WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JERRY DILEVA, ***Applicant,*** **vs.** **NORTHROP GRUMMAN SYSTEMS CORP.; INSURANCE COMPANY OF THE STATE OF PA, administered by AIG CLAIMS, INC.,** ***Defendants.***	**Case Nos. ADJ1381123 (VNO 0509657)** **ADJ6813484** **ADJ6813487** **OPINION AND DECISION AFTER RECONSIDERATION**

On May 23, 2014 the Workers' Compensation Appeals Board (Appeals Board) granted reconsideration of the February 27, 2014 Findings and Award to further study the factual and legal issues. This is our Decision After Reconsideration.

Defendant, Insurance Company of the State of Pennsylvania, administered by AIG, seeks reconsideration of the February 27, 2014 Joint Findings, Award and Order wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained three industrial injuries while employed as a landscape gardener by Northrop Grumman Systems Corporation. The WCJ found that applicant sustained an industrial injury during the cumulative period February 2, 2001 through October 13, 2003 to his cervical spine, lumbar spine, left arm, psychological system and gastrointestinal system. The WCJ also found that applicant sustained industrial injuries on February 1, 1994 and September 24, 1993 to his lumbar spine. The WCJ found that applicant's permanent disability for his lumbar spine and psychological symptoms is inextricably intertwined. He awarded applicant temporary disability, further medical treatment, and 96% permanent disability.

Defendant contends that the WCJ erred in issuing a joint award of 96% permanent disability arguing that applicant is not entitled to a joint award of permanent disability because the orthopedic agreed medical evaluator (AME) apportioned applicant's disability between three dates of injury. Defendant also argues that the WCJ's decision is not based on substantial medical evidence and that the

applicant's treating psychologist failed to address apportionment in compliance with Labor Code section 4663.

We have received an answer from applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that defendant's petition be denied. We solicited supplemental briefs from the parties regarding how each party would apportion the disability given that the disability relating to applicant's orthopedic body parts was apportioned and the disability related to applicant's psychiatric injury was not apportioned. We have considered the supplemental briefs as well as the petition for reconsideration, applicant's answer, and the record in this matter. For the reasons discussed by the WCJ in his report, which we adopt and incorporate by reference, and for the reasons discussed below, we will affirm the WCJ's decision.

This matter proceeded to trial after defendant filed a Declaration of Readiness to Proceed on June 3, 2013. At trial, the parties submitted exhibits including reports from the agreed medical evaluator (AME) in the field of orthopedic surgery, Dr. Michael Patzakis and reports from applicant's treating psychologist, Dr. Friedman. (January 6, 2014 minutes of hearing and summary of evidence, pp. 5 – 8.) The parties did not obtain an agreed medical evaluation or a panel qualified medical evaluation in the field of psychiatry or psychology.

Defendant has the burden of proof on the issue of apportionment. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) In *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113], the Court of Appeal held that "a system of apportionment based on causation requires that each distinct industrial injury be separately compensated based on its individual contribution to a permanent disability." However, "there 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." (Id. at 1560.)

We find it significant that defendant did not avail itself of the dispute resolution process provided by Labor code section 4061(b) which provides: "if either the employee or employer objects to a medical

determination made by the treating physician concerning the existence or extent of permanent impairment and limitations or the need for future medical care, and employee is represented by an attorney, a medical evaluation to determine permanent disability shall be obtained as provided in Section 4062.2." Labor Code section 4061(i) states that: "No issue relating to a dispute over the existence or extent of permanent impairment and limitations resulting from the injury may be the subject of a declaration of readiness to proceed unless there has first been a medical evaluation by a treating physician and by either an agreed or qualified medical evaluator...." [Emphasis added.]

In this case, defendant filed the Declaration of Readiness to Proceed and yet did not offer any evidence on the issues of permanent disability and apportionment of applicant's psychiatric injury other than the reports of Dr. Friedman.

Defendant argues that applicant's psychiatric injury is a compensable consequence of his orthopedic injuries and, therefore, applicant's psychiatric disability should be apportioned in accordance with the orthopedic AME's apportionment of the disability caused by his orthopedic injuries. However, it is important to note that "the 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." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc).)

While it may be simpler to apportion permanent disability identically for all body parts, in matters that require scientific medical knowledge, the Appeals Board may not substitute its judgment for that of a medical expert. *(E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 929 [71 Cal.Comp.Cases 1687].) A medical evaluator in a particular field is tasked with parceling out industrial and non-industrial causation of permanent disability for the body parts or body systems that are within his or her area of expertise "A medical report predicated upon an incorrect legal theory and devoid of relevant factual basis, as well as a medical opinion extended beyond the range of the physician's expertise, cannot rise to a higher level than its own inadequate premises." (*Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358, 363].)

In this case, although applicant's orthopedic permanent disability could be apportioned between injuries, the overall permanent disability caused by applicant's industrial injuries is inextricably intertwined, entitling applicant to a joint award.

For the foregoing reasons,

IT IS ORDERED as our Decision After Reconsideration that the February 27, 2014 Joint Findings, Award and Order is **AFFIRMED.**

WORKERS' COMPENSATION APPEALS BOARD

I CONCUR,

FRANK M. BRASS

MARGUERITE SWEENEY

I DISSENT (See Dissenting Opinion),

DEIDRA E. LOWE

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 03 2015

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

KEGEL TOBIN & TRUCE
STOCKWELL HARRIS WOOLVERTON & MUEL
GRANCELL STANDER REUBENS THOMAS
RONDEAU LAW
JERRY DILEVA
BURGIS & ASSOCIATES

MWH/bgr/jp

Dissenting Opinion

I respectfully dissent. It is settled law that when two industrial injuries combine to cause permanent disability then the permanent disability caused by each must be separately awarded, unless 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. *(Benson v. The Permanente Medical Group* (2007) 72 Cal.Comp.Cases 1620 (Appeals Board en banc), affirmed sub nom. *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113].) Prior to *Benson*, separate industrial injuries involving a common body part were routinely combined into a single award of permanent disability when they became permanent and stationary on the same date, in accordance with the holding of the Supreme Court in *Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 19 Cal.3d 491 [42 Cal.Comp.Cases 406 (*Wilkinson*). However, the new regime of apportionment adopted by the Legislature as part of Senate Bill 899 (SB 899) changed the *Wilkinson* rule by repealing former section 4750 and by requiring, in the new section 4663, that permanent disability be apportioned by parceling it out based upon its causative sources. In *Benson v. Permanente Medical Group, supra,* 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113, 130] the Court of Appeal opined: "We cannot conceive that the Legislature would intend to 'replace' or 'repeal and recast' the rules of apportionment but still retain the *Wilkinson* doctrine."

Here, contrary to *Benson, supra,* the majority is disregarding the considered opinion of the AME that the permanent disability caused by applicant's orthopedic injuries should be apportioned.

Turning to apportionment of applicant's psychiatric disability, the WCJ must make a determination of what percentage of an applicant's permanent disability was directly caused by the industrial injury and what percentage of disability was caused by other factors based on substantial medical evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Labor Code section 4663(c) states that "In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination....If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination...The physician shall then consult

with other physicians or refer the employee to another physician...in order to make the final determination." (Lab. Code §4663(c).)

Here, Dr. Friedman stated: "While I see multiple dates of orthopedic injury, I believe it would be speculative to attempt to apportion the permanent psychiatric disability between the various injury dates. Thus, 100% of the permanent psychiatric disability is due to the combined effects of all dates of injury, which are inextricably intertwined." (Exh. 10, February 6, 2013 Report, pp. 13-14.) Dr. Friedman did not explain why "it would be speculative to attempt to apportion the permanent psychiatric disability" His reporting is not substantial medical evidence on the issue of apportionment.

As set forth in *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924, 926-927], Labor Code sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings. (See also *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436 [33 Cal.Comp.Cases 656, 659]; *King v. Workers' Comp. Appeals Bd.* (1991) 231 Cal.App.3d 1640 [56 Cal.Comp.Cases 408, 414]; *Raymond Plastering v. Workmen's Comp. Appeals Bd.* (*King*) (1967) 252 Cal.App.2d 748 [32 Cal.Comp.Cases 287, 291].) Before directing augmentation of the medical record, however, the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (*Tyler, supra*, 62 Cal.Comp.Cases at p. 928; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261, 265].)

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In this case, Dr. Friedman's opinion on apportionment is inconsistent with the orthopedic AME and is not adequately explained as required by Labor Code section 4663 and *Escobedo, supra.* Accordingly, I would return the matter to the trial level for further development of the record on the issue of apportionment of applicant's psychiatric injury.

DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MAR 0 3 2015

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

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STATE OF CALIFORNIA
DIVISION OF WORKERS' COMPENSATION
WORKERS' COMPENSATION APPEALS BOARD

WCAB Case No(s). ADJ 1381123 (VNO 0509657) (MF)
ADJ 6813484
ADJ 6813487

JERRY DILEVA,	VS.	**NORTHROP GRUMMAN SYSTEMS CORPORATION; AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, administered by CNA Claims Plus; INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, administered by AIG Claims Services, Inc.,**
APPLICANT,		DEFENDANT(S).

WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE
DAVID L. POLLAK MARCH 27, 2014

REPORT AND RECOMMENDATION OF WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE ON PETITION FOR RECONSIDERATION

INTRODUCTION:

On March 24, 2014, the Defendant, Insurance Company of the State of Pennsylvania, administered by AIG Claims Services, Inc., filed a timely and verified Petition for Reconsideration dated March 24, 2014, alleging that the undersigned WCJ erred in his Joint Findings of Fact, Award & Order dated February 27, 2014. The Defendant contends that the undersigned WCJ should have apportioned permanent disability separately between the three claims of injury in accordance with Benson v. Permanente Medical Group (2009) 72 Cal. Comp. Cases 1160. (Appeals Board en banc) (Benson) and the Agreed Medical Evaluator in orthopedics, Michael J. Patzakis, M.D., and should have rejected the medical opinion of David L. Freeman, M.D., Ph.D., the Applicant's treating physician in psychiatry, that the industrial permanent disability was inextricably linked between the three industrial injuries.

This case is currently scheduled for a lien conference on August 7, 2014 at 1:30 p.m. with WCJ Lynn Devine based on a Declaration of Readiness to Proceed filed by Friedman Psychiatric Medical Group on March 19, 2014. Given that a Petition for Reconsideration has been filed by the Defendant, the lien conference will be cancelled.

STATEMENT OF FACTS:

The Applicant, while employed as a landscape gardener by Northrop Grumman Systems Corporation, sustained industrial injury during the period February 2, 2001 to October 13, 2003 to his cervical spine, lumbar spine and left arm, and claimed to have sustained industrial injury to his psychological system,

gastrointestinal system, central nervous system (in the form of sleep disorder) and neurological system (in the form of headaches).

In addition, the Applicant claimed to have sustained industrial injuries to his lumbar spine on September 24, 1993 and February 1, 1994.

On January 6, 2014, the parties tried and submitted this case to the undersigned WCJ for a decision on the disputed issues of permanent disability and apportionment.

On February 27, 2014, the undersigned WCJ issued his Joint Findings of Fact, Award & Order dated February 27, 2014, finding that the Applicant sustained a cumulative trauma injury to his cervical spine, lumbar spine, left arm, psychological system and gastrointestinal system, but not to his central nervous system (in the form of sleep disorder) or his neurological system (in the form of headaches). In addition, the Applicant was awarded 96% permanent disability with the need for further medical treatment and found that the Applicant's permanent disability for his lumbar spine and psychological system was inextricably linked based on the medical report of Dr. Freeman dated February 6, 2013, thereby entitling the Applicant to a joint permanent disability award.

It is from this decision that the Defendant claims to be aggrieved.

DISCUSSION:

Pursuant to Benson, the rule in Wilkinson v. Workers' Comp. Appeals Bd. (1977) 42 Cal. Comp. Cases 406, allowing a combined award of permanent disability in successive injury cases, was not consistent with the new requirement of apportionment being based on causation and was no longer generally applicable. A WCJ must now determine and apportion to the cause of permanent disability each injury that is work related. Furthermore, consideration must be given to all potential causes of disability, whether from a current, prior or subsequent injury, or nonindustrial injury or condition.

However, there may be some cases when the evaluating physicians cannot parcel out with reasonable medical probability the approximate percentages that each successive injury contributed to the overall permanent disability and that, in these limited circumstances, the industrial injuries may be deemed "inextricably linked" allowing a joint award of permanent disability. [Benson, *supra*, 74 Cal. Comp. Cases at pp. 1622-1623; City of Cathedral City v. Workers' Comp. Appeals Bd. (Fields) (2013) 78 Cal. Comp. Cases 696, 698-699 (writ denied); Lamont v. Boeing (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 27, 9-10 (Appeals Board noteworthy panel decision); see Lakew v. San Francisco Hilton Hotel & Tower (2011) 2011 Cal. Wrk. Comp. P.D. LEXIS 326, 23-24 (Appeals Board noteworthy panel decision)]

In addition, while there may be some parts of body that are not inextricably linked, where those parts of body straddle and overlap various dates of injury to such a degree that they overlap parts of body that are inextricably linked, thereby preventing a WCJ from parsing and apportioned the linked parts of body from the parts of body that are not linked and issuing awards that adequately and

proportionally compensate an applicant, a joint award must be issued. [See Delia v. County of Los Angeles (2010) 2010 Cal. Wrk. Comp. P.D. LEXIS 282, 18 (Appeals Board noteworthy panel decision)]

In this case, the undersigned WCJ relied on the medical report of Dr. Freeman dated February 6, 2013 regarding apportionment. [Applicant's Exhibit "10"] On pages 13 to 14 of his report, he wrote the following:

> "While I see multiple dates of orthopedic injury, I believe it would be speculative to attempt to apportion the permanent psychiatric disability between the various injury dates. Thus, 100% of the permanent psychiatric disability is due to the combined effects of all dates of injury, which are inextricably intertwined."

It was based on this medical opinion that the undersigned WCJ wrote the following in his Joint Opinion on Decision dated February 27, 2014, on page two:

> "Based on the medical report of Dr. Friedman dated February 6, 2013, the Applicant's psychological permanent disability was apportioned jointly among all three injuries and couldn't be parceled out. It therefore constitutes an exception under Benson v. Permanente Medical Group (2009) 74 Cal. Comp. Cases 113 and therefore entitles the Applicant to a joint award for his psychological system.
>
> Based on the AME report of Dr. Patzakis dated February 17, 2012, [Applicant's Exhibit "6"] there is a reasonable basis to apportion 25% permanent disability to the lumbar spine jointly to the February 1, 1994 and September 24, 1993 dates of injury and 75% to the continuous trauma injury during the period February 2, 2001 to October 13, 2003. However, given that the psychological permanent disability was deemed inextricably linked, the Applicant is entitled to a joint award for his lumbar spine."

Notwithstanding the Defendant's critical characterizations of Dr. Freeman, the undersigned WCJ still found his medical opinion on apportionment to be credible, well-reasoned and substantial evidence in accordance with Benson. Its personal dissatisfaction with Dr. Freeman's medical opinion alone cannot render it not substantial evidence.

In addition, while the Defendant contends that the undersigned WCJ exceeded his authority in issuing a joint award because Dr. Freeman failed to consult with other physicians or refer the Applicant to another physician to make an apportionment determination, this argument is based upon an erroneous interpretation of Labor Code § 4663(c) requiring that a reporting physician should consult with other physicians only if a final opinion cannot be obtained with respect to apportionment. [Fields v. City of Cathedral City, 2013 Cal. Wrk. Comp. P.D. LEXIS 103, 7

writ denied *sub. nom* City of Cathedral City v. Workers' Comp. Appeals Bd. (Fields), *supra*]

Therefore, for the reasons that were set forth above, the undersigned WCJ did not err in finding that the Applicant was entitled to a joint award.

RECOMMENDATION:

The undersigned WCJ respectfully recommends that the Defendant's Petition for Reconsideration dated March 24, 2014 be **DENIED**.

Date: **March 27, 2014**

DAVID L. POLLAK
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

Filed and Served by mail on all parties
on the Official Address Record.

By: Thelma Martinez
Dated: March 27, 2014