ..., unless that party... is unrepresented, in which event service shall be made directly on the party ... ." (*NOTE: Effective January 1, 2020, former WCAB Rule 10510 is now WCAB Rule 10625.*) Here, therefore, SCIF was not required to serve applicant directly because she is a represented party. Similarly, SCIF was not obligated to serve CDCR because SCIF is representing CDCR.

As pertinent here, Dr. Weissman's March 26, 2016 AME internal medicine report opined among other things that applicant has cardiomyopathy that is "related entirely" to her pre-existing diabetes mellitus, but that her diabetes mellitus was "significantly aggravated and accelerated" by her "inability to exercise and the psychological aftermath" of her September 11, 2006 and June 28, 2012 industrial injuries. (WCAB Exhibit M, at p. 32.) Dr. Weissman's March 26, 2016 report further stated:

> With respect to her diabetes being a derivative injury, given the affect of these injuries on her exercise capacity as well as her psychological state, I would conclude that 60% of the aggravation and acceleration of problems referable to diabetes leading to the heart disease, eye involvement ..., would relate to aggravation and acceleration of the diabetes by industrial considerations. 40% was to the fact this was a preexisting condition. These other problems were part of a natural history of such disease process.
>
> ***
>
> With respect to apportionment, as noted, I would attribute 60% of the cause for her cardiomyopathy to aggravation and acceleration of diabetes by industrially related factors and 40% to nonindustrial factors.
>
> Of the 60% related to industrial factors, I would apportion 50% to the first industrial injury of 2006 and 50% to the second industrial injury of 2012. Therefore, 30% of her residual impairment would relate to the first industrial injury, 30% to the second industrial injury, and 40% to nonindustrial considerations related to the natural history of this disease.
>
> (*Id.*, at pp. 32-33.)

In his October 31, 2016 AME ophthalmological report, Dr. Keyes diagnosed applicant to have a "Legal Blindness, Both Eyes." (WCAB Exhibit W, at p. 6.) Dr. Keyes further declared:

> Causation of work related ophthalmic/visual disability/impairment is proportional to the industrial causation of the underlying diabetes and/or hypertension, if present. That causation is deferred to an experienced medical specialist/internist because it is outside the experience and expertise of an ophthalmologist.
>
> (*Id.*, at p. 7.)

It appears that when Dr. Keyes made this statement, he had not been provided with the March 26, 2016 report of Dr. Weissman, the AME in internal medicine. (*Id.*, at p. 4.)

In his July 28, 2017 AME report, Dr. Weissman reviewed the October 31, 2016 report of

Dr. Keyes. Dr. Weissman observed that Dr. Keyes had indicated that applicant was "legally blind" and that Dr. Keyes had concluded "that causation [of] the work related ophthalmic/visual disability was proportional to the industrial causation of the underlying diabetes or hypertension." (WCAB Exhibit N, at pp. 3-4.) As to causation, Dr. Weissman's merely reiterated the opinion given in his March 26, 2016 report: (1) 60% causation to applicant's industrial injuries, i.e., 30% to the September 11, 2006 injury and 30% to the June 28, 2012 injury; and (2) 40% to non-industrial causation. (*Id.*)

Dr. Keyes was deposed on January 25, 2017. (WCAB Exhibit X.) At this deposition, Dr. Keyes again testified that applicant is legally blind in both eyes, which makes her totally disabled. (*Id.*, at 7:13-8:11.) Dr. Keyes also reiterated that the causation of applicant's blindness is derivative of her diabetes and hypertension, if there is hypertension. (*Id.*, at 8:11-9:1.) Again, though, Dr. Keyes stated that he lacks the expertise to determine what percentage of applicant's diabetes and hypertension is industrial and what percentage is non-industrial, so he would defer to Dr. Weissman. (*Id.*, at 5:22-6:10; 9:1-9:17.)

II. DISCUSSION

A. The Labor Code Section 4662(a) Conclusive Presumption of Permanent Total Disability Does Not Preclude Apportionment

Section 4662 provides:

> (a) Any of the following permanent disabilities shall be conclusively presumed to be total in character:
>
> (1) Loss of both eyes or the sight thereof.
> (2) Loss of both hands or the use thereof.
> (3) An injury resulting in a practically total paralysis.
> (4) An injury to the brain resulting in permanent mental incapacity.
>
> (b) In all other cases, permanent total disability shall be determined in accordance with the fact.

The fundamental rule of statutory construction is to effectuate the Legislature's intent. (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382, 387 [58 Cal.Comp.Cases 286] (*DuBois*).) The best indicator of legislative intent is the clear, unambiguous, and plain meaning of the statutory language. (*DuBois*, *supra*, 5 Cal.4th at pp. 387–388.) When the statutory language is clear and unambiguous, there is no room for interpretation and the WCAB must enforce the statute according to its plain terms.

(*DuBois, supra*, 5 Cal.4th at p. 387.)

The plain language of section 4662(a) declares that certain specified permanent disabilities "shall be conclusively presumed to be *total in character*." (Emphasis added.)

It is well established that where the law establishes a conclusive presumption evidence will not be received to contradict it. (*People v. McCall* (2004) 32 Cal.4th 175, 185; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1106 [71 Cal.Comp.Cases 1229] (stating that "[w]here the law makes a certain fact a 'conclusive presumption' evidence cannot be received to the contrary" and holding that section 4664(b)'s provision that "[i]f the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury" means that "evidence cannot be received that the prior permanent disability associated with [a prior] award did *not* exist at the time of any subsequent industrial injury" [some internal quotation marks omitted]).

Accordingly, the clear and unambiguous language of section 4662(a) establishes that the disability in question — loss of sight in both eyes in this case — must be conclusively presumed to be "*total in character*" (emphasis added). That is, the "character" of the ***overall*** permanent disability must be conclusively deemed to be "total," i.e., 100%.

Nevertheless, section 4662(a)'s conclusive presumption that certain specified disabilities are "total in character" does not establish that such conclusively presumed 100% permanent disabilities entirely resulted from industrial causation.

Significantly, the language of section 4662(a) is silent on the question of whether an industrially injured employee's conclusively presumed 100% *overall* permanent disability is subject to apportionment. When a statute is completely silent on a point, the Appeals Board must construe it in the context of the entire statutory scheme, with the goal of harmonizing it with related sections and promoting the legislative objective. (*People v. Superior Court* (*Zamudio*) (2000) 23 Cal.4th 183, 194; *Waterman Convalescent Hospital, Inc. v. State Dept. of Health Services* (2002) 101 Cal.App.4th 1433, 1439; *Bravo v. Ismaj* (2002) 99 Cal.App.4th 211, 224.)

///

In this regard, section 4663 provides, in relevant part:

> (a) Apportionment of permanent disability shall be based on causation.
> (b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.

Similarly, section 4664 provides, in relevant part:

> (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.

As the Supreme Court observed in *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565), the Legislature's enactment of sections 4663 and 4664(a) established a "new regime of apportionment based on causation" (40 Cal.4th at p. 1327) and these apportionment provisions of sections 4663 and 4664(a) constituted an "expansion of the range of bases that would trigger apportionment." (40 Cal.4th at p. 1330, fn. 13; see also *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1556 [74 Cal.Comp.Cases 113] (in enacting sections 4663 and 4664, "the Legislature intended to expand the scope of apportionment"); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 616 (Appeals Board en banc) (in enacting sections 4663 and 4664, "the Legislature intended to expand rather than narrow the scope of legally permissible apportionment"). Moreover, in *Brodie*, the Supreme Court declared that "the new approach to apportionment is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source." (40 Cal.4th at p. 1328.)

Therefore, the clear and unambiguous language of section 4663 and 4664(a) requires that the apportionment of permanent disability — be it permanent total disability or permanent partial disability — "shall" based on causation. (See *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78 Cal. Comp. Cases 751] [apportionment to non-industrial causation applies even when effects of injury result in total loss of earning capacity and 100% permanent disability].) This plain language does *not* exempt permanent disability that is conclusively presumed to

be total pursuant to section 4662(a).[5]

To the contrary, the language of section 4663(a) that "[a]pportionment of permanent disability *shall* be based on causation" (emphasis added) and the language of section 4664(a) that "[t]he employer *shall* only be liable for the percentage of permanent disability directly caused by the injury" (emphasis added) mandate that conclusively presumed total disabilities under section 4662(a) *shall* be subject to apportionment to causation. (Lab. Code, § 15 [" 'Shall' is mandatory and 'may' is permissive"]; *Smith v. Rae-Venter Law Group* (2003) 29 Cal.4th 345, 357 ("As used in the Labor Code, 'shall' is mandatory").)[6]

Moreover, when the Legislature enacted section 4664 (Stats. 2004, ch. 34, § 35 (SB 899)), it expressly included a reference to disabilities that are "conclusively presumed to be total in character pursuant to Section 4662." However, section 4664's reference to section 4662 was included only in section 4664*(c)(1)* (emphasis added), which relates solely to "[t]he accumulation of all permanent disability awards issued with respect to any one region of the body." The fact that the Legislature did not concurrently exclude conclusively presumed total permanent disabilities under section 4662(a) from the apportionment to causation provision of section 4664*(b)* (emphasis added) — or from the apportionment to causation provision of section 4664(a) that was enacted by the same bill at the same time (Stats. 2004, ch. 34, § 34 (SB 899)) — strongly suggests that the Legislature did not intend to exclude conclusively presumed total disabilities under section 4662(a) from those apportionment to causation provisions. (Cf. *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 236-237 (Appeals Board en banc) (the

---

[5] We are aware that the dissent cites to Appeals Board panel decisions and writ denied cases that concluded where an injured employee's permanent disability is conclusively presumed to be total under section 4662(a), apportionment cannot be applied. However, it is well settled that neither panel decisions nor writ denied cases are binding precedent on WCJs or on subsequent Appeals Board panels, and that they do not have any stare decisis effect. (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 (Appeals Board en banc).) We conclude that the panel decisions and writ denied decisions upon which the dissent relies were erroneously decided, for the reasons above.

[6] See also *Morris v. County of Marin* (1977) 18 Cal.3d 901, 907 [42 Cal.Comp.Cases 131] ("Labor Code section 15 ... explicitly declares that ' "[shall]" is mandatory and "may" is permissive.' In light of this clear statutory language ... there can be no question but that section 3800 [requiring that 'contractors shall show their valid workers' compensation insurance certificate' when obtaining a permit] imposes a 'mandatory duty' on the county ... .")

principle that statutes relating to the same subject matter must be harmonized to the extent possible "applies with particular force when the two statutes relating to the same subject matter were enacted by the same bill and chaptered at the same time"); accord: *Eel River Disposal & Resource Recovery, Inc. v. County of Humboldt* (2013) 221 Cal.App.4th 209, 231-232; *Krumme v. Mercury Ins. Co.* (2004) 123 Cal.App.4th 924, 943, fn.6; *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 932.)

Additionally, "[w]e should not interpret or apply statutory language in a manner that will lead to absurd results." (*Alvarez v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 575, 590 [75 Cal.Comp.Cases 817].) With respect to apportionment to causation under sections 4663 and 4664(b), there is no reasonable rationale for distinguishing between permanent disabilities that are conclusively presumed to be total in character pursuant to section 4662(a) and those that are factually determined to have caused 100% overall permanent disability pursuant to sections 4662(b) and 4660.[7] Indeed, part of the legislative intent in enacting the apportionment to causation provisions of sections 4663 and 4664 was to encourage employers to hire disabled workers. (*Strong* v. *City and County of San Francisco* (2005) 70 Cal.Comp.Cases 1460, 1469 (Appeals Board en banc) (disapproved on another ground in *Kopping* v. *Workers' Comp. Appeals Bd* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229].) Yet, under the dissent's interpretation of section 4662(a), an employer who hired an employee with a pre-existing loss of the use of one arm or one eye would be liable for the employee's entire 100% permanent disability if a workplace injury caused the loss of the use of the other arm or other eye.

Moreover, as a final point, it must be presumed that the Legislature had some purpose in mind when it used the phrase "total *in character*" in section 4662(a). (Emphasis added.) That is, in the absence of an affirmative reason to suppose otherwise, we must presume that the Legislature choses its words carefully and had good reason for the words it chose. (*People v. Herman* (2002) 97 Cal.App.4th 1369, 1384; *People v. Brewer* (2001) 87 Cal.App.4th 1298, 1304 ("We ... presume that the Legislature

---

[7] See *Dept. of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 617-620 [83 Cal.Comp.Cases 1680] (holding in substance that permanent total disability determinations "in accordance with the fact" under section 4662(b) are subject to section 4660).

intended every word of the statutory language to perform a useful function"); see also *Robertson v. Health Net of California, Inc.* (2005) 132 Cal.App.4th 1419, 1426 ("the Legislature is presumed to have meant exactly what it said").) Moreover, it is a basic principle of construction that meaning must be given to every word or phrase of a statute, if possible, so as not to cause any word or phrase to be mere surplusage. (*Hassan v. Mercy American River Hosp.* (2003) 31 Cal.4th 709, 716; *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230 [38 Cal.Comp.Cases 652].)

We conclude that section 4662(a)'s language that certain specified permanent disabilities "shall be conclusively presumed to be total *in character*" (emphasis added) simply signifies that the "*one* of the attributes," but not the sole attribute, of permanent disabilities under section 4662(a) are that they are total, i.e., 100%.[8] However, the fact that these specified permanent disabilities "shall be conclusively presumed to be total *in character*" (emphasis added) does not mean that these disabilities cannot also have other characteristics such as being caused in part by non-industrial factors.

On remand, the WCJ should redecide permanent disability and apportionment in applicant's three cases in light of the correct legal principle that permanent disabilities that are conclusively presumed to be total under section 4662(a) *are* subject to apportionment to causation under sections 4663 and 4664(a). This, of course, requires consideration of Dr. Weissman's and Dr. Keyes' AME opinions that applicant's legal blindness was 60% caused by his industrial injuries (i.e., 30% due to the September 11, 2006 injury and 30% due to the June 28, 2012 injury) and 40% to non-industrial causation. Further, the WCJ should consider whether applicant's other permanent disability is due to other injured body parts should be apportioned to non-industrial causation in light of the other medical evidence.

///

///

///

///

///

[8] See Merriam-Webster Online Dict. < https://www.merriam-webster.com/dictionary/character > [as of Feb. 26, 2020] [defining "character" as "one of the attributes or features that make up and distinguish" something].

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the three Findings and Awards in Case Nos. ADJ3465394, ADJ115935, and ADJ9431954 issued by the workers' compensation administrative law judge on July 19, 2018 are **RESCINDED** and that these matters are **RETURNED** to the WCJ for further proceedings, if he in his discretion deems them appropriate, and for new decisions that apply apportionment to causation principles under sections 4663 and 4664(a).

WORKERS' COMPENSATION APPEALS BOARD

DEIDRA E. LOWE

I CONCUR,

JOSÉ H. RAZO

I CONCUR AND DISSENT,

CHAIR

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 05 2020

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

MARIA FRAIRE
GLAUBER BERENSON VEGO
STATE COMPENSATION INSURANCE FUND

NPS/bea

DISSENTING OPINION OF CHAIR KATHERINE A. ZALEWSKI

I dissent. I would conclude that because the permanent disabilities delineated in Labor Code section 4662(a) "shall be conclusively presumed to be total in character," any such conclusively presumed permanent total disability cannot be apportioned to causation under sections 4663 and 4664(a). To the contrary, section 4662(a)'s declaration that the permanent disabilities it enumerates "shall be conclusively presumed to be total in character" reflects a substantive policy decision by the Legislature that these disabilities cannot be apportioned.

"Conclusive presumptions, as is now well recognized, are not truly rules of evidence, but are substantive rules of law, which exist to further particular social policies and purposes." (*Federal Deposit Ins. Corp. v. Superior Court* (1997) 54 Cal.App.4th 337, 346.) This view is echoed by Witkin: "[A] conclusive or indisputable presumption is entirely different from the ordinary rebuttable presumption: It need not have a logical basis, and no evidence may be received to contradict it. Hence, it is more accurately described as a rule of substantive law a rather than of evidence." (1 Witkin, *Cal. Evidence* (5th ed. 2018) Burden of Proof and Presumptions, §164, p. 336.) It is also affirmed by the Law Review Commission Comments on Evidence Code section 620: "Conclusive presumptions are not evidentiary rules so much as they are rules of substantive law."

Conclusive presumptions are public policy determinations made by the Legislature to further a particular goal. (*Brian C. v. Ginger K.* (2000) 77 Cal.App.4th 1198, 1204 ("[A] conclusive presumption is essentially a social policy statement made by the Legislature."); *Federal Deposit Ins. Corp., supra,* 54 Cal.App.4th at p. 346 ("Conclusive presumptions … are substantive rules of law, which exist to further particular social policies and purposes."); *Vincent B. v. Joan R.* (1981) 126 Cal.App.3d 619, 623 ("[A] conclusive presumption is actually a substantive rule of law based upon a determination by the Legislature as a matter of overriding social policy.")

As the majority recognizes, it is well established that where the law establishes a conclusive presumption evidence will not be received to contradict it. (*People v. McCall* (2004) 32 Cal.4th 175, 185; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1106 [71 Cal.Comp.Cases 1229]

("[w]here the law makes a certain fact a 'conclusive presumption' evidence cannot be received to the contrary"); Law Rev. Com. Comments on Evid. Code, § 601 ("Under existing law, some presumptions are conclusive. The court or jury is required to find the existence of the presumed fact regardless of the strength of the opposing evidence.").)

Evidence will not be received to contradict or rebut a conclusive presumption even where there may be strong countervailing evidence. (E.g., *Estate of Cornelious* (1984) 35 Cal.3d 461, 464-465 (conclusive presumption of former Evidence Code section 621(a) establishing the legitimacy of a child conceived while husband and wife were cohabitating could not be rebutted "despite the scientific advantages that have increased the reliability of blood tests"); *Pacific Employers Ins. Co. v Industrial Acc. Com.* (*Wayne*) (1947) 81 Cal.App.2d 37, 41 [12 Cal.Comp.Cases 156] (conclusive presumption of former Labor Code section 3501 that a minor child is a dependent of a deceased industrially-injured parent was applied notwithstanding defendant's allegations that the undisputed facts established that the minor had not been dependent for support on her deceased father).)

Therefore, in *Sanchez v. County of Los Angeles* (2005) 70 Cal. Comp. Cases 1440, 1457 (Appeals Board en banc),[9] the Board held that the conclusive nature of the section 4662(a) presumptions of total permanent disability precluded apportionment pursuant to section 4664(c)(1), which provides that the accumulation of all permanent disability awards issued with respect to any one region of the body cannot exceed 100% over the employee's lifetime.

Similarly, in *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd.* (*Dragomir-Tremoureux*) (2006) 71 Cal.Comp.Cases 538 (writ den.), the Board held that the injured employee's conclusively presumed permanent total disability under section 4662(a)(2) ["Loss of both hands or the use thereof"] was not subject to apportionment under section 4664(b) for a prior award.

Consistent with the above principles, the Appeals Board has repeatedly held that permanent disabilities that "shall be conclusively presumed to be total in character" pursuant to section 4662(a) are not subject to apportionment to causation under section 4663 or 4664(a).

---

[9] Disapproved on other grounds in *Kopping, supra*, 142 Cal.App.4th at pp. 1110-1111.

For example, in *Hirschberger v. Stockwell Harris Woolverton & Muehl* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 482 (Appeals Board panel decision), the employee's industrial psychiatric injury aggravated his non-industrial Parkinson's disease resulting in permanent total mental incapacity of the brain under section 4662(a)(4). The Board held that "that findings of total permanent disability based upon the conclusive presumptions contained in section 4662(a) are not subject to apportionment."

Also, in *City of Santa Clara v. Workers' Comp. Appeals Bd.* (*Sanchez*) (2011) 76 Cal.Comp.Cases 799 (writ den.), the employee suffered an injury to the brain resulting in permanent mental incapacity as the result of a stroke suffered during industrially-related knee replacement surgery, triggering the conclusive presumption of total permanent disability under former section 4662(d) [now, § 4662(a)(4)]. With respect to the issue of apportionment to causation, the Board concluded:

> Labor Code section 4662's conclusive presumption of "total" disability in and of itself precludes any type of apportionment. We note that the last sentence of [former] section 4662 [see now, § 4662(b)] which states that only in "all *other* cases, permanent total disability shall be determined in accordance with the fact," precludes section 4662 cases from the evidentiary requirements of 4663, which requires evidence of the causation of permanent disability. Section 4662 creates a conclusive presumption that [the permanent total disability] was caused by the injury.
>
> (76 Cal.Comp.Cases at p. 803 [emphasis in original].)

More recently, in *De La Rosa v. Kloeckner USA Holdings* (Case No. ADJ8621726, July 18, 2019, Appeals Board panel decision), the Board held that "[w]here the injury is conclusively presumed to have caused permanent total disability under Section 4662(a), ... apportionment will not be applied to reduce the award," citing to *Hirschberger, supra,* 84 Cal.Comp.Cases 229 (Appeals Board panel decision) and *Dragomir-Tremoureux, supra*, 71 Cal. Comp. Cases 538 (writ den.).

Subsequently, the defendant filed a petition for writ of review challenging this holding. However, in *Kloeckner USA Holdings v. Workers' Comp. Appeals. Bd.* (*De La Rosa*) (2019) 84 Cal.Comp.Cases 1020 (writ den.), the Court of Appeal summarily denied defendant's petition for writ review, finding "no reasonable basis" for that petition under section 5801. In finding no reasonable basis for defendant's petition, the Court cited to *Crown Appliance v. Workers' Comp. Appeals Bd.* (*Wong*) (2004) 115 Cal.App.4th 620, 627-628 [69 Cal.Comp.Cases 55]. It is noteworthy that, in *Crown Appliance* (*Wong*),

the Court held that a finding of no reasonable basis under section 5801 is "analogous to the lack of merit of a frivolous appeal" and that an action is frivolous "when it indisputably has no merit," i.e., "when any reasonable attorney would agree that the appeal is totally and completely without merit." (115 Cal.App4th at pp. 627-628 [internal quotation marks omitted].)

The Court of Appeal's summary affirmation of the Board's decision in *De La Rosa*, together with the Court's section 5801 finding that defendant's petition for writ of review had no reasonable basis — which, again, implies a finding that defendant's petition was frivolous and totally and completely without merit (*Crown Appliance (Wong), supra*) — strongly supports my opinion and the holding of previous Appeals Board cases that the permanent disabilities specified in section 4662(a) that are "conclusively presumed to be total in character" cannot be apportioned to causation under sections 4663 and 4664(a).

Accordingly, for the reasons above, I would affirm the WCJ's conclusion that permanent disabilities that are conclusively presumed to be total under section 4662(a) are not subject to apportionment to causation under sections 4663 and 4664(a). Again, section 4662(a)'s declaration that the permanent disabilities it enumerates "shall be conclusively presumed to be total in character" reflects a substantive policy decision by the Legislature that these disabilities cannot be apportioned.

I would observe, however, that in Case No. ADJ115935 *and* in Case No. ADJ9431954, the WCJ issued *two* separate permanent total disability (i.e., 100%) awards, with each award allowing lifetime permanent total disability indemnity at the rate of $442.62 per week. The WCJ fails to explain how two separate 100% awards are justified.

I am aware that section 4664(c) provides:

> (1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime *unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662.* As used in this section, the regions of the body are the following:
>
> (A) Hearing.
> (B) Vision.
> (C) Mental and behavioral disorders.
> (D) The spine.

(E) The upper extremities, including the shoulders.
(F) The lower extremities, including the hip joints.
(G) The head, face, cardiovascular system, respiratory system, and all other systems or regions of the body not listed in subparagraphs (A) to (F), inclusive.

(2) Nothing in this section shall be construed to permit the permanent disability rating for each individual injury sustained by an employee arising from the same industrial accident, when added together, from exceeding 100 percent.

(Lab. Code, § 4664(c), emphasis added.)

Nevertheless, in his Joint Opinion on Decision, the WCJ does not even address how, if at all, this provision of section 4664(c) could justify two separate 100% permanent disability awards in these cases.

Accordingly, for this limited reason, I would have rescinded WCJ's decisions and returned these cases to the WCJ to consider whether two separate 100% permanent disability awards are justified.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE A. ZALEWSKI, Chair

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
MAR 05 2020

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

MARIA FRAIRE
GLAUBER BERENSON VEGO
STATE COMPENSATION INSURANCE FUND

NPS/bea