WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RONALD AIMA, *Applicant,* **vs.** **BUESTAD CONSTRUCTION, INC.; STATE COMPENSATION INSURANCE FUND,** *Defendants.*	**Case No. ADJ2614932 (SFO 0509772)** **ORDER DENYING PETITION FOR RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

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For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

KATHERINE ZALEWSKI

I CONCUR,

RONNIE G. CAPLANE

MARGUERITE SWEENEY

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 25 2015

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

BOXER & GERSON
RONALD AIMA
STATE COMPENSATION INSURANCE FUND

ebc

STATE OF CALIFORNIA

WORKERS' COMPENSATION APPEALS BOARD

Ronald Aima *Applicant,* v. **Buestad Construction and State Compensation Insurance Fund,** *Defendants.*	Case No. ADJ2614932 **Report and Recommendation on Petition for Reconsideration**

Introduction

Defendant, State Compensation Insurance Fund, petitions for reconsideration of the Findings and Award that I issued in this case on December 17, 2014. In that decision, I found that applicant's industrial injury caused permanent and total disability.

The parties had stipulated that applicant, Ronald Aima, born July 25, 1968, sustained cumulative injury to his back and psyche and consisting of sleep and sexual dysfunction arising out of and in the course of his employment as a construction laborer (occupational group number 480) during a period of ending December 26, 2006, by defendant, Buestad Construction, then insured for workers' compensation liability by defendant, State Compensation Insurance Fund.

Defendant contends in its petition for reconsideration that I erred in finding that applicant's injury caused permanent total disability because (1) the opinion of the vocational rehabilitation expert upon which I relied does not constitute substantial evidence; and (2) the opinion of the agreed medical examiner in orthopedics is substantial evidence supporting apportionment of permanent disability to non-industrial causes.

The petition for reconsideration was timely filed and is accompanied by the verification required under Labor Code section 5902.

Discussion

I

The Finding that Applicant's Injury Caused Permanent Total Disability Before Consideration of the Issue of Apportionment To Non-Industrial Causes Is Justified By Applicant's Credible Testimony, the Opinions of Dr. Taylor and Dr. Lerchin, the Agreed Medical Examiners, and the Opinion of A Vocational Rehabilitation Expert, Malcolm Brodzinsky, Which Is Substantial Evidence.

Defendant first contends that I erred in concluding that applicant's injury caused permanent total disability because the opinion of the vocational rehabilitation expert upon which I relied does not constitute substantial evidence. Defendant's contention lacks merit.

I explained the evidence upon which I relied and the rationale for my conclusion that applicant' injury caused permanent total disability as follows in my Opinion on Decision:

> **"The Evidence**
>
> "Applicant testified at trial in substance as follows. He started work for Buestad Construction in 2004, and worked full-time as a construction laborer. His job was to drive a dump truck and distribute 55-gallon trash cans to all the job sites. In addition, it was his duty to clean up the job sites and pick up all the construction

debris in the cans after they were filled up, and load them onto the dump truck. He would have to lift up to 100 pounds multiple times a day. He had to physically lift the cans with the debris into the back of the truck, at least four feet high, more than 100 times a day. There are a lot of times when he wouldn't be able to lift the trash can because it was so heavy, and he would have to shovel debris out of the trash can before he could lift it.

"The last time he worked was in December of 2006 after Christmas when he felt he had no choice but to have surgery. He had to stop working then because the pain had gotten so bad he had lost control of his legs. He had surgery after that on January 19, 2007, within a matter of weeks of when he stopped working. The surgery stopped him from losing his legs completely, but did not stop his pain. His pain increased with the hardware pushing on the nerves. The surgery only helped him to avoid collapsing because of his legs.

"He has not worked for pay anywhere else since December of 2006. He does not believe that he can physically sustain any work. He has been awarded social security disability benefits based on his back injury and surgery. There were no other conditions that caused his disability.

"He has not engaged in much activity over the last few months. He cannot engage in any sustained activity. He walks around the block. He thinks that happens maybe every other day. It takes him 20 minutes or so to walk around the block. He stops when he needs to rest. After he walks around the block, he has to rest and lie down and put his leg up. It is painful for him to walk. He deals with those symptoms by laying down and putting his legs on pillows. He needs to rest maybe an hour after walking for 20 minutes for his symptoms to come back down. On an average day, he spends most of the day lying down or reclining. That would be maybe nine to ten hours out of twelve waking hours. He usually sleeps

four or five hours a night. Then during the daylight, he is laying down most of the time.

"His pain level he would say, on average, is 7 out of 10, but sometimes it's worse. The pain limits his activities. The pain affects his ability to take care of himself and to do things like brushing his teeth every morning. He has to change hands because the fingers start falling to sleep. He has to lean or get on his knees in order to brush because of the pressure on his back. He is able to dress himself but with difficulty, and his wife ties his shoes. His wife helps him out with stuff.

"He takes medications for the effects of his injury. He takes Percocet, Trazodone, Lyrica., Flexoril, Synecot and Pristiq. It's his understanding that the latter medication is for depression. He is also prescribed medication for constipation because of the narcotic medications he takes. He feels a lot of side effects from his medications. He is groggy. It's like he's in a cloud. It's hard for him to concentrate and focus and remember things. He experiences those side effects on a daily basis. Prior to being injured, he did not experience grogginess or problems concentrating or focusing.

"He agrees with the psychiatric limitations indicated by Dr. Lerchin. His emotional condition has not significantly improved since he was first evaluated by Dr. Lerchin because he is discouraged and depressed by his ongoing pain and limitations.

"Prior to his employment with Buestad Construction, he was involved in a motor vehicle accident maybe in 2003. He was in a car and was rear-ended on the freeway. He had what he calls a whiplash as a result of the accident. The injury was to his neck area and maybe a little bit to the back. A lawsuit was filed, and he thinks he got maybe $1,000 in a settlement. He saw a chiropractor for a couple of weeks. He thinks he made approximately six visits to the chiropractor. He got no

other kind of physical treatment. He had X-rays as a result of the accident. The doctor told him that the X-rays did not show anything regarding the injury to his back. He was probably on pain pills for maybe a month or so. He thinks that the pain pills might have been Motrin or stuff like that. He agrees with the history taken by Dr. Taylor on pages 24 and 25 of his January 14, 2014 report that after the motor vehicle accident, applicant was able to perform the relatively heavy activities at Buestad because of natural healing and the treatment he received. Before his employment at Buestad Construction, he no longer had any symptoms after a while. He also had no emotional symptoms that he related to the motor vehicle accident. He had returned to the condition he had before the motor vehicle accident when he went to work for Buestad Construction in approximately 2004. He had no physical limitation or restrictions from a doctor. He did not limit his physical activity or self-impose any restrictions. He felt he was able to handle all physical activities. He never prior to 2006 turned down any work because the doctor had restricted him in any way physically or medically. He thinks Dr. Taylor was wrong when he said that applicant had some interim aching in his low back. He would be sore after performing a day of labor at Buestad Construction. He was sore in the muscles in his body, including his low back. He regularly had pain from working heavy duty because it was a hard job. He never associated those aches and pains with his 2003 motor vehicle accident. He never told any doctor that he did associate those pains with the motor vehicle accident.

"Prior to his employment by Buestad Construction, he was never treated by a psychologist, psychiatrist or therapist and had never spoken with a private physician concerning emotional problems nor had he talked to a physician about treatment protocols, and had never been prescribed medication for depression or anxiety or any psychiatric condition.

"He does not believe that he can compete for and perform the job of lobby attendant as recommended by Dr. Van de Bittner. He knows what a lobby attendant is, and doesn't believe he could perform that work because he can't stand on his leg for long or sit down for long. He does not believe he could sit and answer phones for eight hours a day because he can't sustain any position for any length of time, and that's why his everyday life is so frustrating and irritating because he has to change positions constantly due to his pain. He does not believe he could perform the sedentary jobs recommended by Dr. Van de Bittner because of his level of pain and discomfort.

"His symptoms have been affected by his being here today. His pain has increased. After he has a doctor's appointment, he has to spend four days or maybe the whole week laying down. He anticipates that after today's trial.

"He agrees with Mr. Brodzinsky's opinion that he is unable to work at this time. He agrees with D Brodzinsky's conclusion that 100% of his work disability is because of the injury he sustained at Buestad Construction.

"Applicant's permanent disability as a result of his industrial injury has been evaluated by two reporting medical experts, Patrick Taylor, M.D.., the agreed medical examiner in orthopedics, and Harvey Lerchin, M.D., the agreed medical examiner in psychiatry. Each physician concluded that applicant's injury caused permanent impairments under the American Medical Association's Guides to the Evaluation of Permanent Impairments, 5th Edition (AMA Guides) and the permanent disability rating schedule adopted by the Administrative Director of the Division of Workers' Compensation effective January 1, 2005. In addition, each physician noted that applicant's injury has resulted in a number of limitations in his ability to function in a work environment which are not ratable as impairments under the AMA Guides and which are in addition to those impairments.

"Dr. Taylor, in his final report dated January 14, 2014 concluded that applicant suffers from the following diagnoses as a result of his industrial injury: (1) chronic lumbar disk syndrome, status post-fusion with instrumentation anteriorly and posteriorly, status post removal of construct and right-sided decompression, persistent low back pain and right sciatica; (2) chronic anxiety and depression; (3) chronic insomnia coupled with drug side effects with mild cognitive dysfunction; and (4) status post coccygectomy. Dr. Taylor concluded that applicant's injury caused a whole person impairment (WPI) for his orthopedic condition of 30% and for his sexual dysfunction of 5%, resulting in a combined WPI of 34%. Dr. Taylor also concluded that applicant's injury has resulted in the following limitations: inability to return to construction work, preclusion from heavy lifting, a need to vary sitting and standing and take breaks as needed, pace himself, limitation to driving for 15 minutes, limitation to a physically low stress job, and the need to be absent from work about three days per month. (Report of Dr. Taylor dated January 14, 2014, pages 22-26, Joint Exhibit 1,)…

"Dr Lerchin, in his report of March 24, 2014 (Joint Exhibit 11, pages 11-12), concludes that applicant's injury caused permanent psychiatric disability warranting a WPI of 17%.

"In a report dated December 19, 2011 (Joint Exhibit 13, pages 1-2), Dr. Lerchin indicated that applicant also suffered from limitations of a psychological, cognitive or emotional nature. Dr. Lerchin concluded that applicant suffered from moderate impairments in his ability perform the following activities: to interact appropriately with the general public; to carry out detailed instruction; to maintain intensity and concentration for extended periods; to perform activities within a schedule, to maintain regular attendance and to be punctual; to sustain ordinary routines without special supervision; to work without being distracted; to accept instruction and respond appropriately to criticism from supervisors; to get along

with co-workers; and to maintain socially appropriate behavior or adhere to basic standards of neatness and cleanliness…

"The parties each proposed permanent disability ratings based on the opinions of the agreed medical examiners. Applicant proposed a permanent disability rating of 65% before apportionment and defendant proposed a permanent disability rating of 61% before apportionment.

"Applicant's ability to compete in the labor market was evaluated by two vocational rehabilitation experts. Malcolm Brodzinsky, a vocational rehabilitation expert selected by applicant, concluded in his report of July 29, 2014 (applicant's Exhibit 16) , that the combination of applicant's physical, cognitive and emotional limitations and impairments as specified by Dr. Taylor and Dr. Lerchin would preclude applicant from competing in the labor market and would cause a total loss of future earnings.

"Eugene Van de Bittner, a vocational rehabilitation expert selected by defendant, concluded in his report of May 14, 2014 (defendant's Exhibit A) that applicant is not precluded from the labor market and that there would be unskilled sedentary and light jobs in the Alameda and Contra Costa labor market that applicant might be able to acquire and perform.

"Permanent Disability

"A permanent disability rating should reflect as accurately as possible an injured worker's diminished ability to compete in the open labor market and a scheduled rating can be rebutted by a rating derived from the opinions of vocational rehabilitation and labor market experts where such evidence more accurately describes a worker's diminished future earning capacity and ability to compete in the labor market. (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234

[48 Cal. Comp. Cases 587, 597]; *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624, 634].) *Gill v. Workers' Comp. Appeals Bd.* (1985) 167 Cal.App.3d 306 [50 Cal. Comp. Cases 258, 260].) A worker can rebut a scheduled permanent disability rating based on expert vocational rehabilitation evidence that as a result of an industrial injury, the worker suffered a total loss of earning capacity or is unable to compete in the open labor market, which are synonymous concepts. (Labor Code section 4662; *Ogilvie v. Workers' Comp. Appeals Bd., supra*. 197 Cal.App.4th at page 1274-1275 [76 Cal.Comp.Cases at page 634].)

"I conclude that the work restrictions and limitations that Dr. Taylor and Dr. Lerchin believe are necessary for applicant because of the effects of his injury greatly outweigh the ratable permanent impairments under the AMA Guides suffered by applicant, whether the correct scheduled rating is 65% as proposed by applicant or 61% as proposed by defendant. Based on the opinion of Brodzinsky, those restrictions and limitations combined with the cognitive impairments applicant suffers as a side effect of the medication he takes make it impossible for applicant to compete in the labor market and cause a total loss of future earning capacity. Thus, the opinions of Dr. Taylor, Dr. Lerchin and Brodzinsky rebut the scheduled permanent disability rating based on the AMA Guides, which is not nearly an accurate depiction of applicant's diminished future earning capacity and ability to compete in the labor market.

"The opinion of Van de Bittner that there are some jobs applicant could perform and some segment of the labor market in which applicant can compete is not plausible or convincing in light of the varied and significant work restrictions and limitations, both of a physical and cognitive in nature, that are applicable to applicant according to the unrebutted opinions of the agreed medical examiners, Dr.Taylor, and Dr. Lerchin. Van de Bittner unduly minimizes the effects of

> applicant's medication-related cognitive and attention limitations in asserting that there are jobs applicant could obtain and perform within the physical restrictions imposed by Dr. Taylor. Furthermore, Van de Bittner has not convincingly explained how applicant, who Dr. Taylor opined would need to be absent from work an average of three days per month because of his continuing pain, could satisfy the production and scheduling requirements of any employer. Brodzinsky's opinion, moreover, is more consistent than the opinion of Van de Bittner with applicant's credible testimony as to his continuing symptoms and limitations.
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> "Therefore, based on the opinions of Dr. Taylor, Dr. Lerchin and Brodzinsky and applicant's credible testimony, I conclude that applicant's injury caused permanent and total disability before consideration of the issue of apportionment of permanent disability to non-industrial causes."

II

The Opinion of Dr. Taylor On the Issue of Apportionment Is Not Substantial Evidence To Meet Defendant's Burden of Proof on that Issue.

Defendant next contends that I erred in not apportioning liability for permanent disability because the opinion of the agreed medical examiner in orthopedics, Dr. Taylor, is substantial evidence as to apportionment of permanent disability to non-industrial causes. That contention is lacking in merit for the reasons explained in my Opinion on Decision:

> "Dr. Taylor stated as follows on the issue of apportionment of permanent disability in his final report dated January 14, 2014, (Joint Exhibit 1):

> "In my opinion it cannot be ignored that he had suffered previous problems with his cervical and low back regions in the motor vehicle accident some years ago. This required treatment which appears to have restored him along with natural healing to the point where he could work with the relatively heavy activities at Buestad. However, the intermittent or occasional aches and pains that he suffered thereafter likely correlated with some of the degenerative changes seen on his radiologic studies. For that reason, apportionment is indicated despite his ability of being able to work in construction. Previously, I suggested with a medical probability that approximately 15 percent of the applicant's impairment was to be attributed to preexisting factors and the remainder to his employment with Buestad Construction. I remain with that opinion.' (Id, at pages 24-25.)…

"Dr. Lerchin opined that 85% of applicant's psychiatric disability is attributable to his industrial injury and the remainder is apportionable to non-industrial causes based on the opinion of Dr Taylor as to the apportionment of applicant's physical disability. (Report of Dr. Lerchin dated May 24, 2013, page 4, Joint Exhibit 10.)…

"Apportionment of Liability for Permanent Disability

"There is no substantial and persuasive expert medical evidence to justify apportionment of liability for permanent disability to non-industrial causes. Dr. Taylor noted that applicant had experienced "intermittent or occasional aches and pains" prior to December 26, 2006, when applicant was forced to stop working because of the cumulative effects of his physically arduous employment. Dr. Taylor then attributed 15% of applicant's permanent disability to "some of the degenerative changes seen on his radiologic studies." Dr. Taylor did not indicate whether the degenerative changes themselves were caused or accelerated by

applicant's years of heavy labor. Nor did Dr. Taylor state that the degenerative changes were entirely non-industrial in origin.

"A cumulatively injured worker is entitled to recover for the entire period of his cumulative trauma which may include employment with more than one employer, although the period for determining the liability of employers and insurance carriers under Labor Code section 5500.5 is limited to the last year of injurious employment. (*Flesher v. Workers' Comp. Appeals Bd.* (1979) 23 Cal. 3d 322 [44 Cal. Comp. Cases 212, 215-216].)

"Dr. Taylor's opinion does not meet defendant's burden of proof to justify apportionment because Dr. Taylor did not indicate whether the degenerative changes themselves were caused or accelerated by applicant's years of heavy labor. Indeed, he did not state that the degenerative changes were non-industrial. Applicant testified credibly and plausibly that he would experience aches and pains in his muscles after a heavy day of work. Insofar as Dr. Taylor attributes those aches and pains to degenerative changes, he must explain how the degenerative changes were the result of non-industrial causes and must explain to what extent the degenerative changes were affected by the cumulative effects of applicant's heavy employment to justify apportionment. Dr. Taylor did not do so. Dr. Taylor's opinions on those issues could have been clarified at his depositions, but no clarification was obtained. Thus, the opinion of Dr. Taylor does not meet the legal standard for apportionment and is not substantial evidence on that issue.

"Based entirely on the opinion of Dr. Taylor that some of applicant's physical disability is non-industrial, Dr. Lerchin attributed the same proportion of applicant's psychiatric disability to non-industrial causes. Thus, because Dr. Taylor's opinion does not meet the legal standard to justify apportionment, neither does the opinion of Dr. Lerchin. I conclude, therefore, that all of applicant's

> disability, whether physical or psychological, is attributable to his industrial injury. Having concluded that applicant is totally and permanently disabled before consideration of apportionment, I will find that applicant's injury caused permanent total disability and apportionment of liability for permanent disability to non-industrial causes is not justified."

A reporting physician is required to determine what percentage of an injured worker's disability "was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors. . ." (Lab. Code, § 4663(c).) For an opinion to be substantial evidence, a physician must discuss industrial causation and determine the applicant's level of permanent disability and, if appropriate, the existence of apportionment between injuries and between industrial and non-industrial causes. (See Lab. Code, § 4663(c), 4664(a); *Yeager v. Workers' Comp. Appeals Bd (Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (en banc), 70 Cal.Comp.Cases 1506 (writ den.).) Moreover, to qualify as substantial evidence, a physician's report must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions. (*Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten), supra* 145 Cal.App.4th at p. 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls, supra* 70 Cal.Comp.Cases at p. 612 (Appeals Board en banc), 70 Cal.Comp.Cases 1506 (writ den.).) A medical opinion is not substantial evidence if it is known to be erroneous, or if it is based on facts no longer germane, on

inadequate medical history and examination, or on incorrect legal theory. (*Hegglin v. Worker's Comp. Appeals Bd.* (1971) 4 Cal.3d 162,169 [36 CaLComp.Cases 93].)

Defendant argues in its petition for reconsideration that Dr. Taylor's opinion is substantial evidence to support apportionment of permanent disability because he mentions pre-existing factors to which he attributes 15% of applicant's orthopedic disability. To justify apportionment, however, Dr. Taylor must do more. He must explain how and why the pre-existing factors were a direct cause of applicant's disability.

What Dr. Taylor actually said about pre-existing factors is the following. In his report of July 2, 2008, Dr. Taylor noted medical records indicating that applicant injured his back in a motor vehicle accident in May 2003, and received treatment for pain in the form of physical manipulation through July of that year when he had become "much better" and was discharged from further treatment. (Report of Dr. Taylor dated July 2, 2008, page 7, Joint Exhibit 1.) Dr. Taylor stated as follows as to whether apportionment of permanent disability to the motor vehicle accident would eventually be appropriate:

> "Because of the lack of any medical input regarding the low back from August 15, 2003 when he discontinued chiropractic treatment until he was seen by Dr. Craney on February 10, 2005, there appears no reason to suggest that this syndrome is anything else besides a new onset problem beginning in 2005 while working for Buestad Construction. With the lack of any interim medical data to the contrary and lack of input from his employer in regard to any low back disability, it is more likely than not, in my opinion, that this was not a continuation of his previous injury of 2003…(*Id*, pages 12-13)

> "APPORTIONMENT: It is likely that when a final disability pronouncement is made that apportionment will have to be a consideration. However, at this time we lack the input in the medical records as to whether there was any intervening disability between his motor vehicle accident and the onset of pain with Buestad Construction or, for that matter, any record of there being low back problems prior to his employment with Buestad. In this connection, it is my opinion that if radiological evidence cannot be found (comparing the 2003 films with those of 2005), only a minimal amount could be properly attributed to 2003 or previous employment. (*Id*., page 15.)

Dr. Taylor reported again on December 15, 2009, remarking as follows as to the issue of apportionment:

> "APPORTIONMENT: It is likely that when a permanent rating is considered, apportionment will likely be a factor, possibly related to his previous motor vehicle accident and the occasional low back pain he experienced during his employments previous to Buestad." (Report of Dr. Taylor dated December 15, 2009, page 11, Joint Exhibit 6.)

Dr. Taylor's discussion in the foregoing reports was not a definitive opinion on apportionment, but only a speculation on what might be considered by him in formulating his final opinion on apportionment once applicant's condition became permanent and stationary.

Although Dr. Taylor reported four more times, including his final report of January 14, 2014, he did not indicate that he ever reviewed any more records of applicant's treatment for his 2003 motor vehicle accident, or that Dr. Taylor was ever able to compare radiological studies done

after applicant's motor vehicle accident with studies done after his industrial injury. Dr. Taylor had stated that such a comparison would be necessary in order to attribute more than a "minimal" amount of applicant's disability to the motor vehicle accident.

Considering all of Dr. Taylor's reporting, Dr. Taylor has suggested three types of pre-existing factors as possible causes of part of applicant's current disability: (1) the motor vehicle accident of 2003, (2) back aches and pains associated with applicant's heavy labor both for Buestad Construction and his previous employers, and (3) "degenerative changes." The first factor cannot be shown to be a direct cause of part of applicant's current disability because applicant testified credibly and the contemporaneous medical records show that applicant was cured of his back symptoms as a result of the motor vehicle accident within a few weeks of that injury. Furthermore, Dr. Taylor was never able to compare radiological studies to determine if there had been a degeneration of applicant's back condition as a result of the motor vehicle accident before his industrial injury. Thus, based on Dr. Taylor's remarks in his July 2, 2008 report quoted above, evidence was never developed that would allow Dr. Taylor to conclude that applicant's 2003 motor vehicle accident was a direct cause of any of applicant's current orthopedic disability.

The second factor referred to by Dr. Taylor, aches and pains associated with a day's heavy labor, also cannot be shown to be a non-industrial cause of applicant's disability because those pains, which applicant admitted he had occasionally, would be the result of applicant's cumulative trauma during both his Buestad Construction employment and his prior employments, which would constitute one cumulative trauma. It appears that Dr. Taylor was not aware of the legal principle that a cumulatively injured worker is entitled to be compensated for

the effects of a cumulative trauma during the entire period of cumulatively injurious employment even though only the employer which had liability in the last year of injurious employment will be liable. (See Lab. Code, § 5500.5; *Flesher v. Workers' Comp. Appeals Bd., supra,* 23 Cal. 3d 322 [44 Cal. Comp. Cases at pp. 215-216].)

The third possible cause of disability mentioned by Dr. Taylor, degenerative changes, likewise does not provide a basis for apportionment unless Dr. Taylor differentiated the extent to which the degenerative changes are related to applicant's cumulative trauma and the extent to which the degenerative changes are related to purely non-industrial natural processes. Dr. Taylor did not make such a differentiation. Thus, it cannot be determined from Dr. Taylor's opinion to what extent the degenerative changes were caused by non-industrial factors. Defendant could have clarified Dr. Taylor's opinion on that point at either of the two depositions of Dr. Taylor, but did not do so.

Thus, Dr. Taylor, who apportions to degenerative changes and aches and pains applicant sometimes experienced after a day of heavy labor, has failed to explain why those factors were not simply manifestations of applicant's cumulative industrial trauma, and were instead related to non-industrial factors. Furthermore, Dr. Taylor ignored his initial conclusion that a comparison of post-2003 motor vehicle accident radiology studies with post-industrial injury studies would be necessary to justify apportionment to the motor vehicle accident when he nevertheless apportioned to the motor vehicle despite the medical evidence and applicant's credible testimony that applicant was cured of symptoms from the accident by mid-2003. I remain persuaded,

therefore, that the opinion of Dr. Taylor as to apportionment is not substantial evidence to meet defendant's burden of proving apportionment.

Recommendation

For the foregoing reasons, I recommend that the Petition for Reconsideration filed by defendant, State Compensation Insurance Fund, on January 6, 2015, be denied.

David Hettick
Workers' Compensation Judge
Workers' Compensation Appeals Board

The Report and Recommendation on Petition for Reconsideration was filed and served on all parties listed in the Official Address Record.

Date:

By: A. Paraiso