Maria Padilla, Petitioner v. Workers' Compensation Appeals Board, Donald Fareed et al., Respondents

Civil No. B279089

Court of Appeal, Second Appellate District, Division Six

82 Cal. Comp. Cases 400; 2017 Cal. Wrk. Comp. LEXIS 22

March 7, 2017 Writ of Review Denied

PRIOR HISTORY: [1]**
W.C.A.B. Nos. ADJ128523 [GOL 0095636], ADJ1378031 [GOL 0095637]—WCJ Scott J. Seiden (OXN); WCAB Panel: Commissioners Zalewski, Brass, Razo

DISPOSITION: Petition for writ of review denied

CALIFORNIA COMPENSATION CASES HEADNOTES / SUMMARY

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CALIFORNIA COMPENSATION CASES HEADNOTES

Permanent Disability—Apportionment—WCAB rescinded WCJ's unapportioned award of 100 percent permanent disability to applicant who suffered industrial injuries to her back, left shoulder, urinary system, gastrointestinal system, and psyche while working as a housekeeper on 1/1/2000 and from 1/1/2000 through 9/2/2003, and returned matter to trial level for further development of record on issues of permanent disability and apportionment, when WCAB found that WCJ incorrectly analyzed issue of apportionment in finding that apportionment did not apply, based on medical and vocational evidence establishing that applicant was unable to compete in open labor market due to her industrial injury, that pursuant to Labor Code § 4663 and *Benson v. W.C.A.B.* (2009) 170 Cal. App. 4th 1535, 89 Cal. Rptr. 3d 166, 74 Cal. Comp. Cases 113, permanent disability must be apportioned between injuries and/or to nonindustrial factors based on causation of disability to extent possible, and, if physician is unable to parcel out causes of disability, [*401] physician must explain why, then consult with another treating or evaluating physician to make final determination, and that, in this case, although evaluating physicians addressed issue of apportionment in their reports, their reports were not substantial evidence on issue and additional medical evidence was required in order to make determination on apportionment of applicant's permanent disability.

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.07, 32.03A; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[1], 7.42[1], [2], [4]; The Lawyer's Guide to the **AMA *Guides*** and California Workers' Compensation, Ch. 3, 4, 9.]

CALIFORNIA COMPENSATION CASES SUMMARY

Applicant suffered admitted industrial injuries to her back, left shoulder, urinary system, gastrointestinal system, and psyche on 1/1/2000 and from 1/1/2000 through 9/2/2003, while working as a housekeeper for Defendants Donald and Linda Fareed. She also claimed additional injuries to her left hip, left knee, right shoulder, and bilateral upper and lower extremities.

Based on Applicant's credible testimony, together with the medical reporting of Arnold Gilberg, M.D., appointed by the WCJ as an IMR in psychiatry, and AMEs Elmore Smith, M.D. (orthopedic surgery), Edward O'Neill, M.D. (internal medicine) and Fred Kuyt, M.D. (urology), the WCJ found that Applicant sustained industrial injury to the alleged body parts. The WCJ also concluded from the medical reports and the vocational reporting of Laura Wilson & Associates that Applicant suffered 100 percent PD without apportionment to non-industrial factors or between her two injuries. Although the WCJ acknowledged that some of the physicians reporting in this case did find a legal basis for apportionment between Applicant's injuries and to nonindustrial factors, he determined that apportionment was moot given the finding that Applicant was unable to compete in the open labor market due to her industrial injuries.

Defendants filed a Petition for Reconsideration, asserting in relevant portion that the WCJ erred in failing to apportion PD to nonindustrial factors pursuant to Labor Code § 4663(a), that Applicant was not entitled to an unapportioned 100 percent PD award based on her diminished future earning capacity, as determined by the WCJ, because the vocational reporting offered by Applicant failed to account for the opinions of the reporting physicians, all of whom apportioned disability to nonindustrial factors, that the WCJ erred in failing to apportion Applicant's disability as between her two cases under *Benson v. W.C.A.B.* (2009) 170 Cal. App. 4th 1535, 89 Cal. Rptr. 3d 166, 74 Cal. Comp. Cases 113, and based on the medical evidence, and that, given Dr. Smith's opinion that the injuries to Applicant's left knee and right shoulder were nonindustrial and that a nerve conduction study of Applicant's bilateral upper extremities probably produced a false positive, the WCJ erred in finding that Applicant suffered orthopedic injuries to her left hip, left knee, right shoulder, and bilateral upper and lower extremities.

Applicant responded, contending in relevant portion that the combined effects of her disability supported a finding of PTD and the medical reports were not sufficient to establish that nonindustrial factors contributed to her inability to work **[*402]** in the labor market, that the limited impact of the nonindustrial portion of her disability did not affect the vocational expert's opinions regarding Applicant's employability, that Dr. Gilberg's opinion supported the WCJ's combined award under *Benson*, since he found Applicant's disability attributable to the specific injury and was unable to parcel disability between the two injuries, and that the AME reports and depositions of Dr. Smith indicating that injury to her left side "including hip" supported the finding of injury to the additional body parts alleged by Applicant.

Although the WCJ recommended that reconsideration be denied, the WCAB granted reconsideration, rescinded the WCJ's findings as to PD and apportionment and deferred those issues pending further development of the record. The WCAB also reversed the WCJ's finding that Applicant met her burden of establishing industrial injury to her left hip, left knee, right shoulder, and bilateral upper and lower extremities, concluding that Dr. Smith's reporting did not support such a finding.

On the issue of apportionment, the WCAB found the WCJ's analysis faulty

under Labor Code § 4663(a), *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion), and *Benson*, which require that apportionment be based on causation of disability and apportioned between injuries and/or to nonindustrial factors by the reporting physicians to the extent possible:

… Section 4663(a), effective April 19, 2004 states: "Apportionment of permanent disability shall be based on causation." (Lab. Code § 4663(a).) This was analyzed in our en banc decision of *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc), wherein we stated:

The plain reading of "causation" in this context is causation of the permanent disability. This reading is consistent with other provisions of section 4663 and 4664. That is: (1) section 4663(b) provides that a physician's report on permanent disability shall address "the issue of causation of the permanent disability;" (2) section 4663(c) provides that a physician's report shall find "what approximate percentage of the permanent disability was caused by the direct result of injury … and what approximate percentage of permanent disability was caused by other factors;" and (3) section 4664(a) provides that an employer "shall only be liable for the percentage of permanent disability directly caused by the injury …"

(*Escobedo, supra*, 70 Cal. Comp. Cases at p. 611.)

Furthermore, in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535 [89 Cal. Rptr. 3d 166, 74 Cal. Comp. Cases 113], the Court of Appeal affirmed our prior en banc decision, wherein we held that when permanent disability arises from separate industrial injuries there must be a separate determination of the cause of disability for each injury. All questions of law and fact must be decided separately for each **[*403]** injury and separate awards of permanent disability must be issued. An exception to this requirement arises only when a reporting physician is unable to "medically parcel out the degree to which each injury is causally contributing to the employee's overall permanent disability." In that event, an applicant may be entitled to an undivided award for the combined permanent disability. (*Benson, supra*, 170 Cal. App. 4th at p. 1560; *Benson v. The Permanente Medical Group* (2007) 72 Cal. Comp. Cases 1620 (Appeals Board en banc).) Moreover, apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 611, 620-621 (Appeals Board en banc).) To constitute substantial evidence "… a medical opinion 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." (*Id.* at 621.) In those cases where the doctor is unable or unwilling to make an apportionment determination, the parties should follow section 4663(c), which states:

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 of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(Lab. Code, § 4663(c).)

The WCAB pointed out that in this case Dr. Smith found apportionment between

Applicant's specific and cumulative injuries but did not provide reasoning to support his findings or fully address apportionment to nonindustrial factors for all body parts. Drs. O'Neill, Kuyt, and Gilberg found apportionment between industrial and nonindustrial factors but failed to address apportionment between Applicant's two injuries, and Applicant's vocational expert did not consider apportionment at all. Given the flaws in the medical and vocational reporting on the issue of apportionment, the WCAB concluded that the reports were not substantial evidence on which a PD or apportionment finding could be based, and ordered further development of the record.

Applicant filed a Petition for Writ of Review, contending in relevant part that the WCAB erred in reversing the WCJ's finding of PTD and that the weight of the evidence supported an award of 100 percent PD without apportionment. Applicant also asserted that Dr. Smith's opinion was substantial evidence to support a finding of industrial injury to her left hip, left knee, right shoulder, and bilateral upper and lower extremities, as alleged. **[*404]**

Defendant filed an Answer, asserting in pertinent respects that the WCAB correctly rescinded the WCJ's unapportioned award of PTD and properly remanded the case to the trial level for further development of the record on the issues of PD and apportionment. Defendant further asserted that the WCAB correctly reversed the WCJ's finding of industrial injury to the additional body parts alleged by Applicant.

WRIT DENIED March 7, 2017.

COUNSEL: For petitioner—Law Offices of Moises Vazquez, by Moises Vazquez

For respondent Allstate Insurance Company c/o Sedgwick CMS—Law Office of Alan S. Freeman, by Alan S. Freeman