

K. abeyasinghe

WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOSE ZUNIGA,

Applicant,

vs.

**COUNTY OF LOS ANGELES, Permissibly
Self-Insured,**

Defendant.

**Case Nos. ADJ8610355 MF
ADJ8610360
(Van Nuys District Office)**

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted defendant's petition for reconsideration of the September 19, 2013 Findings Of Fact And Award of the workers' compensation administrative law judge (WCJ) who found in ADJ8610355 that applicant incurred industrial injury to his spine, knees, cardiovascular system and in the form of sleep disorder while employed by defendant as a deputy sheriff during the period from May 15, 2006 through June 30, 2008, causing 74% permanent disability after apportionment, and a need for medical treatment. In ADJ8610360 the WCJ found that applicant incurred industrial injury to those same body parts, except his knees, while in that same employ on June 30, 2008, causing 64% permanent disability after apportionment, and a need for medical treatment. The WCJ further found that defendant failed to meet its burden of proving that it is entitled to credit for duplication or overpayment of Labor Code section 4850 salary continuation benefits and temporary disability indemnity benefits during the period from August 13, 2010 through February 8, 2012.¹

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¹ Further statutory references are to the Labor Code.

1 Defendant contends that the WCJ did not properly apply apportionment of permanent disability
2 between the two injuries as described in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th
3 1535 [74 Cal.Comp.Cases 113] (*Benson*), and that the WCJ should have allowed credit for overlapping
4 payments of section 4850 benefits and temporary disability indemnity.²

5 An answer to defendant's petition was received from applicant.

6 The WCJ provided a Report and Recommendation on Petition for Reconsideration (Report)
7 recommending that reconsideration be denied.

8 The WCJ's September 19, 2013 decision is affirmed, but amended, as our Decision After
9 Reconsideration. The WCJ correctly concluded under the circumstances of this case that applicant was
10 entitled to two periods of section 4850 and temporary disability indemnity benefits. In addition, section
11 4663(e) precludes apportionment of the permanent disability caused by applicant's back and
12 cardiovascular condition between the two injury claims. However, under the unique circumstances of
13 this case as discussed below, we issue a single combined permanent disability award.

14 BACKGROUND

15 The WCJ describes the underlying facts in his Report as follows:

16 "Applicant, Jose Zuniga, born 7/22/69, worked as a deputy sheriff for the
17 County of Los Angeles for approximately nine years. In 2006 he was
18 reassigned to patrol duties and remained in that position through his last
19 day of work on 7/5/08. Applicant sustained a specific injury to his lumbar
20 spine on 6/30/08 (ADJ8610360). From the history contained in the
21 submitted medical reporting, it appears that applicant did not report the
22 injury until a few days later. Applicant subsequently claimed additional
23 injuries related to the specific injury in the form of hypertensive
cardiovascular disease and sleep.

24 "Applicant also filed a continuous trauma claim covering the period from
25 5/15/06 through the specific injury of 6/30/08, with injuries to the identical
26 body parts claimed in the specific injury (ADJ8610355). A third claim, also
27 a continuous trauma claim, which covered the same continuous trauma
period, was later filed alleging injury to applicant's bilateral knees

² Attached to defendant's petition is an excerpt of the June 5, 2010 transcript of the deposition of Robert Samson, M.D., that was not offered or received into evidence at trial. Defendant is admonished that attachment of that document to the petition was improper, and it was not considered upon reconsideration. (See Cal. Code Regs., tit. 8, §§ 10600, 10842.)

Also attached to defendant's petition are copies of documents that have already been received into evidence, or that have already been made part of the legal file. Such documents are not to be attached as exhibits to answers to petitions for reconsideration. (Cal. Code Regs., tit.8, §10842.)

1 (ADJ6498650). At trial herein, the parties stipulated that the two
2 continuous trauma claims were really a single injury, and as a result,
3 'knees' were added as an admitted body part to ADJ8610355, and
4 ADJ6498650 was dismissed as redundant pursuant to Cal. Reg. §10770.

5 "Applicant has not returned to work for the employer since 7/5/08. He was
6 originally taken off work by his then treating physician relating to his back
7 injury. Applicant received L.C. §4850 salary continuation benefits,
8 relating to the specific injury claim, from 7/6/08 through 7/5/09, and then
9 temporary disability benefits from 7/6/09 through 6/16/10. While still on
10 temporary disability, the parties agreed to utilize agreed medical evaluators
11 in the fields of orthopedics, internal medicine and neurology/sleep to
12 address the contested issues. When the orthopedic AME initially evaluated
13 the applicant on 1/29/09, 'knees' were not discussed or evaluated (Board
14 Exhibit 4). When applicant was evaluated by the same AME on 8/20/09,
15 he concluded that applicant's knee complaints were not work related
16 (Board Exhibit 5). The AME's opinion relating to the knees changed
17 however in subsequent reporting dated 3/19/10 (Board Exhibit 7).

18 "Following the finding by the orthopedic AME that applicant's knee
19 injuries were a compensable component of applicant's continuous trauma
20 injury, applicant subsequently underwent left knee arthroscopic surgery on
21 10/1/10 consisting of partial medial and lateral meniscectomies,
22 chondroplasty of the patellofemoral joint and medial compartment, and a
23 three compartment synovectomy/debridement. Almost a year later, on
24 9/9/11, a nearly identical procedure was performed on his right knee.
25 During this period, defendant paid the applicant a second period of L.C.
26 §4850 salary continuation from 8/13/10 through 8/12/11, and temporary
27 disability from 8/13/11 through 3/2/12. At trial the parties stipulated that
defendant was entitled to credit for temporary disability overpayment
during the period from 2/9/12 through 3/2/12. In addition, defendant was
seeking credit for claimed duplicative/overpayment of L.C. §4850 salary
continuation and temporary disability benefits beyond a single 104 week
cap.

"The undersigned concluded in part that (1) applicant sustained two
distinct periods of temporary disability, one relating solely to his initial
specific back injury (ADJ8610360), and the second period relating solely
to his subsequent knee surgeries (ADJ8610355), and (2) applicant's lumbar
disability was not subject to apportionment between the two industrial
injuries.

"It is from these two findings that defendant has petitioned for
reconsideration."

Following the trial of the two claims on May 8, 2013, the WCJ issued his September 19, 2013
decision as described above. In his Report, the WCJ explains the reasons he found no basis for
apportionment of permanent disability between the two injuries as described *Benson* in pertinent part as
follows:

1 "The undersigned disagrees with defendant's argument that the anti-
2 attribution components of applicant's claims can be apportioned between
3 the two industrial injuries herein.

4 "The majority of applicant's disability herein relates to his lumbar spine
5 and the hypertensive cardiovascular disease, both of which are subject to
6 anti-attribution statutes and L.C. §4663(e). Only the disability associated
7 with applicant's bilateral knees and in the form of sleep [disorder] are not
8 subject to those apportionment limitations. The undersigned provided
9 rating instructions to the Disability Evaluation Unit [DEU] specialist to
10 apportion these latter two components of applicant's injuries between
11 industrial and non-industrial factors, combine their respective components
12 with the unapportioned lumbar and cardio components, and then split the
13 money associated with that portion of each award that was
14 duplicative/overlapping, i.e. the cardio and lumbar components, in order to
15 avoid duplication of benefits. There was no objection made to the DEU
16 ratings or any request to cross-examine the rater. Although one award is
17 for 62 percent, and the other for 74%, the weekly benefit rates are split in
18 half during that portion of each award that is duplicative. As a result, the

19 total dollar amount of the combined awards is equivalent to a single 74%
20 award. Defendant correctly points out that 10% of the 5 percent sleep
21 impairment was apportioned to the specific injury, however when the
22 resulting 1% was combined with the other impairment factors it did not
23 change the overall rating for the specific injury, i.e. 52 C 21 C 1 results in
24 52 C 21 = 62, and 62 C 1 still equals 62%." (Bracketed material added.)

25 The WCJ further explains in his Report why he determined that defendant was not entitled to the
26 additional credit it claims for its alleged overpayment/duplication of section 4850 and temporary
27 disability benefits in pertinent part as follows:

28 "The parties stipulated that defendant was entitled to credit for TTD
29 [temporary total disability] overpayment from 2/9/12 through 3/2/12.
30 Defendant also contended that it was entitled to credit for claimed
31 duplicative/overpayment of L.C. §4850 salary continuation and temporary
32 disability benefits beyond a single 104 week benefit cap pursuant to L.C.
33 §4656(c)(2). Applicant disagreed, as did the undersigned.

34 "Defendant has the burden of proof pursuant to L.C. §3202.5 in proving by
35 a preponderance of the evidence that an overpayment has been made, and
36 that the court should exercise its discretion in allowing a credit for any
37 overpayment. In this case(s), defendant's position is that the first period of
38 temporary disability, when applicant initially went off work in 2008, was
39 due to both the specific and the continuous trauma injuries. As a result,
40 defendant contends that when it paid another full year of salary
41 continuation and over a half year of additional temporary disability
42 benefits, it did so in err [sic] and outside the statutory cap. Such a credit, if
43 allowed, would be well in excess of \$100,000.00 and would essentially
44 eliminate most of applicant's permanent disability awards herein.

1 However, the undersigned did not need to address the issue of equity and
2 whether it would be proper to exercise the court's discretion in allowing
3 such a credit, as the evidence did not support defendant's position in any
4 case.

5 "Dr. Robert Meth (Board Exhibits 1-3), addressing applicant's
6 hypertensive cardiovascular disease and sleep injuries, persuasively
7 concluded that applicant was never temporarily totally disabled due to
8 those components of his claims. As a result, the only basis for applicant's
9 period of temporary disability was his orthopedic injuries.

10 "A review of the submitted orthopedic AME reports, from Robert Samson,
11 M.D. (Board Exhibits 4-13), as well as the record reviews contained in
12 those reports, fails to establish that that an overpayment was made.
13 Applicant stopped working following the 6/30/08 specific lumbar injury.
14 Salary continuation and subsequently temporary disability benefits were
15 paid relating to that injury only. Summaries of the initial treating
16 physicians' reporting contained in the submitted AME reports, show that
17 applicant was placed on light duty and then total disability due to the
18 specific injury. Report summaries note that his disability is 'due to the
19 industrial injury in question', with only the specific injury identified in the

20 report summaries (See WCAB Exhibit 4, pages 2, 6, and 8). Summaries of
21 subsequent treating physician reports either note only the specific injury
22 and continuing temporary disability, or the reporting is silent on the cause.

23 "The first reference to knee complaints is not until a year after the applicant
24 initially went off work. The orthopedic AME, Robert Samson, M.D.,
25 originally concluded that any knee complaints were not industrial (Board
26 Exhibit 4). Although he subsequently changed his mind relating to
27 industrial causation (Board Exhibit 7), he also concluded in his 8/26/10
report that applicant's knee injuries had not kept him from working in the
past (Board Exhibit 8, page 3). Applicant then underwent staged bilateral
knee surgeries resulting in the second period of temporary disability.
Defendants properly paid for the new period of salary continuation and
temporary disability under the continuous trauma claim, which is the only
claim that involved the knees." (Bracketed material added.)

DISCUSSION

21 For the reasons expressed by the WCJ in his Report, we agree that defendant is not entitled to
22 additional credit beyond the amount stipulated at trial for its payment of section 4850 and temporary
23 disability indemnity benefits because the WCJ correctly determined that applicant incurred two periods
24 of temporary disability as a consequence of separate injuries as discussed in the Report.

25 However, applicant's claims present an unusual fact pattern because of the delayed recognition of
26 cumulative industrial injury to applicant's knees. Payment for the first period of temporary disability
27 was made because of the specific injury to applicant's back on June 30, 2008. When the AME

1 Dr. Samson changed his opinion in his March 19, 2010 report and concluded that applicant also incurred
2 cumulative trauma injury to his knees, applicant sustained the subsequent period of temporary disability
3 in connection with the surgery performed on the left knee on October 1, 2010, and the surgery performed
4 on the right knee on September 9, 2011.

5 But even if applicant had not incurred the subsequent period of temporary disability due to the
6 injury to his knees, we would disallow defendant credit for its alleged overpayment. Section 4909
7 authorizes the Appeals Board to award a defendant credit for payments made during a time period that
8 there was not a legal obligation to do so.³ (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111
9 Cal.App.3d 827 [45 Cal.Comp.Cases 1106].) However, it has long been recognized that it is appropriate
10 for the WCAB to exercise its discretion and deny some or all of the credit claimed when a large
11 overpayment is made without fault of the employee. (*Ibid*; *Herrera v. Workmen's Comp. Appeals Bd.*
12 (1969) 71 Cal.2d 254 [34 Cal.Comp.Cases 382]; *Genlyte Group, LLC v. Workers' Compensation*
13 *Appeals Board (Zavala)* (2008) 158 Cal.App.4th 705 [73 Cal.Comp.Cases 6]; *California Indem. Ins. Co.*
14 *v. Workers' Comp. Appeals Bd. (Estrella)* (2003) 68 Cal.Comp.Cases 233 (writ denied); *County of*
15 *Sacramento v. Workers' Comp. Appeals Bd. (Stapp)* (1999) 64 Cal.Comp.Cases 788 (writ den.).) In this
16 regard, credit has been denied when the allowance of credit would create a hardship for the injured
17 employee. (*California Indem. Ins. Co. v. Workers' Comp. Appeals Bd. (Estrella)* (2003) 68
18 Cal.Comp.Cases 233 (writ denied).)

19 Here, defendant voluntarily made the payments to applicant without fault on his part. The
20 amount of the alleged overpayment is large and would deprive applicant of the substantial part of the
21 permanent disability indemnity that is due because of his injuries, and would undoubtedly cause him
22 hardship. Under these circumstances, it would be appropriate to disallow credit in this case in our
23

24 ³ Section 4909 provides in full: "Any payment, allowance, or benefit received by the injured employee during the period of
25 his incapacity, or by his dependents in the event of his death, which by the terms of this division was not then due and payable
26 or when there is any dispute or question concerning the right to compensation, shall not, in the absence of any agreement, be
27 an admission of liability for compensation on the part of the employer, but any such payment, allowance, or benefit may be
taken into account by the appeals board in fixing the amount of the compensation to be paid. The acceptance of any such
payment, allowance, or benefit shall not operate as a waiver of any right or claim which the employee or his dependents has
against the employer." (Emphasis added.)

1 discretion even if we disagreed with the WCJ that applicant was entitled to receive the subsequent set of
2 section 4850 and temporary disability indemnity benefits paid by defendant.

3 Turning to the issue of apportionment, we also agree with the WCJ's reasoning in his Report that
4 section 4663(e) precludes apportionment of the permanent disability caused by applicant's back and
5 cardiovascular conditions.⁴ This is a result of the legislative presumption that injuries to certain body
6 parts arise out of and are incurred in the course of the worker's employment as a peace officer.
7 (*Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Alexander)* (2008) 166
8 Cal.App.4th 911 [73 Cal.Comp.Cases 1294].) The effect of those statutory presumptions has been
9 construed by the Appeals Board to preclude apportionment of permanent disability to separate dates of
10 injuries because the statutes do not allow permanent disability to be parceled out based upon its cause.
11 (*Delia v. County of Los Angeles* (2010) Cal. Work. Comp. P.D. LEXIS 282; see also, *Brodie v. Workers'*
12 *Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565] ["[T]he new approach to
13 apportionment is to look at the current disability and parcel out its causative sources – nonindustrial,
14 prior industrial, current industrial – and decide the amount directly caused by the current industrial
15 source."].)

16 The WCJ correctly concluded that the permanent disability caused by the injuries to applicant's
17 back and cardiovascular system was not subject to apportionment. However, we do not agree with his
18 allocation of the permanent disability indemnity due applicant to separate awards. Instead, we find that a
19 single combined award should issue for the permanent disability caused by the injury to those body parts.

20 In *Benson*, the Court noted that there were circumstances where a combined award may issue,
21 writing as follows:

22 "We also agree that there may be limited circumstances, not present here,
23 when the evaluating physician cannot parcel out, with reasonable medical
24 probability, the approximate percentages to which each distinct industrial
injury causally contributed to the employee's overall permanent disability.

25 ⁴ Section 4663(a) provides that "Apportionment of permanent disability shall be based on causation." However, section
26 4663(e) limits that requirement and provides that subdivision (a) "shall not apply to injuries or illnesses covered under
27 sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12,
3213, and 3213.2," which preclude apportionment of permanent disability for peace officers, like applicant, when the injury is
to certain specified body parts, including the back and cardiovascular system as found in these cases.

1 In such limited circumstances, when the employer has failed to meet its
2 burden of proof, a combined award of permanent disability may still be
justified." (*Benson, supra*, 170 Cal.App.4th at 1560.)

3 Like the situation identified in *Benson* where the evaluating physician cannot parcel out the
4 causes of permanent disability, the anti-attribution statutes in this case preclude the parceling out of
5 permanent disability caused by the injuries to applicant's back and cardiovascular system. The fact that
6 the cumulative and specific injuries to those body parts and the accompanying sleep disorder intertwine
7 and overlap the two claims, and were contemporaneously caused, further supports the issuance of a
8 single award of permanent disability in this case. A combined award also assures that applicant obtains
9 the full level of permanent disability caused by his injuries while assuring that defendant is held liable
10 only for the permanent disability caused by those injuries.

11 The combined award we substitute for the WCJ's September 19, 2013 decision in this case
12 follows the apportionment of the knee and sleep disorder conditions as applied by the WCJ. But instead
13 of issuing separate awards, the permanent disability caused by those conditions is combined into a single
14 award with the unapportioned permanent disability caused by the injuries to the back and cardiovascular
15 system, using the following formula that was adapted from the formula used by the DEU specialist:

16 04.01.00.00 - 34 - [5]43 - 4901 - 52 - 52 PD (A)

17 15.03.02.03 - 12 - [5] 15 - 4901 - 21 - 21 PD (A)

18 75% (17.05.06.00 - 10 - [2] 11 - 4901 - 16 - 16) 12 PD (A)

19 85% (17.05.06.00 - 11 - [2] 13 - 4901 - 18 - 18) 15 PD (A)

20 80% (13.03.00.00 - 5 - [6]7 - 4901 - 11 - 11) 9 PD (A)

21 (A) 52 C 21 C 15 C 12 C 9 = 75 FINAL PD

22 The above formula yields a final combined permanent disability value of 75%, and that is what
23 we substitute for the two awards issued by the WCJ. In addition, we make some minor technical changes
24 in the form of the findings and the award of attorney's fees is modified to allow 15% of the awarded
25 permanent disability indemnity to be commuted from the side of the award as reasonable attorney's fees,
26 with the exact amount to be adjusted by the parties or determined by the WCJ as appropriate.

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1 For the foregoing reasons,

2 **IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals
3 Board that the September 19, 2013 Findings Of Fact And Award of the workers' compensation
4 administrative law judge is **RESCINDED** and the following is **SUBSTITUTED** in its place:

5 **FINDINGS OF FACT**

6 1. ADJ8610360 (SP: 6/30/08): The applicant, Jose Zuniga, born [redacted], while employed on
7 6/30/08, as a Deputy Sheriff, occupational group number 490, at Monterey Park, California, by the
8 County of Los Angeles, sustained injury arising out of and occurring in the course of employment to his
9 lumbar spine, and in the form of hypertensive cardiovascular disease and sleep disorder.

10 2. ADJ8610355 (CT: 5/15/06 to 6/30/08): The applicant, Jose Zuniga, born [redacted] while
11 employed during the period from 5/15/06 through 6/30/08, as a Deputy Sheriff, occupational group
12 number 490, at Monterey Park, California, by the County of Los Angeles, sustained injury arising out of
13 and occurring in the course of employment to his lumbar spine, bilateral knees, and in the form of
14 hypertensive cardiovascular disease and sleep disorder.

15 3. Applicant's earnings at the time of injury were \$1,602.13 per week, sufficient to produce a
16 temporary disability rate of \$986.69 per week and a permanent partial disability rate at the statutory rate.

17 4. Applicant has been adequately compensated for all periods of temporary disability claimed.

18 5. Defendant is entitled to credit for temporary disability overpayment in ADJ8610355 for all
19 benefits paid during the period from 2/9/12 through 3/2/12. Defendant has failed to meet its burden of
20 proof that it is entitled to credit for duplication or overpayment of L.C. §4850 salary continuation and
21 temporary disability benefits paid during the period from 8/13/10 through 2/8/12.

22 6. The impairment relating to applicant's admitted hypertensive cardiovascular disease injury is
23 not subject to apportionment, either to non-industrial factors, or between the two industrial injuries
24 herein, pursuant to L.C. §3213.2 and L.C. §4663(e).

25 7. The impairment relating to applicant's lumbar spine injury is not subject to apportionment,
26 either to non-industrial factors, or between the two industrial injuries herein, pursuant to L.C. §3213.2
27 and L.C. §4663(e).

1 8. With respect to applicant's right knee, there is a legal basis for apportionment of 85% to
2 industrial injury and 15% to non-industrial "other factors" pursuant to L.C. §4663.

3 9. With respect to applicant's left knee, there is a legal basis for apportionment of 75% to the
4 industrial injury and 25% to non-industrial "other factors" pursuant to L.C. §4663.

5 10. With respect to applicant's admitted injury in the form of sleep disturbance, there is a legal
6 basis for apportionment of applicant's sleep impairment of 80% to industrial injury, and 20% to "other
7 factors" pursuant to L.C. §4663.

8 11. Applicant's attorney has performed reasonable services relating to applicant's award of
9 permanent disability benefits and is entitled to 15% of the permanent disability indemnity benefits
10 awarded as a reasonable attorney's fee, to be commuted from the side of the award.

11 12. Applicant is entitled to further medical treatment to cure or relieve from the effects of the
12 injuries herein.

13 13. Jurisdiction is reserved over any outstanding medical-legal and/or self-procured treatment lien
14 claims with the parties to attempt informal resolution of the same, or to be determined in supplemental
15 proceedings upon the filing of a Declaration of Readiness to Proceed.

16 14. The permanent disability caused by applicant's injuries is inextricably intertwined, causing
17 combined permanent disability of 75 percent, equivalent to 513.25 weeks of indemnity payable at the rate
18 of \$270.00 per week, in the total sum of \$138,577.50, payable commencing on 6/17/10, and continuing
19 thereafter as a life pension of \$115.96 per week for life subject to statutory Labor Code section 4659(c)
20 SAWW COLA adjustments, less credit for amounts heretofore paid by defendant on account thereof, less
21 credit to defendant for temporary disability overpayment during the period from 2/9/12 through 3/2/12
22 and less a 15% reasonable attorney's fee commuted from the side of the award payable to applicant's
23 attorney Straussner Sherman, with the exact amount of all sums to be adjusted by the parties or
24 determined by a workers' compensation administrative law judge if they are unable to do so.

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AWARD

AWARD IS MADE in favor of Jose Zuniga against the County of Los Angeles as follows:

(a) Permanent disability indemnity payable as set forth in Finding 14 above.

(b) Further medical treatment as set forth in Finding 12 above.

(c) Reimbursement of self-procured medical treatment and medical-legal costs as set forth in Finding 13 above.

(d) Attorney fees payable as set forth in Findings 11 and 14 above.

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1 IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers'
2 Compensation Appeals Board that the case is RETURNED to the trial level for such further proceedings
3 and decision by the workers' compensation administrative law judge as may be appropriate in
4 accordance with this decision.

5 WORKERS' COMPENSATION APPEALS BOARD

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8 _____
FRANK M. BRASS

9 I CONCUR,

10 
11 _____
12 MARGUERITE SWEENEY

13 I CONCUR AND DISSENT (See separate concurring and dissenting opinion),

14
15 
16 _____
RONNIE G. CAPLANE



17
18 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

19
20 OCT 07 2014

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

23 JOSE ZUNIGA
24 STRAUSSNER SHERMAN
25 VEATCH CARLSON, LLP

26 JFS/abs
27 

ZUNIGA, Jose

1 **CONCURRING AND DISSENTING OPINION OF COMMISSIONER CAPLANE**

2 I concur with the majority that section 4663(e) precludes apportionment of the permanent
3 disability caused by applicant's back and cardiovascular condition between the two injury claims and that
4 the issuance of a single award is appropriate. However, I do not agree that applicant is entitled to two
5 periods of section 4850/temporary disability indemnity benefits.

6 The WCJ found that both claims involve injury to the low back, and defendant paid temporary
7 disability benefits on the specific injury claim in ADJ8610360 from July 6, 2008 to June 16, 2010.
8 Although the WCJ did not find injury to the knees as part of that claim, Dr. Sampson wrote in his August
9 20, 2009 report, in which he opined that applicant incurred cumulative industrial injury to both knees,
10 that applicant had bilateral knee pain for approximately two years before that date. Thus, applicant's
11 knee condition contributed to the period of temporary disability paid in in ADJ8610360.

12 In addition, applicant did not return to work in the month between the end of the first period when
13 temporary disability benefits were paid for the specific injury, and the start of the second period during
14 which temporary disability benefits were paid for the cumulative injury from August 13, 2010 to March
15 2, 2012. In that the same body parts were involved in both periods of temporary disability, the WCJ
16 should have found that the temporary disability indemnity/section 4850 benefits paid for the specific
17 injury in ADJ8610360 overlap the temporary disability attributed to the cumulative injury in
18 ADJ8610355.

19 The period of temporary disability for which indemnity is owed runs concurrently in separate
20 injury claims to the extent the periods of temporary disability for the two claims overlap. (*Foster v.*
21 *Workers' Comp. Appeals Bd.* (2008) 161 Cal.App.4th 1505 [73 Cal.Comp.Cases 466]; *Morris v.*
22 *Workers' Comp. Appeals Bd.* (2009) 79 Cal.Comp.Cases 794 (writ den.)) The employee is entitled to
23 additional indemnity only to the extent that the periods of temporary disability do not overlap. (*Ibid.*)
24 Here, the temporary disability caused by the two injuries overlapped and defendant should only be liable
25 for one period of temporary disability indemnity/section 4850 benefits.

26 The issuance of a single combined award of permanent disability for both injury claims further
27 supports the conclusion that there is overlap of the two injury claims for the purpose of awarding

1 temporary disability benefits. It is anomalous to issue one award of permanent disability for both injury
2 claims because they are inextricably intertwined, while awarding separate periods of temporary disability
3 for each of the injury claims.

4 I would find that applicant's period of temporary disability ran concurrently for both injury
5 claims.

6 **WORKERS' COMPENSATION APPEALS BOARD**



12
13 *R. Caplane*

14 **RONNIE CAPLANE, Commissioner**

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

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18 **OCT 07 2014**

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

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27 **JOSE ZUNIGA
STRAUSSNER SHERMAN
VEATCH CARLSON, LLP**

JFS/abs