WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ENRIQUE HERRERA, ***Applicant,*** **vs.** **MAPLE LEAF FOODS; U.S. FIRE INSURANCE COMPANY (Administered by CRUM & FORSTER INSURANCE); & ALEA NORTH AMERICAN INSURANCE COMPANY (Administered by TRISTAR RISK MANAGEMENT),** ***Defendants.***	**Case Nos. ADJ4258585 (OXN 0130492)** **ADJ220258 (OXN 0130487)** **OPINION AND DECISION AFTER RECONSIDERATION**

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

Applicant, Enrique Herrera, defendant, U.S. Fire Insurance Company (U.S. Fire), and defendant, Alea North American Insurance Company (Alea), each filed petitions seeking reconsideration of the Findings and Award in Case No. ADJ4258585 issued by the workers' compensation administrative law judge (WCJ) on June 19, 2015 and of the Amended Findings and Award in Case No. ADJ220258 issued by the WCJ on June 30, 2015.

In the June 19, 2015 decision in Case No. ADJ4258585, the WCJ found that applicant sustained industrial injury to his back, gastrointestinal system, psyche, right shoulder, left shoulder, left index finger, lumbar spine, neck (cervical spine), and headaches while employed as a baker by Maple Leaf Foods from October 15, 2002 through January 2, 2003. The WCJ further found that this injury caused temporary disability from January 3, 2003 through and including February 21, 2007 and that it caused 68% permanent disability after apportionment.

In the June 30, 2015 decision in Case No. ADJ220258, the WCJ found that applicant sustained industrial injury to his right index finger, right shoulder, lumbar spine, cervical spine, psyche, gastrointestinal system, and headaches while employed as a baker by Maple Leaf Foods *from October 15,*

2002 through January 2, 2003 [*sic*], rather than an October 15, 2002 specific injury as stipulated by the parties. The WCJ further found that this injury caused temporary disability from January 3, 2003 through and including February 21, 2007 and that it caused 39% permanent disability after apportionment.

Alea's petition for reconsideration filed on July 7, 2015 in Case No. ADJ4258585 contends that: (1) the date of birth used in the WCJ's rating instructions is inconsistent with the date stipulated by the parties;[1] (2) the only orthopedic injury sustained by applicant from October 15, 2002 through January 2, 2003 was to his lumbar spine; (3) applicant's only injury in the cumulative trauma claim was to the lumbar spine and, therefore, it was error to apportion 80% of applicant's internal permanent disability to the cumulative injury; (4) applicant's only injury in the cumulative trauma claim was to the lumbar spine and, therefore, it was error to apportion 80% of applicant's psychiatric permanent disability to the cumulative injury; and (5) the WCJ erred in finding greater permanent disability for the October 15, 2002 through January 2, 2003 cumulative injury than for the October 15, 2002 specific injury.

U.S. Fire's petition for reconsideration filed on July 14, 2015 in both cases contends that: (1) the Amended Findings and Award in Case No. ADJ220258 incorrectly finds a cumulative trauma from October 15, 2002 through January 2, 2003, rather than an October 15, 2002 specific injury as stipulated by the parties; (2) the date of birth used in the WCJ's rating instructions in both cases is inconsistent with the date stipulated by the parties; (3) it was error for the WCJ to issue separate awards of temporary disability indemnity for a concurrent time period in both cases.

Applicant's petition for reconsideration filed on July 24, 2015 in both cases contends that: (1) based on the opinions of Jeffrey A. Hirsch, M.D., the agreed medical evaluator (AME) in internal medicine, 80% of applicant's gastrointestinal permanent disability should have been apportioned to the October 15, 2002 specific injury, 20% to non-industrial causation, and 0% to the cumulative injury; (2) based on the opinions of Morrison S. McDavid, M.D., and Andrew L. Sew Hoy, M.D., the AMEs in orthopedics, 100% of applicant's cervical spine permanent disability and 40% of his lumbar spine permanent disability should have been apportioned to the October 15, 2002 specific injury; (3) the disability evaluation specialist (rater)

---

[1] To protect applicant's privacy, we shall not refer to the actual date of his birth in this opinion. (See Lab. Code, § 138.7(a).

failed to issue a rating for applicant's finger/grip loss disability for either injury, despite the WCJ's instructions to rate and apportion these body parts; (4) the WCJ's rating instructions contained a clerical error regarding applicant's age; (5) the Amended Findings and Award in Case No. ADJ220258 incorrectly finds a cumulative trauma from October 15, 2002 through January 2, 2003, rather than an October 15, 2002 specific injury as stipulated by the parties; (6) based on the opinions of Thomas E. Preston, M.D., the AME in psychiatry, 100% of applicant's psychiatric permanent disability should have been apportioned to the October 15, 2002 specific injury; and (7) proper apportionment of applicant's permanent disabilities to his October 15, 2002 specific injury in Case No. ADJ220258 will result in a life pension for applicant in that case.[2]

The WCJ issued a separate Report and Recommendation on Petition for Reconsideration (Report) regarding each of the three petitions for reconsideration. U.S. Fire filed answers to the petitions for reconsideration filed by Alea and applicant.

We have reviewed the record, the allegations of the three petitions for reconsideration and of U.S. Fire's two answers, and the contents of the WCJ's three Reports. Based on our review and for the reasons we shall explain, we will rescind both the June 19, 2015 Findings and Award in Case No. ADJ4258585 and the June 30, 2015 Amended Findings and Award in Case No. ADJ220258 and issue a new Joint Findings and Award that, among other things, finds that applicant's combined permanent disability in both cases is 83% after non-industrial apportionment, based on the "cannot parcel out" exception outlined in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113]

---

[2] Applicant's July 24, 2015 petition for reconsideration is untimely with respect to the WCJ's June 19, 2015 decision in Case No. ADJ4258585, having been filed well over 25 days after that decision. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10507(a)(1).) The July 24, 2015 petition, however, is timely with respect to the WCJ's June 30, 2015 decision in Case No. ADJ220258.

Nevertheless, when the Appeals Board grants reconsideration concerning a point timely raised in a petition for reconsideration, it not only may but must also grant reconsideration concerning a point not timely raised but inextricably interwoven with the point on which it did grant reconsideration. (*General Insurance Co. of America v. Workers' Comp. Appeals Bd.* (*Sale*) (1980) 104 Cal.App.3d 278, 279, 282-285 [45 Cal.Comp.Cases 403].) Here, the points applicant failed to timely raise with respect to the WCJ's June 19, 2015 decision in Case No. ADJ4258585 are inextricably interwoven with the points he timely raised with respect to the WCJ's June 30, 2015 decision in Case No. ADJ220258, as well as with the points timely raised by both defendants' petitions for reconsideration. Accordingly, we will address all the points raised in applicant's July 24, 2015 petition with respect to the June 19, 2015 decision in Case No. ADJ4258585.

(*Benson*). Specifically, we conclude that where *some aspects* of the industrially-caused permanent disability from two or more separate industrial injuries cannot be parceled out because this disability is inextricably intertwined (in this case, the psychiatric and gastrointestinal disability), then a combined permanent disability award must issue even though *other aspects* of the industrially-caused permanent disability from those injuries can be parceled out with reasonable medical probability (in this case, the orthopedic disability).

I. BACKGROUND

This matter was submitted for decision based on the parties' stipulations, applicant's testimony, and the various medical reports and depositions transcripts that were admitted in evidence.

In Case No. ADJ220258, the parties stipulated that applicant sustained industrial injury to his right index finger, right shoulder, lumbar spine, cervical spine, and psyche while employed as a baker by Maple Leaf Foods on October 15, 2002. They also stipulated that U.S. Fire was the insurance carrier having coverage for this injury. As relevant here, the disputed issues were: (1) injury to applicant's gastrointestinal system, headaches, and upper extremities; (2) applicant's period of temporary disability (with applicant claiming temporary disability from October 15, 2002 through March 4, 2009); (3) permanent disability; and (4) apportionment.

In Case No. ADJ4258585, the parties stipulated that applicant sustained industrial injury to his back, gastrointestinal system, and psyche while employed as a baker by Maple Leaf Foods from October 15, 2002 through January 2, 2003. They also stipulated that U.S. Fire had coverage from October 15, 2002 through November 30, 2002 and that Alea had coverage from December 1, 2002 through January 2, 2003. As relevant here, the disputed issues were: (1) injury to applicant's upper extremities, neck, and headaches; (2) applicant's period of temporary disability (with applicant claiming temporary disability from October 15, 2002 through March 4, 2009); (3) permanent disability; and (4) apportionment.

Although there was some variation in applicant's April 9, 2015 trial testimony and the various medical reports admitted at trial, the following appears to be the basic history.

Applicant worked as a baker at Maple Leaf Bakery. On October 15, 2002, he was trying to fix a box-sealing machine. His right arm/hand got caught in the machine and he jerked it several times to get it

free. In doing so, he lacerated tendons in his right index finger. He also experienced pain in the right neck, right shoulder, and low back due to his twisting motions while trying to free his hand. On October 17, 2002, he had surgery to repair the tendons in his right index finger. About one week after his surgery, he returned to work while wearing a cast. He initially performed light duty office work until the cast was removed about two months later. He then was put on a job operating two bread machines. Both his office work with the cast and his subsequent job operating two bread machines aggravated his neck, low back, right shoulder, and both hands. He also developed headaches and depression. His physician took applicant off work, with his last day being January 2, 2003. On October 6, 2003, he had arthroscopic right shoulder surgery. Eventually, an orthopedic surgeon recommended back surgery, but applicant declined it.

At trial, numerous medical exhibits were admitted in evidence. Although we have considered all the medical evidence, we will focus on the reports and deposition transcripts of the various AMEs. This is partly because, unless there is good reason to find an AME's opinion unpersuasive, AMEs are ordinarily followed because of their presumed expertise and neutrality. (*Pearson Ford v. Workers' Comp. Appeals Bd. (Hernandez)* (2017) 16 Cal.App.5th 889, 892, fn. 1 [82 Cal.Comp.Cases 1105]; *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) It is also partly because the WCJ relied on the AMEs and none of the petitions for reconsideration significantly challenge this reliance.

We will begin with the reports and deposition transcript of Dr. McDavid, the original AME in orthopedics.

In his initial report of June 15, 2004, Dr. McDavid diagnosed applicant to have laceration of the extensor tendon of the right index finger, surgically treated; neuromusculoligamentous strain of the right shoulder, probable brachia plexus injury plus impingement of the shoulder, the latter being surgically treated; and degenerative disk disease of the lumbar spine, multiple level with right lower extremity radiculopathy. (Dr. McDavid's 6/15/04 report, at p. 8 [WCAB Exh. Q].) Among other things, Dr. McDavid said:

> ... As best as we can make out of it, at the time of his injury in October 2002, his right hand was caught in the machine which lacerated the right index finger. He jerked at his arm to try and get it loose, injuring the right shoulder including the brachial plexus. It

> sounds like he twisted his lumbar spine at that time. The extensor tendon of the index finger was repaired. In a couple of days, he went back to work. He was operating two different machines. It sounds like he was moving repeatedly from one machine to another and likely traumatized his low back further with that event as well as having further problems with his right shoulder. ... [¶] ... He has undergone a decompressive surgery for [his right shoulder].
>
> (*Id.*, at pp. 8-9.)

Dr. McDavid found that applicant's various orthopedic conditions were permanent and stationary with specified factors of subjective and objective disability. With respect to applicant's right shoulder, Dr. McDavid stated that applicant has "a work capacity limitation for avoidance of rapid, repetitive movements plus stressful push/pull" and that "[h]e should do no overhead activities and should avoid heavy lifting." (*Id.*, at p. 9.) With respect to apportionment, Dr. McDavid said that applicant's right shoulder "problem is associated with the specific injury of October 2002." (*Id.*). Dr. McDavid also declared that applicant has lumbar spine "disability precluding heavy lifting, repeated bending and stooping," adding that applicant's "ability for sitting is limited to about 1-½ hours following which he would have to get up and move around for 10 or 15 minutes." (*Id.*) With respect to apportionment of the lumbar spine disability, Dr. McDavid said: "We believe the problem with this lumbar spine started with the event of October 2002. We would apportion 30% to it and then 70% to cumulative trauma as he continued working on up [into] January 2003." (*Id.*) Finally, Dr. McDavid found some right index finger permanent disability and indicated that applicant was precluded from "repeated power-gripping." (*Id.*, at p. 10.) With respect to apportionment, Dr. McDavid said that applicant's right index finger "problem is associated with the specific injury of October 2002." (*Id.*)

Dr. McDavid was deposed on November 3, 2004 [WCAB Exh. H]. At his deposition, Dr. McDavid observed that, at the time of the October 15, 2002 specific injury, applicant got his hand caught in a bakery machine and jerked it several times to get it free. Dr. McDavid said that "it's reasonable to think that he jerked his shoulder, had pain on the right side of his neck, ... [and] twisted his spine [causing the] onset of some degree of pain in the low back." (Dr. McDavid's 11/3/04 deposition, at 8:8-8:20.) Dr. McDavid further said that, when applicant returned to work, he was operating two bread machines and "then he had more trouble with his right shoulder and low back [and] so that's why with the low back I entertained

apportionment," i.e., 30% to the specific injury and 70% to the cumulative trauma. (*Id.*, at 8:21-9:4; see also 9:5-9:11 & 10:20-11:4.) In this regard, Dr. McDavid noted that applicant's work operating two bread machines, as well as making bread and pulling shelves in and out of the ovens, caused increased low back difficulties and was enough to cause continuous trauma to his back. (*Id.*, at 13:12-13:25.) Although Dr. McDavid acknowledged that applicant had MRI evidence of degenerative disc disease, he further stated "I just don't think we can apportion to something other than the injury with a man this young" and it is "most probably" the case that applicant's low back disability is due to the specific injury and the cumulative trauma. (*Id.*, at 14:1-18:21.) With respect to the neck and right shoulder, Dr. McDavid stated that these conditions were attributable to the jerking he did to pull his right hand out of the machine on October 15, 2002. (*Id.*, at 11:5-13:11.)

Dr. McDavid reevaluated applicant and, on January 25, 2005, issued a supplemental report [WCAB Exh. P]. He declared that applicant's "low back appears to have significantly worsened since we saw him in June 2004" and that applicant "is a surgical candidate requiring surgery at two levels in the lower lumbar spine." (Dr. McDavid's 1/25/05 report, at p. 4.) Dr. McDavid stated, therefore, that applicant is now temporarily disabled. He reiterated his belief that applicant's "low back problem is associated with a specific injury of October 2002 plus cumulative trauma that occurred on up until he stopped working in January 2003." (*Id.*)

On June 14, 2005, Dr. McDavid issued another supplemental report after reevaluating applicant [WCAB Exh. O]. In this report, Dr. McDavid notes that applicant's low back complaints have worsened but that applicant declined recommended back surgery, so his lumbar spine is permanent and stationary. Dr. McDavid declared that applicant now has "disability precluding heavy work" and that "his ability for standing, sitting and walking is about half-hour; following which he will have to change to another attitude for 10 or 15 minutes." (Dr. McDavid's 6/14/05 report, at p. 4.) Dr. McDavid's opinion regarding apportionment of applicant's low back disability remained the same, i.e., he stated: "With regard to the question of apportionment for the lumbar spine, we would apportion 30% to the October 2002 specific event and 70% to cumulative trauma on up until he stopped working in January 2003. We know of no non-industrial factors regarding apportionment." (*Id.*)

On February 5, 2006, Dr. McDavid issued his last report, which was a record review without a reevaluation [WCAB Exh. N]. He concluded: "In the end, ... I have no change with regard to opinions as previously expressed." (Dr. McDavid's 2/5/06 report, at p. 4.)

Thereafter, Dr. McDavid no longer acted as the AME in orthopedics. Instead, the parties utilized Dr. Sew Hoy as the orthopedic AME.

In his March 4, 2009 report [WCAB Exh. ZZ], Dr. Sew Hoy diagnosed applicant to have: (1) laceration of the dorsal aspect of the right index finger with division of the extensor tendon right index finger, surgically repaired; (2) residuals of musculoligamentous strain, tendinitis and probable impingement syndrome right shoulder, status post arthroscopic subacromial decompression on October 6, 2003; (3) probable neurological traction injury resulting in supraspinatus atrophy of the right shoulder; (4) residuals of musculoligamentous strain of the right shoulder; and (5) residuals of musculoligamentous strain of the lumbosacral spine and disc protrusions of the lumbosacral spine with radiating complaints down both lower extremities. (Dr. Sew Hoy's 3/4/09 report, at p. 24.) Dr. Sew Hoy stated that applicant "sustained injuries to his right index finger, right shoulder, cervical spine, and lumbosacral spine as a result of the industrial injury." (*Id.*) Dr. Sew Hoy found periods of temporary total and temporary partial disability until applicant "reached a point of maximum medical improvement two years after the date of the surgical procedure to his right shoulder, that is, on 10/6/05." (*Id.*) Dr. Sew Hoy listed various subjective and objective factors of disability, and also stated:

> With regard to the right index finger and right hand, Mr. Herrera is able to work with a prophylactic restriction of no repetitive or forceful gripping and grasping, and no repetitive fine manipulation, contemplating on a prophylactic basis a 50 percent loss of pre-injury capacity for those tasks.
>
> ***
>
> Mr. Herrera, with regard to the right shoulder, is able to work with a prophylactic restriction of no heavy lifting, and no repetitive work with the right upper extremity at or above shoulder level, contemplating on a prophylactic basis a 50 percent loss of pre-injury capacity for those tasks.
>
> ***
>
> Mr. Herrera, with regard to the cervical spine, is able to work with a prophylactic restriction of no very heavy lifting and no very prolonged work with the neck in a fixed

position at the limits of motion.

***

Mr. Herrera, with regard to the lumbosacral spine, is able to work with a prophylactic restriction of no heavy lifting, no repetitive bending and stooping, contemplating on a prophylactic basis a 50 percent loss of pre-injury capacity for those tasks, with a further prophylactic restriction of no prolonged standing and walking, contemplating on a prophylactic basis that Mr. Herrera should not be required to stand or walk for more than 45 minutes without a 15 minute period off his feet.

***

... There is not good information available that Mr. Herrera had any significant degenerative change in his musculoskeletal system prior to the date of injury. Apportionment with regard to the right index finger, right shoulder, and cervical spine relates 100 percent to the incident of 10/15/02. Apportionment with regard to the lumbar spine relates 40 percent to the incident of 10/15/02 and 60 percent to a period of continuous trauma from 10/15/02 to 1/2/03.

(*Id.*, at pp. 25-26.)

Dr. Sew Hoy was deposed on May 3, 2010 [WCAB Exh. I]. There, Dr. Sew Hoy testified that it is reasonable to conclude that applicant injured his low back on October 15, 2002. (Dr. Sew Hoy's 5/3/10 deposition, at 6:7-8:13.) He also found no basis to apportion any of applicant's low back disability to non-industrial causation. (*Id.*, at 9:4-12:20.) Dr. Sew Hoy also opined that applicant injured his neck on October 15, 2002. (*Id.*, at 12:21-15:8; 18:23-19:6.) Dr. Sew Hoy testified, however, that applicant suffered no neck injury or disability as the result of his cumulative trauma. (*Id.*, at 15:9-16:21; 20:23-21:2.) Ultimately, Dr. Sew Hoy stated that he had no changes to the opinions or conclusions of his March 4, 2009 report. (*Id.*, at 21:10-21:16.)

Applicant was also evaluated by Dr. Hirsch as the AME in internal medicine.

Dr. Hirsch's January 31, 2012 report diagnosed applicant to have multi-factorial gastrointestinal illness (including hiatal hernia/reflux disease and gastritis). (Dr. Hirsch's 1/31/12 report, at p. 10 [WCAB Exh. Z].) As to causation, Dr. Hirsch said, among other things:

... Individuals who experience significant musculoskeletal pain and/or anxiety can develop acid-related upper GI disorders. Such individuals can develop increased acidity to the gastric milieu, more pronounced episodes of reflux, and/or inappropriate

> decrease in tone of the lower esophageal sphincter. Also, Mr. Herrera used large quantities of non-steroidal anti-inflammatory drugs (NSAID's) over the years. These drugs are very useful as analgesic and anti-inflammatory medications. However, their mechanism of action is comprised of inhibition of prostaglandin synthesis. Inhibition of prostaglandin synthesis in the inflamed and painful tissues leads to decrease in pain and other problems. Inhibition of the same chemical messengers in the upper GI tract lining impedes the GI tract's ability to protect itself from the corrosive effect of gastric acid. Thus, long-term use or high-dose use of NSAID's is associated with a greatly increased risk of acid-related upper GI symptomatology.
>
> (*Id.*, at p. 11.)

Dr. Hirsch declared applicant to be permanent and stationary from an internal medicine standpoint with subjective and objective factors of disability and with a prophylactic preclusion from exposure to undue or excessive stress. (*Id.*, at pp. 24-25.) With respect to apportionment, Dr. Hirsch said: "80% of the permanent disability caused by *chronic hypertension* [*sic*] is industrial and 20% is non-industrial." (*Id.*, at p. 25 [italics added].) Furthermore, with respect to apportionment, Dr. Hirsch also stated:

> In light of the *Benson* decision, it is appropriate to comment as to how apportionment might be allocated between different dates of injury. The manner by which Mr. Herrera's occupation contributed to these problems in the field of Internal Medicine is not amenable to separation based on various dates of injury. It would require speculation to allocate specific levels of apportionment to each date of injury. 100% of the permanent industrial disability is attributed [*sic*] specific injury of October 15, 2002.
>
> (*Id.*, at p. 24.)

In his April 24, 2012 report [WCAB Exh. Y], Dr. Hirsch stated that the apportionment opinion at page 25 of his January 31, 2012 report was incorrect and that it should have read: "80% of the permanent disability caused by *the upper gastrointestinal illness* is industrial and 20% is non-industrial." (Dr. Hirsch's 4/24/12 report, at p. 2 [italics added].) Dr. Hirsch did not otherwise change his apportionment opinion.[3]

Applicant was additionally evaluated by Dr. Preston as the AME in psychiatry.

///

[3] Dr. Hirsch also issued supplemental reports of November 25, 2013 [WCAB Exh. X], January 15, 2014 [WCAB Exh. W], July 7, 2014 [WCAB Exh. V], August 13, 2014 [WCAB Exh. U], October 24, 2014 [WCAB Exh. T], December 9, 2014 [WCAB Exh. S], and January 14, 2015 [WCAB Exh. R]. These reports, as relevant here, did not change his previously stated opinions.

In his June 25, 2013 report [WCAB Exh. M], Dr. Preston diagnosed applicant to have "Major Depressive Disorder, Moderate." (Dr. Preston's 6/25/13 report, at p. 31.) Dr. Preston also gave applicant a Global Assessment of Functioning rating of 51, stating that applicant has "moderate depression, distressed and vague perceptual symptoms." (*Id.*, at p. 32.) Dr. Preston observed that applicant's "Major Depressive Disorder ... is characterized by depressed mood nearly every day, insomnia, loss of energy, feelings of worthlessness and diminished interest and pleasure in most activities [and] [h]e also suffers a chronic pain syndrome ... ." (*Id.*, at p. 33.) Dr. Preston found no periods of temporary total psychiatric disability. (*Id.*) With respect to Work Function Impairments, Dr. Preston found very slight to slight impairment in Work Functions 1 and 2 (ability to comprehend and follow instructions and ability to perform simple and repetitive tasks); slight impairment in Work Functions 4, 5, and 6 (ability to perform complex or varied tasks, ability to relate to other people beyond giving and receiving instructions, and ability to influence people); slight to moderate impairment in Work Functions 7 and 8 (ability to make generalizations, evaluations or decisions without immediate supervision and ability to accept and carry out responsibilities for direction, control and planning); and slight to moderate to moderate impairment in Work Function 3 (ability to maintain a work pace appropriate to a given workload). (*Id.*, at pp. 33-34.) With respect to causation, Dr. Preston stated: "The predominant cause of the applicant's psychiatric injury is his orthopedic condition and the pain and limitations associated with it." (*Id.*, at p. 35.) With regard to apportionment, Dr. Preston declared:

> In accordance with Labor Code §4663, I have considered all causes of the applicant's psychiatric disability. I would apportion 80% of the applicant's psychiatric disability to his orthopedic condition. This aspect of his disability would be apportioned along the lines of orthopedic apportionment. I would apportion 10% to his internal medical problems, including his gastrointestinal distress, and the other disorders diagnosed by the agreed internal medical examiner. This aspect of his disability would be apportioned along the lines of internal medical apportionment. I would apportion 10% of the applicant's psychiatric disability to his headaches. These are apparently currently in the process of being evaluated.

///

///

///

> In accord with Benson, there are two injuries claimed. It is not possible to parse out the disability arising from the specific injury of 10/15/02 and the brief cumulative trauma injury for the period during which he worked until he last worked in early 2003 without speculating. These injuries are inexorably intertwined.
>
> (*Id.*, at p. 35.)[4]

Applicant was also evaluated by Dr. Furst as the AME in neuropsychology. Dr. Furst issued a single report, dated September 16, 2014 [WCAB Exh. YY]. In that report, Dr. Furst deferred to Dr. Preston's opinions regarding applicant's Major Depressive Disorder, psychiatric disability, and apportionment. (Dr. Furst's 9/16/14 report, at p. 64.) Dr. Furst, however, also commented that "I find [applicant's] presentation [to be] entirely consistent with the earlier conclusions of Dr. Preston." (*Id.*) Dr. Furst then stated, "I assume that the current neuropsychological evaluation was for the specific purpose of evaluating the applicant's cognitive status, with regard to his memory complaints and recent surgical history." (*Id.*, at p. 65.) Dr. Furst concluded that applicant's neurocognitive testing scores "were not indicative of any clear impairment," that is "memory complaint is likely secondary to his clinical depression," "I do not see any indication of a cognitive disorder from brain dysfunction," and "[t]here is no objective evidence of memory or cognitive dysfunction from any other cause." (*Id.*)

This completes our summary of applicant's trial testimony and of the various reports and deposition transcripts of the several AMEs admitted in evidence at trial.

Following trial, the WCJ issued two sets of formal rating instructions, one for the specific injury and one for the cumulative injury.

Both sets of instructions listed subjective and objective factors of disability and work preclusions under the April 1997 Schedule for Rating Permanent Disabilities (1997 Schedule).[5] The factors of disability in the WCJ's rating instructions for applicant's right shoulder, right index finger, lumbar spine, and cervical spine were consistent with the March 4, 2009 report of Dr. Sew Hoy, the second AME in orthopedics. The factors of disability for the psyche were consistent with the June 25, 2013 report of Dr.

---

[4] Dr. Preston also issued supplemental reports of March 4, 2014 [WCAB Exh. L], July 7, 2014 [WCAB Exh. K], and November 28, 2014 [WCAB Exh. J] that, as relevant here, did not change his previously stated opinions.

[5] None of the parties' petitions for reconsideration dispute utilization of the 1997 Schedule. The 1997 Schedule may be found at http://www.dir.ca.gov/dwc/pdr1997.pdf.

Preston, the AME in psychiatry. The gastrointestinal factors of disability were consistent with the January 31, 2012 report of Dr. Hirsch, the AME in internal medicine.

In addition, both sets of rating instructions addressed apportionment.

The WCJ instructed the rater to apportion all of the right shoulder and right index finger disability to the October 15, 2002 specific injury. This is consistent with the opinion of Dr. Sew Hoy as well as that of Dr. McDavid, the first AME in orthopedics.

The WCJ instructed the rater to apportion 70% of the lumbar spine disability to the cumulative injury through January 2, 2003 and 30% to the October 15, 2002 specific injury. This is consistent with the June 15, 2004 and subsequent opinions of Dr. McDavid, the first AME in orthopedics.[6]

The WCJ instructed the rater to apportion 70% of applicant's cervical spine disability to the cumulative injury through January 2, 2003 and 30% to the October 15, 2002 specific injury. As will be discussed later, the basis for this cervical spine apportionment instruction is not clear.

The WCJ instructed the rater to apportion 80% [*sic*] of the gastrointestinal disability to the cumulative trauma through January 2, 2003 and 30% [*sic*] to the specific injury of October 15, 2002. We presume that these 80%/30% apportionment instructions constituted clerical error.

Finally, the WCJ directed the rater to apportion 100% of the psychiatric disability to the cumulative injury through January 2, 2003.

Subsequently, the rater issued recommended ratings in each case that followed the WCJ's rating instructions, including those with respect to apportionment.

For the cumulative injury through January 2, 2003 in Case No. ADJ4258585, the rater found 68% permanent disability after application of the multiple disabilities table (MDT), although the rater incorrectly utilized a "10-15-02" date of injury for the cumulative injury claim.

For the October 15, 2002 specific injury in Case No. ADJ220258, the rater found 43% permanent disability after application of the MDT.

---

[6] The WCJ's instructions did not follow the March 4, 2009 opinion of Dr. Sew Hoy, the second orthopedic AME, who opined that 60% of the lumbar spine disability related to the cumulative trauma and 40% to the specific injury of October 15, 2002.

Thereafter, the WCJ's June 19, 2015 decision in Case No. ADJ4258585 found cumulative injury from October 15, 2002 through January 2, 2003 causing 68% permanent disability after apportionment.

The WCJ's June 30, 2015 decision in Case No. ADJ220258 also found cumulative injury from October 15, 2002 through January 2, 2003 [*sic (i.e., not an October 15, 2002 specific injury)*], and that this injury caused 39% permanent disability after apportionment.

The petitions for reconsideration from applicant, U.S. Fire, and Alea all followed, as did the WCJ's various Reports.

On March 28, 2018, the Appeals Board issued new combined (joint) permanent disability rating instructions. Because our instructions directed the rater to issue a *combined* rating, we directed the rater to use the permanent disability indemnity rates in effect in 2003, i.e., the ending date of applicant's cumulative injury.[7] Like the WCJ's rating instructions, the factors of disability in the Appeals Board's instructions for applicant's right shoulder, right hand/index finger, lumbar spine, and cervical spine were consistent with the March 4, 2009 report of Dr. Sew Hoy, the second AME in orthopedics; the factors of disability for the psyche were consistent with the June 25, 2013 report of Dr. Preston, the AME in psychiatry; and the gastrointestinal factors of disability were consistent with the January 31, 2012 report of Dr. Hirsch, the AME in internal medicine. However, unlike the WCJ, the Appeals Board's instructions only directed the rater to apportion 20% of applicant's gastrointestinal disability to non-industrial causation. The Appeals Board did not instruct the rater to apportion any disability as between the October 15, 2002 specific injury and the cumulative injury from October 15, 2002 through January 2, 2003.

On March 29, 2018, based on the Appeals Board's rating instructions, the rater found that applicant's combined (joint) permanent disability for the two injuries was 83%, after apportionment of 20% of applicant's gastrointestinal disability to non-industrial causation.

On April 17, 2018, the Appeals Board issued a "Notice of Intention to Admit Rating Instructions

---

[7] This is consistent with the long-standing principle that where successive injuries cause permanent disabilities that cannot be separated, the dollar value of the combined disability is determined by application of the law in effect on the date of the last injury contributing to the disability. (*Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491, 494 [42 Cal.Comp.Cases 406] (*Wilkinson*); *Norton v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 618, 625 [45 Cal.Comp.Cases 1098] (*Norton*); *Nuelle v. Workers' Comp. Appeals Bd.* (1979) 92 Cal.App.3d 239, 249 [44 Cal.Comp.Cases 439].)

and Recommended Permanent Disability Rating into Evidence and Notice of Intention to Submit for Decision" (NIT). In this NIT, the Board noticed its intent to admit its rating instructions and the rater's recommended rating into evidence. It further gave notice that the parties had seven days (as extended by WCAB Rules 10507 and 10508)[8] to file a timely written objections to the NIT; otherwise, the matter would be submitted for decision in 30 days.

On April 27, 2018, Alea filed a timely written objection that, in essence, asserted that the Appeals Board's rating instructions (and, therefore, the rater's recommended rating) were contrary to Labor Code section 4663[9] and *Benson*'s "cannot parcel out" exception. It further argued that apportionment of applicant's psychiatric and gastrointestinal disabilities should be in accordance with the orthopedic apportionment. With respect to the psychiatric apportionment, Alea asserted that the June 25, 2013 AME report of Dr. Preston expressly states: "I would apportion 80% of the applicant's psychiatric disability to his orthopedic condition. This aspect of his disability would be apportioned along the lines of orthopedic apportionment." (WCAB Exh. M, at p. 35.) With respect to the gastrointestinal apportionment, Alea argued that applicant's gastrointestinal complaints were caused by medications taken for the orthopedic injury. Thus, the gastrointestinal apportionment should follow the orthopedic apportionment. We will address Alea's timely objection in the Discussion section of our opinion.

On May 2, 2018, U.S. Fire filed an *untimely* written objection to the Appeals Board's April 17, 2018 NIT.[10] U.S. Fire's untimely objection asserted that our instruction to issue a "combined (joint)" rating violates section 4663 and *Benson*. The untimely objection also argued that the rater's recommended right upper extremity rating is erroneous because the standard rating should be 20% rather than 25% and the occupational modifier should be "H" rather than "I." It further argued that the standard rating for the gastrointestinal disability should be 10% rather than 15%. It also attached a declaration of readiness (DOR)

---

[8] Cal. Code Regs., tit. 8, §§ 10507, 10508.

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

[10] The Appeals Board's NIT was served by mail on April 17, 2018. The seven-day period for objecting would have been April 24, 2018, but this seven-day period was extended by the five-day mailing provision of WCAB Rule 10507(a)(1) to Sunday, April 29, 2018 (Cal. Code Regs., tit. 8, § 10507(a)(1)). In turn, the next business day provision of WCAB Rule 10508 extended the last day for filing to Monday, April 30, 2018 (Cal. Code Regs., tit. 8, § 10508).

stating that the principal issue is "Object to Rating," although the DOR did not actually check any box requesting a hearing to cross-examine the rater.[11] We will address U.S. Fire's untimely objection in the Discussion section of our opinion.

On May 14, 2018, applicant responded to defendant's objections to the NIT, essentially arguing that the Appeals Board's rating instructions and the rater's rating are correct.

Although more than 30 days have elapsed since our April 17, 2018 NIT, no settlement papers have been received.

II. DISCUSSION

At the outset, we will quickly dispose of five relatively simple issues.

First, all parties and the WCJ agree that the date of birth used by the WCJ in his formal rating instructions (and as subsequently used in the rater's recommended ratings) was incorrect and that the date of birth stipulated by the parties at trial should have been used. We used the correct date of birth in issuing the new combined (joint) permanent disability rating instructions and the rater used the correct date of birth in issuing the new recommended rating.

Second, all parties and the WCJ agree that the June 30, 2015 decision in Case No. ADJ220258 should have found an October 15, 2002 specific injury rather than a cumulative injury from October 15, 2002 through January 2, 2003. We used October 15, 2002 as the date of injury in Case No. ADJ220258 in issuing our new combined (joint) permanent disability rating instructions and the rater used it in issuing the new recommended rating. We will also use it in our Joint Findings and Award.

Third, in both the specific injury case (Case No. ADJ220258) and the cumulative injury case (Case No. ADJ4258585), the WCJ found that applicant was temporarily disabled from January 3, 2003 through

---

[11] Because U.S. Fire's May 2, 2018 objection was untimely, we will not consider it. We note, however, that its *Benson* argument rests at the core of our discussion of the parties' underlying petitions for reconsideration, so U.S. Fire's untimely objection does not prejudice it in this regard. Further, as to U.S. Fire's contentions about the standard ratings and the occupational modifier, we observe that raters are experts in the application of the rating schedule. (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 622 (Appeals Board en banc); *Aliano v. Workers' Comp. Appeals Bd.* (1979) 100 Cal.App.3d 341, 373 [44 Cal.Comp.Cases 1156].) Moreover, U.S. Fire's objection does not clearly and specifically state why different standard ratings or occupational modifiers should have been used. Further, U.S. Fire's DOR neither requested to cross-examine the rater nor indicated that it was prepared to offer any evidence to rebut the rater's expert opinion regarding the standard ratings and the occupational modifier.

and including February 21, 2007. The WCJ, however, issued *separate* awards of temporary disability indemnity for this period in *both* cases. It is settled law that an injured employee is not entitled to receive a double amount of temporary disability benefits for a single period of temporary disability. (*Foster v. Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505, 1511-1513 [73 Cal.Comp.Cases 466].) In our disposition, we will correct this error and issue a single temporary disability indemnity award.

Fourth, applicant's petition for reconsideration contends that the original rater failed to issue a recommended rating for applicant's finger/grip loss, despite the WCJ's express rating instructions. Preliminarily, this alleged error became moot when we issued our own rating instructions and the new rater issued a new recommended rating. Further, applicant did not timely object to our NIT regarding our rating instructions or the new recommended rating. In any event, both the original and new raters used rating strings beginning with "7." This is the *generic* Disability Number for "Shoulders and Arms." (See http://www.dir.ca.gov/dwc/pdr1997.pdf, at p. 2-7.) This suggests that both raters combined applicant's right index finger/right-hand disability with his right shoulder disability to avoid any potential pyramiding and/or overlap problem. Applicant does not show how this might be erroneous and we will accept the expert opinions of both raters. (See *Aliano, supra,* 100 Cal.App.3d at p. 373 (a rater "is an expert ... in the application of the rating schedule"); accord: *Blackledge, supra,* 75 Cal.Comp.Cases at p. 622.)

Fifth, Alea's petition for reconsideration contends that the only orthopedic injury sustained by applicant in the October 15, 2002 through January 2, 2003 cumulative injury case was to his lumbar spine and, therefore, it was error to apportion any of applicant's internal or psychiatric permanent disability to the cumulative injury. However, at the April 9, 2015 trial, the parties *stipulated* that applicant sustained cumulative injury to his back, gastrointestinal system, and psyche from October 15, 2002 through January 2, 2003. (MOH/SOE, 4/9/15 trial, at 2:20-2:24 [Stipulation No. 1].) It is well-established that the WCAB may make findings based on stipulations of the parties (Lab. Code, § 5702; Cal. Code Regs., tit. 8, §§ 10496, 10497) and that the parties' stipulations are binding on them unless good cause for relief is shown. (*County of Sacramento v. Workers' Comp. Appeals Bd.* (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1118-1121 [65 Cal.Comp.Cases 1]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 791 [52 Cal.Comp.Cases 419].) Alea has not shown good cause why it should be relieved of the

stipulation that applicant's cumulative trauma included injury to his internal system and psyche.

We turn now to the foundational issues in these cases: that is, the level of applicant's industrial permanent disability and the extent to which, if any, that industrial permanent disability should be apportioned as between his specific injury of October 15, 2002 and his cumulative injury from October 15, 2002 through January 2, 2003.

In addressing these issues, we observe that when the Appeals Board grants reconsideration, it has the power under Labor Code sections 5906 and 5908 to make new and different findings on all issues presented for determination at the trial level, even with respect to issues not raised in the petition(s) for reconsideration before it. (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 (Appeals Board en banc); *Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322] (a grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination"); *State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98] (a grant of reconsideration "threw the entire record open for review"); see also *Tate v. Industrial Acc. Com.* (1953) 120 Cal.App.2d 657, 663 [18 Cal.Comp.Cases 246]; *Pacific Employers Ins. Co. v. Industrial Acc. Com. (Sowell)* (1943) 58 Cal.App.2d 262, 266–267 [8 Cal.Comp.Cases 79].) In these cases, we deem it appropriate to evaluate the entire record with respect to the questions of permanent disability and apportionment and not limit our review to the specific issues raised by the parties in their petitions for reconsideration.

Senate Bill 899 (SB 899), which became effective in 2004, enacted sections 4663 and 4664(a).[12] Among other things, section 4663 states that "[a]pportionment of permanent disability shall be based on causation" and section 4664(a) provides that "[t]he 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

[12] After SB 899, section 4663 was amended in ways not relevant here.

employment."[13]

In *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565], the Supreme Court declared that sections 4663 and 4664(a) established a "new regime of apportionment based on causation" (40 Cal.4th at p. 1327) and 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.)

Under SB 899, however, the burden of proving apportionment of permanent disability still rests with the defendant(s). (*Benson, supra,* 170 Cal.App.4th at p.1560; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc).)

Section 4663, subdivision (b), requires that "[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.*" (Italics added.) Therefore, ordinarily, there will be medical evidence that will enable each distinct industrial injury to be separately rated based on its individual contribution the employee's permanent disability. (*Benson, supra,* 170 Cal.App.4th at p. 1560.)

Nevertheless, in *Benson*, the Court of Appeal held:

> [T]here may be limited circumstances ... when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified.
>
> (*Benson, supra,* 170 Cal.App.4th at p. 1560.)

In so holding, the *Benson* court affirmed the Appeals Board's underlying decision in *Benson v.*

---

[13] Even though applicant's October 15, 2002 specific injury and his cumulative injury from October 15, 2002 through January 2, 2003 occurred before the effective date of SB 899, the apportionment provisions of sections 4663 and 4664 are nevertheless applicable because his claims did not become final before the effective date. (*E & J Gallo Winery v. Workers' Comp. Appeals Bd.* (*Dykes*) (2005) 134 Cal.App.4th 1536, 1543 [70 Cal.Comp.Cases 1644]; *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (*Scheftner*) (2005) 131 Cal.App.4th 517, 531 [70 Cal.Comp.Cases 999]; *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 285–289 [70 Cal.Comp.Cases 133].)

The Permanente Medical Group (2007) 72 Cal.Comp.Cases 1620 (Appeals Board en banc). There, the Appeals Board held that when multiple industrial injuries combine to cause permanent disability, the permanent disability caused by each injury must be separately calculated — *unless* the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages of the overall permanent disability caused by each industrial injury. (*Id.*, 72 Cal.Comp.Cases at pp. 1622-1623, 1634.) The Appeals Board further held that if a physician opines that the approximate percentages of disability caused by each injury cannot reasonably be parceled out, then this constitutes an apportionment determination within the meaning of section 4663, subdivision (b). (*Id.*, 72 Cal.Comp.Cases at p. 1634.)

These holdings by the Court of Appeal and the Appeals Board in *Benson* have been reaffirmed. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Dorsett*) (2011) 201 Cal.App.4th 443, 453 [76 Cal.Comp.Cases 1138] ("successive injuries must be rated separately, except when physicians cannot parcel out the causation of disability").)

Here, in his June 25, 2013 report, Dr. Preston, the AME in psychiatry, declares:

> In accord with Benson, there are two injuries claimed. It is not possible to parse out the disability arising from the specific injury of 10/15/02 and the brief cumulative trauma injury for the period during which he worked until he last worked in early 2003 without speculating. These injuries are inexorably intertwined.
>
> (WCAB Exh. M, at p. 35.)

This statement by Dr. Preston establishes that applicant's psychiatric disability falls within the *Benson* "cannot parcel out" exception and, accordingly, defendants have failed to carry their burden of proof on apportionment of the psychiatric disability between the specific and cumulative injuries.[14]

In its April 27, 2018 timely objection to the Appeals Board's April 17, 2018 NIT, Alea contends that the apportionment of applicant's psychiatric disability should follow the apportionment of applicant's orthopedic disability. This contention is predicated on Dr. Preston's June 25, 2013 statements that: (1) "The predominant cause of the applicant's psychiatric injury is his orthopedic condition and the pain

---

[14] Dr. Preston also found no basis for apportionment of applicant's psychiatric disability to *non-industrial* causation. Rather, he concluded that the psychiatric disability related entirely to applicant's industrial injuries, i.e., 80% to his orthopedic injuries, 10% to his gastrointestinal injury, and 10% to his headaches.

and limitations associated with it" (WCAB Exh. M, at p. 35); and (2) "I would apportion 80% of the applicant's psychiatric disability to his orthopedic condition. This aspect of his disability would be apportioned along the lines of orthopedic apportionment." (*id.*).

As to Dr. Preston's first statement, the fact that applicant's psychiatric *injury* was predominantly caused by the pain and limitations arising from his orthopedic *injury* does not establish that apportionment of applicant's psychiatric *disability* should follow the apportionment of his orthopedic *disability*. (*Escobedo, supra,* 70 Cal.Comp.Cases at p. 611 ["[T]he percentage to which an applicant's *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." (italics in original).].)

Dr. Preston's second statement, though, does initially indicate that 80% of applicant's psychiatric disability should "be apportioned along the lines of applicant's orthopedic apportionment."[15] Yet, this statement is immediately followed by Dr. Preston's statement that, "*In accord with Benson, ... [i]t is not possible to parse out the disability* arising from the specific injury of 10/15/02 and the brief cumulative trauma injury for the period during which he worked until he last worked in early 2003 without speculating. *These injuries are inexorably intertwined.*" (WCAB Exh. M, at p. 35 [italics added].) Accordingly, whatever Dr. Preston might mean by suggesting that applicant's psychiatric disability should be apportioned along the lines of his orthopedic disability, Dr. Preston unequivocally concludes that the *Benson* "cannot parcel out" exception applies with respect to applicant's psychiatric disability. Therefore, in accordance with *Benson*, applicant's psychiatric disability from his specific and cumulative injuries will be rated together under a combined award.

Also, the January 31, 2012 report of Dr. Hirsch, the AME in internal medicine, states:

> In light of the *Benson* decision, it is appropriate to comment as to how apportionment might be allocated between different dates of injury. The manner by which Mr. Herrera's occupation contributed to these problems in the field of Internal Medicine is

---

[15] This statement is presumably a reference to the orthopedic apportionment opinions of Dr. McDavid, the original orthopedic AME, and Dr. Sew Hoy, the subsequent orthopedic AME. (See, e.g., WCAB Exh. ZZ, at pp. 25-26; WCAB Exh. Q, at pp. 9-10.)

> not amenable to separation based on various dates of injury. It would require speculation to allocate specific levels of apportionment to each date of injury. 100% of the permanent industrial disability is attributed [*sic*] specific injury of October 15, 2002.
>
> (WCAB Exh. Z, at p. 24.)

We read Dr. Hirsch's second and third sentences as opining that applicant's gastrointestinal disability also falls within the *Benson* "cannot parcel out" exception. Therefore, applicant's industrial gastrointestinal disability from his specific and cumulative injuries will be rated together under a combined award.[16] However, consistent with Dr. Hirsch's April 24, 2012 opinion that "80% of the permanent disability caused by the upper gastrointestinal illness is industrial and 20% is non-industrial" (WCAB Exh. Y, at p. 2), we will apportion 20% of the gastrointestinal disability to non-industrial causation.

In its April 27, 2018 timely objection to the Appeals Board's April 17, 2018 NIT, Alea contends that the apportionment of applicant's gastrointestinal disability disability should follow the apportionment of applicant's orthopedic disability because "applicant's internal complaints were caused by medications taken for the orthopedic injury."

As Alea argues, Dr. Hirsch did find that applicant's use of non-steroidal anti-inflammatory drugs

---

[16] We are aware, of course, that the fourth and last sentence states, "100% of the permanent industrial disability is attributed [*sic*] specific injury of October 15, 2002." Yet, this sentence is in sharp conflict with the statements in Dr. Hirsch's second and third sentences. The Appeals Board is empowered to draw reasonable inferences from the evidence presented (*Judson Steel Corp. v. Workers' Comp. Appeals Bd.* (*Maese*) (1978) 22 Cal.3d 658, 664 [43 Cal.Comp.Cases 1205]) and to resolve conflicts in the evidence. (*Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280–281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) We conclude that Dr. Hirsch's statements that applicant's permanent disability is "not amenable to separation based on various dates of injury" and that it "would require speculation to allocate specific levels of apportionment to each date of injury" represent the most accurate statement of his opinion. Accordingly, we will disregard Dr. Hirsch's statement that "100% of the permanent industrial disability is attributed [*sic*] specific injury of October 15, 2002."

Moreover, Dr. Hirsch utterly fails to explain his reasoning (i.e., the how and why) behind his statement that "100% of the permanent industrial disability is attributed [*sic*] specific injury of October 15, 2002." (See *Escobedo, supra,* 70 Cal.Comp.Cases at p. 621; see also, e.g., *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1381–1382 [72 Cal.Comp.Cases 389].) Indeed, this purported attribution of 100% of the gastrointestinal permanent disability to the October 15, 2002 specific injury is flatly at odds with Dr. Hirsch's statement that it "would require speculation to allocate specific levels of apportionment to each date of injury." Further, it is well-established that an opinion that rests on speculation does not constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd.* (*Place*) (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Zemke* v. *Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].) Therefore, a speculative opinion cannot carry a defendant's burden of proof on apportionment.

(NSAIDs) to alleviate his orthopedic pain caused his gastrointestinal injury. (Dr. Hirsch's 1/31/12 report, at p. 11 [WCAB Exh. Z].) Yet, although applicant's gastrointestinal *injury* resulted from treatment for his orthopedic *injury*, this does not establish that the apportionment of applicant's gastrointestinal *disability* should follow the apportionment of his orthopedic *disability*. (*Escobedo, supra,* 70 Cal.Comp.Cases at p. 611.) Moreover, although industrially-related medical treatment that results in disability cannot be apportioned to *non-industrial* causation (*Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1262-1263 [82 Cal.Comp.Cases 679]), Dr. Hirsch did not apportion to non-industrial causation here. He simply concluded that, under *Benson*, the extent to which applicant's industrially-prescribed NSAIDs caused his gastrointestinal disability "is not amenable to separation based on various dates of injury" and "[i]t would require speculation to allocate specific levels of apportionment to each date of injury." (WCAB Exh. Z, at p. 24.) The fact that Dr. Hirsch could not apportion applicant's *industrial* gastrointestinal disability as between his specific injury and his cumulative injury is fully consistent with the "cannot parcel out" exception of the Court of Appeal's and the Appeals Board's decisions in *Benson*. (*Benson, supra,* 170 Cal.App.4th at p. 1560 [affg. *Benson, supra,* 72 Cal.Comp.Cases at pp. 1622-1623]; accord *Dorsett, supra*, 201 Cal.App.4th at p. 453 ("successive injuries must be rated separately, except when physicians cannot parcel out the causation of disability").)

Having concluded that both applicant's industrial psychiatric disability and industrial gastrointestinal disability must be rated together under the *Benson* "cannot parcel out" exception, we now consider whether what this means for rating the industrially-caused disability for applicant's other body parts.

It is settled law that all separate disabilities arising out of a *single injury* are rated together. (*Norton, supra,* 111 Cal.App.3d at p. 626 ("where multiple independent factors of disability to different parts of the body result from a *single* industrial injury, the proper method of rating is to include all factors of disability in the rating instructions and then achieve an overall rating by use of the multiple disabilities table" (italics in original)]; see also *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93] [chef suffered specific back injury but, as a result of blood transfusions given during later back surgery, contracted hepatitis; employee's spinal disability and liver disability were rated

together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Morgan v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 710 [43 Cal.Comp.Cases 1116] [police officer suffered a cumulative injury causing hypertension, peptic ulcer, hepatitis, gastrointestinal bleeding, and hernia; employee's separate disabilities were rated together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720 [41 Cal.Comp.Cases 81] [employee's chest and left knee injuries rated together].)

Accordingly, under these cases: (1) *all* of the industrially-caused disability from applicant's October 15, 2002 specific injury must be rated together; and (2) *all* of the industrially-caused disability from applicant's October 15, 2002 through January 2, 2003 cumulative injury must be rated together.

The obvious difficulty, though, is that the psychiatric and gastrointestinal disability caused by the specific and cumulative injuries cannot be parceled out because they are inextricably intertwined. Accordingly, this precludes separate awards of permanent disability for each of the two injuries and instead mandates that *all* of the industrially-caused disability (orthopedic, psychiatric, and gastrointestinal) be rated together in a single joint award.

This conclusion is consistent with *Dileva v. Northrop Grumman Systems Corp.* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 99 (Appeals Board panel decision), writ den. sub nom. *Northrop Grumman Systems Corp. v. Workers' Comp. Appeals Bd.* (*Dileva*) (2015) 80 Cal.Comp.Cases 749. In *Dileva*, both applicant's orthopedic and his psychiatric disability resulting from three separate dates of injury were rated *together* in a joint award under *Benson* because the treating psychiatrist found the psychiatric effects of the three injuries to be inextricably intertwined, even though the orthopedic AME was able to apportion applicant's orthopedic disability among three dates of injury.

This conclusion is also consistent with *Fields v. City of Cathedral City* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 103 (Appeals Board panel decision), writ den. sub nom. *City of Cathedral City v. Workers' Comp. Appeals Bd.* (*Fields*) (2013) 78 Cal.Comp.Cases 696. In *Fields*, both applicant's orthopedic and internal disability resulting from a specific injury and a cumulative injury were rated together in a joint award under *Benson* because the AME in internal medicine determined that the internal

disability was inextricably intertwined.

The combined rating under *Benson* of all of the disability from applicant's specific and cumulative injuries is analogous to *Norton, supra,* 111 Cal.App.3d 618. In *Norton*, the permanent disability from injured employee's three specific back injuries, his cumulative back injury, and his cumulative gastric injury were all rated together under *Wilkinson, supra,* 19 Cal.3d 491, because they became permanent and stationary at the same time. Of course, we cite to *Norton* only for an analogy. We fully recognize that, although SB 899 did not expressly abrogate *Wilkinson*, the language of sections 4663 and 4664 mandate that the *Wilkinson* doctrine no longer applies ***as long as the disability caused by separate injuries can be parceled out***. (*Benson, supra*, 170 Cal.App.4th at p. 1560; accord: *Dorsett, supra*, 201 Cal.App.4th at pp. 451-452.) Here, however, the psychiatric and gastrointestinal disabilities in these cases cannot be parceled out.

Because all of applicant's industrial disability must be rated together, we issued new rating instructions and the rater issued a new rating, as discussed above. We will accept the new recommended rating. (See *Aliano, supra,* 100 Cal.App.3d at p. 373 (a rater "is an expert ... in the application of the rating schedule"); *Blackledge, supra,* 75 Cal.Comp.Cases at p. 622.)

As stated previously, the rater's combined (joint) permanent disability rating was 83% after application of the multiple disabilities table (MDT) and after apportionment of 20% of applicant's gastrointestinal disability to non-industrial causation. This 83% permanent disability rating equates to permanent disability indemnity in the total amount of $125,005.00, payable at the rate of $230.00 per week from applicant's permanent and stationary (P&S) date. We observe that the parties did not stipulate to a P&S date at the April 9, 2015 trial (see Minutes of Hearing, p.3, lines 21-22) and that neither the WCJ's June 19, 2015 nor June 30, 2015 made findings on this issue. Therefore, the issue of applicant's P&S date will be deferred and returned to the trial level for a determination in the first instance.[17]

[17] Both the WCJ's June 19, 2015 and June 30, 2015 decisions made "findings" that applicant's permanent disability indemnity was "payable beginning on 2/22/07." However, these "findings" do not constitute an actual determination of the disputed issue of applicant's P&S date and neither of the WCJ's related opinions give any explanation of what evidence this "2/22/07" date is based on. Moreover, we observe that February 22, 2007 is well before the dates that applicant was first evaluated by Dr. Sew Hoy, Dr. Hirsch, and Dr. Preston, i.e., the three AMEs upon whom the WCJ relied in determining permanent disability.

Because applicant's permanent disability rating is 70% or above, he is entitled to the payment of a life pension (Lab. Code, § 4659(a)), with annual cost of living adjustments (COLAs) based on the state average weekly wage (SAWW). (Lab. Code, § 4659(c); *Baker v. Workers' Comp. Appeals Bd. (X.S.)* (2011) 52 Cal.4th 434 [76 Cal.Comp.Cases 701] (*Baker*).)[18] The rater's recommended rating concluded that applicant is entitled to a life pension of $88.90 per week. When we served this recommended rating with our April 17, 2018 NIT, no party objected to this $88.90 per week life pension calculation. Accordingly, we will accept $88.90 as the weekly rate.

As discussed above, however, applicant's P&S date has not been determined and, therefore, it is not yet known when applicant's entitlement to permanent disability indemnity begins or, therefore, when applicant's entitlement to a life pension begins. Among other things, this also means we cannot determine the date on which applicant's section 4659(c) initial annual COLA should be calculated. This is because, in *Baker*, the Supreme Court concluded that the Legislature intended the annual COLA authorized by section 4659(c) should first be calculated and applied as of the January 1 following the date on which partial permanent disability benefits become exhausted. (*Baker, supra*, 52 Cal.4th at p. 443.) Accordingly, these issues must be deferred and returned to the trial level for a determination in the first instance.

In addition, as discussed above, we will issue a joint award of temporary disability indemnity, less credit for wages earned and less credit for temporary disability and/or permanent disability payments made for that period. None of the parties' petitions for reconsideration disputed either the period or the rate found in the WCJ's two decisions, so these issues are now waived. (Lab. Code, §§ 5902, 5904.)

We will also make a joint award of further medical treatment. The WCJ's decisions found that applicant was entitled to further medical treatment in each case and no party sought reconsideration of these findings, so the issue is now waived. (Lab. Code, §§ 5902, 5904.)

We will also make a joint award of self-procured medical treatment and medical-legal costs in amounts to be deferred with jurisdiction reserved at the trial level, consistent with the WCJ's two decisions.

---

[18] We recognize that section 4659(c) applies only to "injuries occurring on or after January 1, 2003." Again, however, where successive injuries cause disabilities that cannot be separated, the injured employee's award is determined by application of the law in effect on the date of the last injury contributing to the disability. (*Wilkinson, supra,* 19 Cal.3d at p. 494; *Norton, supra,* 111 Cal.App.3d at p. 625; *Nuelle, supra,* 92 Cal.App.3d at p. 249.)

The parties stipulated that EDD has paid out a total of $17,108.00 in state disability benefits. We shall direct that, to the extent this lien remains unsatisfied, funds sufficient to satisfy this lien shall be withheld from the accrued and unpaid portions of applicant's temporary disability indemnity award, permanent disability indemnity award, and/or his life pension award.

Of course, in his two decisions, the WCJ awarded attorney's fees to applicant's counsel, the Law Office of Howard J. Wasserman. However, in light of the increased permanent disability award and the award of a life pension, we will defer the amount of the attorney's fee so that it can be resolved at the trial level in the first instance. To ensure that there will be funds sufficient to provide a reasonable attorney's fee, we will order that funds corresponding to 25% of the permanent disability indemnity award (i.e., without the life pension) be withheld from applicant's accrued and unpaid permanent disability indemnity and/or accrued and unpaid temporary disability indemnity. We emphasize, however, that we are in no way suggesting that a 25% fee is or is not reasonable under the circumstances of these cases. Indeed, in his two decisions, the WCJ determined that a reasonable attorney's fee was 15% of the permanent disability benefits awarded, plus 15% of the net "new money" temporary disability benefits awarded. On remand, however, the WCJ can also consider the present value of applicant's life pension, taking into consideration reasonable estimates of applicant's prospective COLA adjustments based on the SAWW. (Cf., e.g., *Wilson v. Piedmont Lumber & Mill Co.* (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 196 (Appeals Board panel decision), as amended 2012 Cal. Wrk. Comp. P.D. LEXIS 48 (Appeals Board panel decision).)

We shall select U.S. Fire to administer the joint award, subject to its right to seek contribution in accordance with the law from Alea in separate contribution proceedings.[19] The selection of a particular defendant to administer a joint award is within the WCAB's discretion. (*General Ins. Co. of America v. Workers' Comp. Appeals Bd. (Sale)* (1980) 104 Cal.App.3d 278, 286 [45 Cal.Comp.Cases 403]; *Gomez v. Golden Eagle Ins. Co.* (2004) 68 Cal.Comp.Cases 753, 762 (Appeals Board en banc decision).) Here,

---

[19] We need not and do not now decide the issue of whether the one-year statute of limitations of Labor Code section 5500.5 for initiating contribution proceedings in cumulative injury cases applies to successive injury cases like this one.

We also need not and do not now decide whether the Petition for Contribution/Reimbursement filed by U.S. Fire on March 14, 2016 can be deemed to apply to our Joint Findings, Award, and Order.

it is appropriate to select U.S. Fire to administer the joint award because, in addition to being jointly liable for applicant's October 15, 2002 through January 2, 2003 cumulative injury (see Lab. Code, § 5500.5(a)), it is solely liable for applicant's October 15, 2002 injury. Moreover, the medical evidence suggest that applicant's cumulative injury was, to some extent, a compensable consequence of his October 15, 2002 specific injury.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award in Case No. ADJ4258585 (OXN 0130492) issued by the workers' compensation administrative law judge on June 19, 2015 and the Amended Findings and Award in Case No. ADJ220258 (OXN 0130487) issued by the workers' compensation administrative law judge on June 30, 2015 are **RESCINDED** and that the following Joint Findings and Award and Order is **SUBSTITUTED** therefor:

JOINT FINDINGS OF FACT
(Case Nos. ADJ4258585 (OXN 0130492) & ADJ220258 (OXN 0130487))

1. Enrique Herrera, while employed on October 15, 2002 as a baker, occupational group number 420, at Oxnard, California, by Maple Leaf Foods, sustained injury arising out of and in the course of his employment to his back, gastrointestinal system, psyche, right shoulder, left shoulder, right index finger, lumbar spine, neck (cervical spine), and headaches. (Case No. ADJ220258 (OXN 0130487.)
2. Enrique Herrera, while employed during the period of October 15, 2002 through January to come 2003 as a baker, occupational group number 420, at Oxnard, California, by Maple Leaf Foods, sustained injury arising out of and in the course of his employment to his right index finger, right shoulder, lumbar spine, cervical spine, psyche, gastrointestinal system, and headaches. (Case No. ADJ4258585 (OXN 0130492).)
3. U.S. Fire Insurance Company (administered by Crum & Forster Insurance) was the employer's workers' compensation insurance carrier from October 15, 2002 through November 30, 2002. Alea North American Insurance Company (administered by TriStar Risk Management) was the

employer's workers' compensation insurance carrier from December 1, 2002 through January 2, 2003.

4. At the time of both injuries, the employee's actual earnings were $518.09 per week, sufficient to entitle him to a compensation rate of $345.37 per week for temporary disability indemnity and of permanent disability indemnity rates of $185.00 per week if the permanent disability is less than 70% or $230.00 per week if the permanent disability is at least 70% but less than 100%.
5. The injuries combined to cause temporary partial or total disability from January 3, 2003 to and including February 21, 2007, less credit for wages earned and less credit for payments made for that period as either temporary disability indemnity benefits or permanent disability indemnity benefits.
6. The injuries combined to cause permanent disability of 83%, after adjustment for age and occupation and after apportionment to non-industrial causation.
7. The issue of applicant's permanent and stationary date and all related issues (including but not necessarily limited to the commencement date of applicant's entitlement to permanent disability indemnity and/or which January 1 to begin calculating applicant's annual COLA under section 4659(c)) are deferred with jurisdiction reserved. The WCJ shall determine these issues in the first instance.
8. Applicant is in need of further medical treatment to cure or relieve from the effects of the injuries.
9. Applicant actually, reasonably and necessarily incurred costs for the purposes of proving a contested claim, and is entitled to reimbursement for costs of necessary medical treatment, said liens to be paid in accordance with the appropriate fee schedule or, in the absence of a fee schedule, in reasonable amounts, with jurisdiction reserved in the event of a dispute over reasonable value only.
10. The Employment Development Department paid applicant state disability benefits at the rate of $329.00 per week from February 5, 2003 to April 21, 2003; at the rate of $169.00 per week from June 11, 2004 through April 25, 2005; and at the rate of $144.00 per week from April 29, 2005 to February 26, 2006, for a total of $17,108.00.

11. The issue of the reasonable value of the legal services performed by applicant's counsel, the Law Office of Howard J. Wasserman, is deferred with jurisdiction reserved. The WCJ shall determine this issue in the first instance.

JOINT AWARD

(Case Nos. ADJ4258585 (OXN 0130492) & ADJ220258 (OXN 0130487))

AWARD IS MADE in favor of **ENRIQUE HERRERA** jointly and severally against **U.S. FIRE INSURANCE COMPANY** (Administered by Crum & Forster Insurance) and **ALEA NORTH AMERICAN INSURANCE COMPANY** (Administered by Tristar Risk Management), as follows:

(a) All further medical treatment reasonably required to cure or relieve from the effects of the injuries herein.

(b) Temporary disability indemnity at the rate of $345.37 per week from January 3, 2003 to and including February 21, 2007, less credit to defendants for wages earned and for payments made for that period as either temporary disability indemnity benefits or permanent disability indemnity benefits in an amount to be adjusted by the parties (with jurisdiction reserved before a WCJ at the trial level if a dispute arises), and less the lien claim of the Employment Development Department, which is hereby allowed in an amount to be adjusted by the parties (with jurisdiction reserved before a WCJ at the trial level if a dispute arises).

(c) Permanent disability indemnity in the total amount of $125,005.00 payable at the rate of $230.00 per week beginning on a date to be determined by the WCJ in the first instance, with jurisdiction reserved, and continuing for 543.50 weeks or until the total amount thereof shall have been paid, with any accrued sums payable forthwith, less credit to defendants for any sums heretofore paid on account thereof in an amount to be adjusted by the parties (with jurisdiction reserved before a WCJ at the trial level if a dispute arises), and thereafter a life pension of $88.90 per week, and less the lien claim of the Employment Development Department, which is hereby allowed in an amount to be adjusted by the parties (with jurisdiction reserved before a WCJ at the trial level if a dispute arises).

(d) Medical-legal expense in an amount to be adjusted by the parties, with jurisdiction reserved before a WCJ at the trial level if a dispute arises.

(e) Reimbursement for self-procured medical expense, in an amount to be adjusted by the parties, with jurisdiction reserved before a WCJ at the trial level if a dispute arises.

(f) Interest as provided by law.

JOINT ORDERS
(Case Nos. ADJ4258585 (OXN 0130492) & ADJ220258 (OXN 0130487))

IT IS ORDERED that U.S. Fire Insurance Company (administered by Crum & Forster Insurance) shall administer all benefits payable to applicant in Case Nos. ADJ4258585 (OXN 0130492) and ADJ220258 (OXN 0130487), subject to its right to seek contribution from Alea North American Insurance Company (administered by TriStar Risk Management), with jurisdiction over separate contribution proceedings reserved before a WCJ at the trial level if a dispute arises.

IT IS FURTHER ORDERED that, pending further order of the WCJ or the Appeals Board, U.S. Fire Insurance Company (administered by Crum & Forster Insurance) shall withhold in trust from applicant's accrued and unpaid permanent disability indemnity and/or temporary disability indemnity: (1) funds sufficient to satisfy the $17,108.00 lien claim of the Employment Development Department, to the extent this lien remains unsatisfied; and (2) funds corresponding to 25% of applicant's permanent disability indemnity award (i.e., without the life pension).

IT IS FURTHER ORDERED that the rating instructions issued by the Appeals Board on March 28, 2018 and the recommended permanent disability rating issued by the Disability Evaluation Unit on March 29, 2018 are **ADMITTED IN EVIDENCE**.

///

///

///

///

///

///

IT IS FURTHER ORDERED that all other pending issues, including but not necessarily limited to penalty issues, are deferred with jurisdiction reserved before a WCJ at the trial level if a dispute arises.

WORKERS' COMPENSATION APPEALS BOARD

MARGUERITE SWEENEY

I CONCUR,

DEPUTY

ANNE SCHMITZ

CHAIR

KATHERINE ZALEWSKI

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUN 19 2018

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

CRUM & FORSTER
EMPLOYMENT DEVELOPMENT DEPARTMENT
ENRIQUE HERRERA
LAW OFFICE OF HOWARD J. WASSERMAN
MORROW & MORROW
MULLEN & FILIPPI
TRISTAR RISK MANAGEMENT

NPS/bea