2012 Cal. Wrk. Comp. P.D. LEXIS 640

Workers' Compensation Appeals Board (panel Decision),

Opinion Filed December 5, 2012

W.C.A.B. No. ADJ6719136—WCJ Christopher Miller (OAK); WCAB Panel: Commissioner Brass, Chairwoman Caplane, Commissioner Moresi

Reporter

2012 Cal. Wrk. Comp. P.D. LEXIS 640 *

Richard Kite, Applicant v. East Bay Municipality Utility District, Athens Administrators, Defendants

Status:

CAUTION: This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: [*1]

The Petition for Reconsideration is *denied*.

Core Terms

impairment, disability, hip, formula, appeals board, permanent, workers' compensation, return-to-work, panel decision, reconsider, permanent disability, stationary, indemnity, injured employee, return to work, recommend, chart

Headnotes

CALIFORNIA COMPENSATION CASES HEADNOTES

Permanent Disability—Rating—AMA *Guides*—WCAB held that WCJ did not err in combining permanent disability stemming from injury to each of applicant/forklift operator's hips using simple addition, rather than by using Combined Values Chart, based upon Panel Qualified Medical Evaluator's opinion, when WCAB found that, although 2005 Permanent Disability Rating Schedule provides that impairments are *generally* combined using reduction formula, AMA *Guides* describe several methods of combining impairments, that rigid application of Multiple Disabilities Table is not mandated, that scheduled impairment rating is rebuttable, and that Panel Qualified Medical Evaluator appropriately determined that impairment resulting from applicant's left and right hip injuries was most accurately combined using simple addition than by use of combined values formula. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 32.03A; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 3, 4.]

Permanent Disability—Offers of Regular, Modified or Alternative Employment—WCAB upheld WCJ's finding [*2] that applicant was entitled to a 15 percent increase in permanent disability awarded for hip injury ending 8/14/2007 based upon defendant's failure to send return-to-work offer until well beyond 60 days from permanent and stationary date, and that applicant's return to work prior to his permanent and stationary date did not preclude increase in permanent disability award pursuant to decision in *City of Sebastopol v. W.C.A.B. (Braga)* (2012) 208 Cal. App. 4th 1197, 146 Cal. Rptr. 3d 713, 77 Cal. Comp. Cases 783, when applicant suffered two periods of temporary disability following hip surgery and defendant had not yet paid permanent disability. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.02[4][d][iii], 32.04[2].]

Counsel

For applicant—Boxer & Gerson

For defendants—Finnegan Marks

Opinion By: Commissioner Frank M. Brass

Opinion

ORDER DENYING RECONSIDERATION

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

We have exercised our **[*3]** discretion to accept defendant's supplemental petition because it was filed within the time to file a petition for reconsideration. (Cal. Code Regs., tit. 8, § 10848, WCAB Rules of Practice and Procedure.) However, it does not change our decision herein.

For the foregoing reasons,

IT IS ORDERED that said Petition for Reconsideration be, and it hereby is, **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Frank M. Brass

I concur,

Chairwoman Ronnie G. Caplane

Commissioner Alfonso J. Moresi

* * * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

By timely, verified petition filed on October 18, 2012, 1 defendant seeks reconsideration of the decision filed herein on October 5, 2012, in this case, which arises out of admitted injuries, over the period of time ending August 14, 2007, to the hips of a 53-year-old forklift driver. Defendant contends, in substance, that it was error to combine the permanent disability stemming from each hip by simple addition, rather than by using the Combined Values Chart, or formula, and that applicant is not entitled to an increase in his permanent disability (PD) indemnity rate pursuant to section 4658, at subd. (d), 2 because he returned to his **[*4]** usual and customary job duties. Applicant has filed an answer. I will recommend that reconsideration be denied.

BACKGROUND

The salient facts are not disputed, and are fairly summarized in defendant's petition. Briefly, applicant was taken off work to undergo replacement of his right hip on August 15, 2007, returning to work about three months later. He then underwent left hip replacement August 30, 2009, and returned to work December 14, 2009. All of his employment with East Bay Municipal Utility District (EBMUD) has been in the same capacity, as a forklift operator.

The parties agreed on the use of Dr. Ernest Cheng, whose name was chosen from a panel of three qualified medical evaluators (QMEs). (At trial, defendant characterized Dr. Cheng as simply a QME; applicant called him an agreed medical evaluator (AME); the doctor combined the two terms.) In the first of his three reports, dated August 6, 2010, Dr. Cheng finds that applicant's job duties contributed to the osteoarthritis in his hips, that his condition, bilaterally, is permanent and stationary, **[*5]** and that he has been left with permanent impairment ratable under the AMA Guides. 3 The QME rates each hip at 20% whole-person impairment (WPI) under those guides, or 40% considering both hips. 4 He explains his method of combining the impairment: "I do find that there is a synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions of the body. In this case, it is my opinion that the best way to combine the impairments to the right and left hips would be to add them versus using the combined values chart, which would result in a lower whole person impairment."

Defendant, on November 17, 2010, mailed to applicant a Notice of Offer of Regular Work, DWC-AD form 10118, 5 as required by section 4658.

Defendant has paid no permanent disability indemnity.

The case came on for trial September 25, 2012, over the extent of **[*6]** permanent disability and whether defendant's tardy return-to-work offer entitled applicant to an increased indemnity rate under section 4658. I found Dr. Cheng's reasoning, in favoring synergy over reduced combined disability, to be persuasive, and I awarded the disability he recommended. I also found that defendant's failure to send the return-to-work offer until well beyond 60 days from permanent and stationary status entitled applicant to the 15% increase required in the statute.

DISCUSSION

Permanent impairment—language

Implicit in defendant's argument against the QME's method of rating applicant's two impaired hips is the notion that "combine" is a term of art, and that it is defined as the combining of impairments using the combined values chart or formula. In other words, *combining* is to be distinguished from adding two impairments, or from combining them through any means other than such chart or formula. [6] However, nowhere in the Labor Code, the rating schedule or the AMA Guides is "combine" defined as entailing that method, or any particular method. The schedule provides that impairments are *generally* combined using the formula. The Guides, upon which the schedule is based, describe **[*7]** several methods of combining impairments, discussed as well *infra*, belying the narrow interpretation of "combine" urged here by defendant.

Permanent impairment—substance

With respect to the most appropriate method of combining multiple impairments, the Guides are instructive:

> A scientific formula has not been established to indicate the best way to combine multiple impairments. Given the diversity of impairments and great variability inherent in combining multiple impairments, it is difficult to establish a formula that accounts for all situations. A combination of some impairments could decrease overall functioning more than suggested by just adding the impairment **[*8]** ratings for the separate impairments (e.g., blindness and inability to use both hands). When other multiple impairments are combined, a less than additive approach may be more appropriate. States also use different techniques when combining impairments. Many workers' compensation statutes contain provisions that combine impairments to produce a summary rating that is more than additive. Other options are to combine (add, subtract, or multiply) multiple impairments based upon the extent to which they affect an individual's ability to perform activities of daily living.

The rating schedule based on those Guides provides: "Impairments and disabilities are *generally* combined using the [reduction] formula..." PDRS, page 1-10, emphasis added; see fn. 6, *supra*. Finally, the enabling statute, section 4660, states (at subd. (c)) that the rating schedule "shall be prima facie evidence of the percentage of permanent disability to be attributed to each injury covered by the schedule." In other words, the schedule provides evidence that is rebuttable.

In sum, nowhere in the statute, the rating schedule or the AMA Guides do we find the rigid language defendant urges be followed: *Multiple disabilities **[*9]** shall be combined using this formula*.

The appeals board and appellate courts have consistently declined invitations to imply a requirement that permanent impairment and disability be rated in a rigid, lockstep fashion. Cited in the opinion on decision and applicant's answer is one such case. The opinion states:

> To the extent that the AMA Guides express favor toward the combined values method, the doctor's ability to employ a different method found within those Guides receives some support from the line of cases including *Milpitas Unified School District v. Workers' Compensation Appeals Board (Guzman)* (2010) 187 Cal.App.[4th 808] [75 Cal.Comp.Cases 837].

Another is *County of Los Angeles v. Wkrs. Comp. Appeals Bd (LeCornu)* (2009) 74 Cal.Comp.Cases 645 (writ denied), where the appeals board confirmed that "[t]he rules provide that the Multiple Disabilities Table is a guide only..." and the trial judge has discretion to depart from such a guide.

Turning to the QME's determination that simple addition of applicant's left and right hip impairment provides a more accurate depiction of his overall impairment than application of the reduction formula, the opinion states:

> Dr. Cheng points to the synergistic **[*10]** effect of one hip injury upon another opposite hip injury. I agree. It appears logical that a person who is able to compensate through the opposite member for an injury to one limb is to some extent less disabled or impaired than someone who cannot so compensate.

I remain persuaded that the QME has appropriately determined that the impairment resulting from applicant's left and right hip injuries is most accurately combined using simple addition than by use of the combined-values formula.

Untimely return-to-work offer

At trial and in its petition, defendant acknowledged that its offer to return applicant to his regular work was tardy, but contends that the breach should be excused by the fact that applicant, when the time arose to provide the offer (report of permanent and stationary status), had already returned to work.

The relevant statute is section 4658, which provides, in relevant part, at subd. (d), as follows:

> (2) If, within 60 days of a disability becoming permanent and stationary, an employer does not offer the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, **[*11]** each disability payment remaining to be paid to the injured employee from the date of the end of the 60-day period shall be paid in accordance with paragraph (1) and increased by 15 percent. This paragraph shall not apply to an employer that employs fewer than 50 employees.
>
> (3)(A) If, within 60 days of a disability becoming permanent and stationary, an employer offers the injured employee regular work, modified work, or alternative work, in the form and manner prescribed by the administrative director, for a period of at least 12 months, and regardless of whether the injured employee accepts or rejects the offer, each disability payment remaining to be paid to the injured employee from the date the offer was made shall be paid in accordance with paragraph (1) and decreased by 15 percent.

As applicant contends in his answer, the plain language of the statute requires a 15% increase in permanent disability in any case in which the return-to-work offer is not made, using the form mandated by the administrative director, within 60 days of a permanent and stationary (P&S) report, and this is such a case. Defendant argues, rather, that the intent of the statute is to provide an incentive (reduction **[*12]** in PD liability) to return an employee to work, and thus the policy advanced by section 4658 has no application when the employee has already gone back to work.

Defendant cites *City of Sebastopol v. Wkrs. Comp. Appeals Board (Braga)* (2012) 208 Cal.App. 4th 1197 [77 Cal.Comp.Cases 783] in support of its position. There, the employee missed no time from work before his condition was declared P&S. As such, the appeals board and the court concluded that requiring the notice and allowing the 15% reduction in PD indemnity under the circumstances would frustrate the purpose of the

statute and render an absurd result. Applicant points out that he was in fact temporarily disabled for the two periods following his hip operations, distinguishing the facts in *Braga*. He also cites two "noteworthy panel decisions" in support of his position. [7] In one, *Jauregui v. Mercy Southwest Hospital* (2008) 2008 Cal. Wrk. Comp. P.D. LEXIS 582, the appeals board disagreed with the trial judge's conclusion that an employee whose condition becomes P&S as to one body part, while another remains temporarily disabling, must be provided a return-to-work offer. However, the panel upheld the award of enhanced PD indemnity **[*13]** because, when the employer did (timely) provide such notice, it was not a bona fide offer. In *Mansfield v. County of Los Angeles* (2010) Cal. Wrk. Comp. P.D. LEXIS 53, the 15% increase was upheld when the offer was found to be untimely and not compliant with regulations.

In assessing whether the holding in *Braga, supra*, ought to be broadened to include employees who suffer temporary disability, I believe it is necessary to examine both the legislative intent and policy embraced in that decision and, as well, the requirements of the return-to-work offer —the "form and manner prescribed by the administrative director."

On the first point, to apply *Braga* to the facts of this case, as defendant would have us do, requires a measure of retrospection: By the time the return-to-work offer was triggered, the employer could see that applicant had already returned to his regular job, and therefore it could not be said to have an incentive **[*14]** to allow him so to return. However, at this point we have the benefit of additional hindsight: This employer did not, at that time or at any time since, provide any PD indemnity whatsoever, at any weekly rate. Thus, it cannot legitimately claim to have a lack of incentive to reduce a benefit it was not providing.

With respect to the statutory and regulatory requirements of the return-to-work notice itself, it must be noted that there are several. The statute itself requires that the work last "at least 12 months." The regulation (see fn. 5, *supra*) sensibly clarifies that the position be *"expected* to last for a total of at least 12 months of work." (Emphasis added) In addition, the regulation specifies that the offer of employment state the return-to-work date, the job title, the location and shift of the position, and the wage rate. It provides several reasons and an opportunity for the employee to reject the offer, object to its terms, or waive such objections. Were the application of *Braga* to be extended to employees who actually *do* return to work from temporary disability—that is, if such employees were not entitled to the same assurances as those whose return-to-work and P&S dates **[*15]** coincide—it would appear that the purposes of the statute and the regulation would be thwarted and there may in fact come to be a disincentive for the employee to return to work before that P&S date.

I believe that, under the circumstances presented in this case, the statute must be interpreted literally.

RECOMMENDATION

I recommend that reconsideration be denied.

Christopher Miller

Workers' Compensation Administrative Law Judge

Dated: October 29, 2012

Footnotes

[1] The petition was date-stamped September 18, 2012, in error.

[2] All statutory references not otherwise identified are to the California Labor Code.

[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment*, 5th Ed., incorporated into the *Schedule for Rating Permanent Disabilities* effective January 1, 2005 by Lab. Code § 4660, at subd. (b).

[4] These figures are before apportionment, which is discussed in a later report.

[5] Title 8, Cal. Code of Regs., § 10118.

[6] The formula, from which the chart was derived, is described in the *Schedule for Rating Permanent Disabilities* (PDRS) (2005), at page 1–10: "Impairments and disabilities are generally combined using the following formula where 'a' and 'b' are the decimal equivalents of the impairment or disability percentages: a+b(1-a)." It represents a slight change from the old formula (and Multiple Disabilities Table derived therefrom), found in the 1997 PDRS at pages 1–9 and 7–12, which added ten percent to the lower rating after reduction.

[7] Noteworthy panel decisions are so designated by the publisher, LexisNexis. Each opens with this disclaimer: "This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board," advising the reader to cite it with care.

2014 Cal. Wrk. Comp. P.D. LEXIS 217

Workers' Compensation Appeals Board (panel Decision),

Opinion Filed May 13, 2014

W.C.A.B. No. ADJ7181658—WCAB Panel: Commissioners Lowe, Brass, Sweeney

Reporter

2014 Cal. Wrk. Comp. P.D. LEXIS 217 *

Sheriee Borela, Applicant v. State of California, Department of Motor Vehicles, Legally Uninsured, State Compensation Insurance Fund/State Contract Services, Adjusting Agency, Defendants

Status:

CAUTION: This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

Disposition: [*1]

The March 17, 2014 Petition for Reconsideration is *granted*, the February 24, 2014 Findings and Award is *rescinded*, and the matter is *returned* to the trial level for further proceedings and a new final decision.

Core Terms

reconsider, permanent disability, impairment, permanent disability rating, workers' compensation, orthopedic, panel decision, body part, disability, recommend

Headnotes

HEADNOTES

Permanent Disability—Rating Multiple Disabilities—Combined Values Chart—WCAB rescinded WCJ's finding that applicant/licensing examiner sustained 73 percent permanent disability as result of 5/29/2009 industrial injury to her neck, back, chest, face, knees, and psyche, and returned matter to WCJ for new permanent disability rating utilizing Combined Values Chart (CVC) in 2005 Permanent Disability Rating Schedule, when WCAB found that (1) WCJ abused her discretion by not applying CVC to rate applicant's permanent disability and, instead, simply adding orthopedic and psychiatric impairments to find permanent disability without evidence from agreed medical examiner indicating that additive method provided more accurate

measure of applicant's overall level of permanent disability than combining disabilities using CVC, (2) this case was distinguishable from cases where medical evidence indicates that adding separate disabilities is best way to combine impairment, (3) although [*2] 2005 Permanent Disability Rating Schedule provides that methods other than "generally" applicable CVC may be used to combine multiple disabilities, WCJ did not provide reasoning for declining to follow rating schedule, (4) absent medical evidence to justify alternative approach, there was no basis for WCJ's rating instruction instructing rater to add applicant's disabilities, (5) WCJ violated principles in *Blackledge v. Bank of America* (2010) 75 Cal. Comp. Cases 613 (Appeals Board en banc opinion), by appropriating role of medical expert in making medical determination as to how to combine applicant's separate impairments in absence of specific medical evidence to substantiate using additive method, and (6) defendant's failure to move to strike rating instructions did not preclude defendant from challenging ultimate rating, as final permanent disability rating must be based on substantial evidence and must be subject to review on reconsideration. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 32.03A [1]-[3]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 4–6.]

Counsel

For applicant—Boxer & Gerson

For defendants—State Compensation Insurance **[*3]** Fund

Opinion By: Commissioner Deidra E. Lowe

Opinion

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant, State of California, Department of Motor Vehicles, legally uninsured, seeks reconsideration of the Findings and Award, issued February 24, 2014, in which a workers' compensation administrative law judge (WCJ) found applicant Sheriee Borela sustained 73% permanent disability as a result of a May 29, 2009 industrial injury to her neck, back, chest, face, knees and psyche, while employed as a Licensing Examiner.

Defendant challenges the WCJ's rating of applicant's permanent disability, contending the WCJ erred in instructing the Disability Evaluation Unit to combine the ratings for applicant's orthopedic and psychiatric impairments "in an additive fashion," rather than instructing the rater to use the method for combining ratings provided in the Combined Values Chart of the 2005 Schedule for Rating Permanent Disabilities. Applicant has filed an answer to defendant's petition, and the WCJ has prepared a Report and Recommendation on Petition for Reconsideration.

Following our review of the record, and for the reasons set forth below, we shall grant reconsideration, **[*4]** rescind the Findings and Award and return this matter for a new permanent disability rating utilizing the Combined Values Chart (CVC) of the 2005 Schedule for Rating Permanent Disabilities.

I.

Applicant was injured in a motor vehicle accident May 29, 2009, while working as a Licensing Examiner by the Department of Motor Vehicles. The parties stipulated that applicant sustained injuries to her neck, low back, chest, face, knees and psyche. At trial on December 4, 2013, the issues for determination included permanent disability and apportionment. The medical evidence included reports from Agreed Medical Examiners, Dr. Steiner in Orthopedics and Dr. Sussman in Psychology.

Dr. Steiner provided WPI ratings for applicant's orthopedic disability, assigning a 7% WPI for the right knee, 18% WPI for the cervical spine and 13% WPI for the lumbar spine. He noted that applicant's "condition is neither complex nor extraordinary and the use of the standard methodology provides and [sic] accurate disposition of this case regarding the multiple body parts involved. This is in conjunction with the *Almaraz/Guzman II* decision." (Joint Exh. 101, 9/25/2012 Report, p. 20.)

Following the hearing, the WCJ issued **[*5]** rating instructions to the DEU, which set out the Whole Person Impairment (WPI) ratings from the AMEs. The WCJ also instructed the rater that "the orthopedic and psychiatric ratings are to be combined in an additive fashion, as there is no overlap with no Orthopedic add-on for pain."

The rater issued a rating of 73% permanent disability, after apportionment of the psyche impairment, representing the sum of the permanent disability for each body part. The WCJ did not explain the basis for her determination to add the separate ratings for each body part, rather than utilize the CVC.

II.

In her Report and Recommendation on Petition for Reconsideration, the WCJ first suggests that defendant waived its right to challenge the permanent disability rating since defendant did not formally object to the rating instructions when they were issued and did not request the opportunity to cross-examine the disability evaluator. The WCJ suggests that a party may not seek reconsideration to object to rating instructions if an objection is not timely raised prior to the issuance of a final order.

While defendant may not have moved to strike the rating instructions, defendant's failure to move to strike does **[*6]** not preclude defendant from challenging the ultimate rating, as the final permanent disability rating must be based on substantial evidence, and must be subject to review on reconsideration.

As to the merits of defendant's petition, we concur with defendant that the WCJ abused her discretion by not applying the CVC to rate applicant's permanent disability. Defendant argues that the WCJ should have used the CVC to reach the final permanent disability rating, rather than simply adding each impairment, and that she abused her discretion by failing to provide a legal justification for not following the CVC in the permanent disability rating schedule.

We note that the AME's opinion did not state that adding the orthopedic and psychiatric permanent disability would be a more accurate measure of applicant's overall level of permanent disability, as opposed to combining the orthopedic and psychiatric permanent disability under the CVC.

This method was approved in *EBMUD v. Workers' Compensation Appeals Board (Kite)* (2013) 78 Cal.Comp.Cases 213, where the Qualified Medical Evaluator recommended the addition of the separate ratings for the right and left hips, as the best way to combine the impairments, **[*7]** rather than using the CVC, which would reduce the overall permanent disability rating.

However, a significant difference between the instant case and the facts in *Kite* is the role of the medical evaluator in determining the most accurate method for combining the separate ratings. In *Kite,* it was the QME who opined that there was a "synergistic effect of the injury to the same body parts bilaterally versus body parts from different regions of the body. In this case, it is my opinion that the best way to combine the impairments to the right and left hips would be to add them versus using the combined values chart, which would result in a lower whole person impairment." (2012 Cal. Wkr. Comp. P.D. LEXIS 640.) Here, Dr. Steiner indicated that applicant's "condition is neither complex nor extraordinary" and does not recommend the combination of the separate disabilities in the manner applied by the WCJ.

The PDRS provides that the CVC is "generally" used to combine multiple disabilities, but that other methodology may be used depending upon the relevant circumstances. Here, the WCJ did not articulate a reason for not following the rating schedule, but asserts in her Report and Recommendation **[*8]** on Petition for Reconsideration that the use of the CVC is not mandatory because the AME did not apply a standard scheduled rating, and thus the WCJ should not be constrained to apply a standard combination of ratings using the CVC.

In the absence of medical evidence that justifies an alternative approach, such as the QME's opinion in *Kite, supra,* there is no medical justification for the WCJ's rating instruction. Under *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 [en banc], the WCJ's role in the context of a formal rating is to frame instructions, based on substantial medical evidence, that specifically and fully describe whole person impairments to be rated. The WCJ appropriated the role of the medical expert when she made a medical determination as to how to combine the separate impairments in the absence of specific medical evidence to substantiate her choice.

Accordingly, we shall grant reconsideration, rescind the Findings and Award and return this matter to the trial level for a new permanent disability rating using the Combined Values Chart.

For the foregoing reasons,

IT IS ORDERED that the March 17, 2014 Petition for Reconsideration be, and hereby is, **GRANTED,** and **[*9]** as our Decision After Reconsideration, the Findings and Award, issued February 24, 2014, is **RESCINDED,** and the matter shall be **RETURNED** to the trial level for further proceedings and a new final decision.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Deidra E. Lowe

I concur,

Commissioner Frank M. Brass

Commissioner Marguerite Sweeney

MAUREEN HIKIDA v. WORKERS COMPENSATION APPEALS BOARD COSTCO WHOLESALE CORPORATION

Court of Appeal, Second District, Division 4, California.

MAUREEN HIKIDA, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD, COSTCO WHOLESALE CORPORATION et al., Respondents.

B279412

Decided: June 22, 2017

Law Firm of Rowen, Gurvey & Win and Alan Z. Gurvey for Petitioner. Law Office of Mark Gearhert and Justin C. Sonnicksen for California Applicants' Attorneys Association as Amicus Curiae on behalf of Petitioner. Mullen & Filippi, Jay S. Cohen and Daniel Nachison; Seyfarth & Shaw and Kiran A. Seldon for Respondents Costco Wholesale Corporation and Helmsman Management Services. John F. Shields and Peter Ray for Respondent Workers' Compensation Appeals Board.

Petitioner Maureen Hikida seeks review of an order of respondent Workers' Compensation Appeals Board (the Board) affirming the decision of the workers' compensation judge (WCJ) to apportion the permanent total disability suffered by petitioner between industrial and nonindustrial causes prior to issuing its award. Petitioner contends that because the agreed medical examiner (AME) concluded her permanent total disability was the result of a failed surgery for carpal tunnel syndrome, a condition she contracted primarily due to the clerical work she performed for respondent Costco Wholesale Corporation (Costco) for more than 25 years, apportionment was not appropriate.[1] After briefing on the merits was complete, respondents filed a supplemental brief raising a "question" as to this court's jurisdiction. Specifically, respondents suggested the writ petition might have been untimely, because the issue of apportionment was resolved by the Board months before the Board denied reconsideration of the WCJ's final award. We conclude the petition was timely filed. We further conclude that despite significant changes in the law governing workers' compensation in 2004, disability resulting from medical treatment for which the employer is responsible is not subject to apportionment. Accordingly, we annul the Board's order and remand for an increase in petitioner's disability award.

FACTUAL AND PROCEDURAL BACKGROUND

Petitioner was employed by respondent Costco from November 1984 to May 2010. During this period, she developed a number of medical conditions, including carpel tunnel syndrome.[2]

In May 2010, she took leave from work to undergo carpel tunnel surgery.[3] Following the surgery, she developed chronic regional pain syndrome (CRPS), a condition that caused her debilitating pain in her upper extremities and severely impaired her ability to function. She never returned to work. The parties stipulated she became permanent and stationary on May 2, 2013.

In 2012 and 2013, petitioner was examined by an AME in orthopedics, Chester Hasday, M.D. Dr. Hasday found petitioner permanently and totally disabled from the labor market. He found that her permanent total disability was due entirely to the effects of the CRPS that she developed as a result of the failed carpal tunnel surgery. He further concluded that petitioner's carpal tunnel condition itself was 90 percent due to industrial factors and 10 percent to nonindustrial factors.[4]

In issuing the award, the WCJ found that petitioner's permanent total disability was 90 percent due to industrial factors, "after adjustment for apportionment." Petitioner sought reconsideration by the Board, contending her disability was 100 percent industrial because it derived from medical treatment, entitling her to an unapportioned award. The WCJ prepared a report and recommendation, in which he recommended denying the petition for reconsideration, stating that he was "obligated under Labor Code section 4663 to address apportionment of permanent disability to factors other than applicant's industrial injury."

On February 8, 2016, in a two-to-one decision, the Board affirmed the apportionment. The majority concluded: "To properly evaluate the issue of apportionment of permanent disability, it is necessary to 'parcel

out' the causative sources of the permanent disability, nonindustrial, prior industrial and current industrial, and 'decide the amount directly caused by the current industrial source.' [Citation.] [¶] As the WCJ notes in the Report, the AME Dr. Hasday concluded that [petitioner's] CRPS caused her to be totally permanently disabled. However, there is a basis for apportionment of that permanent disability to nonindustrial causative sources as found by the WCJ because the CRPS was caused by the surgery to treat [petitioner's] carpal tunnel condition, which is 10 percent nonindustrial and 90 percent industrial as opined by Dr. Hasday. [Citation.]" (Quoting Brodie v. Workers. Comp. Appeals Bd. (2007) 40 Cal.4th 1313, 1328 (Brodie).) The Board nonetheless granted the petition for reconsideration, finding the WCJ had failed to take into account medical reports showing petitioner suffered employment-related psychiatric injuries that "need[ ] to be taken into account along with the other industrial causative sources in determining the level of compensable permanent disability resulting from the industrial injury."

The dissent, citing multiple cases holding that an employee is entitled to compensation for new or aggravated injury resulting from the medical or surgical treatment of an industrial injury, stated the WCJ erred "because he apportioned the permanent disability caused by [petitioner's] CRPS based upon the causation of [her] underlying carpal tunnel injury and not upon the cause of her permanent disability . In that the CRPS causing [petitioner's] total permanent disability resulted entirely from the surgery reasonably performed to treat [her] industrial carpal tunnel injury, it is error to apportion the permanent disability resulting from that medical treatment based upon the causes of the injury that was being treated." (Italics omitted.)

After the Board issued its February 2016 decision remanding the case, petitioner prepared a trial brief urging the WCJ to find her 100 percent disabled based on the psychiatric injury, which she alleged was entirely industrial. Petitioner further contended that the vocational expert's opinion supported a 100 percent award, and that a 100 percent award was required under section 4662, subdivision (b) due to her inability to fully use her arms and hands.[5]

The WCJ increased petitioner's disability award to 98 percent after apportionment. Following issuance of the amended award, petitioner filed a second petition for reconsideration seeking increase in the award on a number of grounds, including the vocational expert's opinion and section 4662. She also asked the Board to revisit the appropriateness of apportionment. By order dated October 25, 2016, the Board again denied reconsideration, finding apportionment appropriate in a two-to-one decision for the reasons previously stated. The writ petition seeking review of the Board's decision was filed December 9, 2016.[6]

DISCUSSION

A. Timeliness of Appeal

Shortly before oral argument, respondents Costco and Helmsman filed a supplemental brief contending the Board's February 8, 2016 opinion was "likely" the "final decision" with respect to the apportionment issue, and that the appeal should be dismissed as untimely. For the reasons set forth below, we disagree.

Section 5950 provides that "[a]ny person affected by an order, decision, or award of the [Board] may . apply to the Supreme Court or to the court of appeal for the appellate district in which he resides, for a writ of review ." The petition for writ of review must be filed "within 45 days after a petition for reconsideration is denied, or, if a petition is granted or reconsideration is had on the appeal board's own motion, within 45 days after the filing of the order, decision, or award following reconsideration." (§ 5950.) "The failure of an aggrieved party to seek judicial review of a final order of the [Board] bars later challenge to the propriety of the order or decision before either the [Board] or the court." (State Farm General Ins. Co. v. Workers' Comp. Appeals Bd. (2013) 218 Cal.App.4th 258, 261.)

Generally, an appeal will not lie to review an order made by the Board where the order remands the matter for a further hearing, leaving issues to be resolved by the WCJ. (Gumilla v. Industrial Acc. Comm. (1921) 187 Cal. 638, 639-640; Safeway Stores, Inc. v. Workers' Comp. Appeals Bd. (1980) 104 Cal.App.3d 528, 533 (Safeway Stores).) "Allowing parties to utilize the appellate process on individual issues in a single compensation claim could create a danger of defeating [the California] constitutional objective" of administering the workers' compensation laws to "accom-plish justice in all cases 'expeditiously, inexpensively, and without incumbrance .' " (Safeway Stores, supra, at p. 533, italics omitted; see Maranian v. Workers' Comp. Appeals Bd. (2000) 81 Cal.App.4th 1068, 1073 (Maranian) ["The well-known final judgment rule that governs general civil appeals was designed to prevent costly piecemeal dispositions and multiple reviews which burden the courts and impede the judicial process"].) At the same time, courts have recognized that permitting early appellate review to resolve certain "threshold issues" may enhance rather than detract from the expeditious resolution of workers' compensation claims. (Safeway Stores, supra, at p. 533; Maranian, supra, at p. 1078.)

In general, a threshold issue is one "crucial to the employee's right to receive benefits." (Maranian, supra, 81 Cal.App.4th at p. 1078; see 2 Hanna, Cal. Law of Employee Injuries and Workers' Compensation (2d rev. ed. 2007) § 28.04, p. 28-11 ["A threshold issue is an issue that is basic to the establishment of the employee's rights to benefits, such as the territorial jurisdiction of the Board, the existence of the employment relationship, and statute of limitations issues" (fn. omitted)].) The fact that an issue is significant or important to the litigation is not sufficient to support a finding that it is a threshold issue. As the court stated in Ogden Entertainment Services v. Workers' Comp. Appeals Bd. (2014) 233 Cal.App.4th 970, 986, 987 although the determination "[w]hether the [worker's] psychiatric injury was industrial" was "one of the principal issues" before the Board, "[t]he disposition by the appeals board of one of several issues on the merits is not a final decision of the appeals board"; "[i]t is only a final order, decision or award of the appeals board that is reviewable by this court by way of a petition for a writ of review."[7]

The Board's February 2016 decision was not a final order disposing of the case, as it remanded the matter to the WCJ to determine the amount of compensation to be awarded for the psychiatric disability and other issues raised by petitioner. Nor was the Board's decision on apportionment a threshold issue, "crucial to [petitioner's] right to receive benefits." (Maranian, supra, 81 Cal.App.4th at p. 1078.) Petitioner was entitled to benefits regardless of apportionment, and respondents essentially conceded petitioner's disability was at least 90 percent the result of industrial factors. On remand to the WCJ, petitioner advanced multiple theories to warrant a 100 percent award without regard to apportionment. By maximizing her award in the workers' compensation proceedings before resorting to the courts, petitioner was following a path that could have led to an expeditious resolution of the proceeding without the need for appellate review. We discern no reason an applicant should be compelled to seek immediate writ review of an issue that may not be dispositive of his or her award. In short, we conclude petitioner's pursuit of her claim to its conclusion, in lieu of seeking review of the Board's February 2016 decision, did not represent disregard of a final order. Accordingly, we deny respondent's request for dismissal.[8]

B. Merits

We turn now to the merits of petitioner's assertion that the Board erred when it found that despite the AME's unchallenged opinion that petitioner's CRPS resulting from the failed surgery rendered her totally disabled, the Board deemed her permanent total disability to be 90 percent due to industrial factors after apportionment.

The Board's conclusions on questions of law are reviewed de novo. (Benson v. Workers' Comp. Appeals Bd. (2009) 170 Cal.App.4th 1535, 1543.) Its findings on questions of fact "are conclusive and final so long as, based on the entire record, they are supported by substantial evidence." (Save Mart Stores v. Workers' Comp. Appeals Bd. (1992) 3 Cal.App.4th 720, 723.) When the reviewing court is asked to interpret and apply a statute to undisputed facts, the review is de novo. (Benson, supra, at p. 1543.)

1. Changes in the Law of Apportionment

" 'Apportionment is the process employed by the Board to segregate the residual[ ] [effects] of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.' " (Brodie, supra, 40 Cal.4th at p. 1321.) Prior to 2004, apportionment was "closely circumscribed." (Id. at p. 1326.) Former section 4663, governing apportionment where an industrial injury aggravated a preexisting nonindustrial condition leading to disability, was interpreted as permitting apportionment " 'only if the [B]oard f[ound] that part of the disability would have resulted from the normal progress of the underlying nonindustrial disease.' "[9] (Brodie, supra, at p. 1326; see Gay v. Workers' Comp. Appeals Bd. (1979) 96 Cal.App.3d 555, 562 ["[T]o support apportionment of nonindustrial disability under [former] section 4663, there must be medical evidence expressly stating that the apportioned disability is the result of the natural progression of the preexisting nonindustrial condition and such nonindustrial disability would have occurred even in absence of the industrial injury"].) This rule was said to flow from the principle that an employer "takes the employee as he finds him at the time of the employment" (Ballard v. Workmen's Comp. App. Bd. (1971) 3 Cal.3d 832, 837), and that an employee could not be denied compensation "merely because his physical condition was such that he sustained a disability which a person of stronger constitution or in better health would not have suffered." (Duthie v. Workers' Comp. Appeals Bd. (1978) 86 Cal.App.3d 721, 727.) The rule "left employers liable for any portion of a disability that would not have occurred but for the current industrial cause; if the disability arose in part from an interaction between an industrial cause and a nonindustrial cause, but the nonindustrial cause would not alone have given rise to a disability, no apportionment was to be allowed." (Brodie, supra, at p. 1326.) "[S]o long as the industrial cause was a but-for proximate cause of the disability, the employer w[as] liable for the entire disability, without apportionment." (Ibid.; see, e.g., Franklin v. Workers' Comp. Appeals Bd. (1978) 79 Cal.App.3d 224, 247 [where employee with history of high cholesterol and arteriosclerosis suffered heart attack while working, no apportionment was required for disability attributable to heart attack "because industrial factors aggravated the heart disease and accelerated the occurrence of the infarct, which absent the industrial exposure would not have occurred when it did"].)

In addition, prior to 2004, former section 4750 -- which governed apportionment between a current and past industrial injury -- was interpreted as allowing the employee to defeat apportionment by establishing rehabilitation of an injury for which a permanent disability award had already been issued.[10] (See, e.g., Robinson v. Workers' Comp. Appeals Bd. (1981) 114 Cal.App.3d 593, 602 ["[T]he fact that a worker received a permanent disability rating for his earlier injury, and was in fact partially disabled for some period of time, does not provide a basis for apportionment. . '[I]f an injured employee recovers and thereafter is again injured, he is entitled to compensation for the injury to his rehabilitated condition, not limited in amount by the terms of a former award' "]; National Auto. & Cas. Ins. Co. v. Industrial Acc. Com. (1963) 216 Cal.App.2d 204, 211 [worker who had been found 65 percent disabled after suffering first back injury and 78 percent after suffering second back injury entitled to 39 percent award where evidence established "a substantial improvement of his bodily condition in the period of time which elapsed prior to the second injury"]; see id., at pp. 206-211.)

As the Supreme Court explained in Brodie, reversing these constraints on apportionment was a key goal of the Legislature when it amended the governing statutes in 2004, eliminating section 4750, re-writing section 4663 and adding section 4664:[11] "The plain language of new sections 4663 and 4664 demonstrates they were intended to reverse these features of former section 4663 and 4750. [Citation.] . [N]ew sections 4663, subdivision (a) and 4664, subdivision (a) eliminate the bar against apportionment based on pathology and asymptomatic causes [citations], while section 4664, subdivision (b) was intended to reverse the rule based on former section 4750 that permitted an injured employee to show rehabilitation of an injury for which a permanent disability award had already been issued [citations]." (Brodie, supra, 40 Cal.4th at pp. 1327, 1328.) In other words, the amendments were intended to usher in a "new regime of apportionment based on

causation," and a "new approach to apportionment" that "look[s] at the current disability and parcel[s] out its causative sources -- nonindustrial, prior industrial, current industrial -- and decide[s] the amount directly caused by the current industrial source." (Id. at p. 1328.)[12]

2. Disability Caused by Medical Treatment of an Industrial Injury

Under the changes wrought by the 2004 amendments, the disability arising from petitioner's carpal tunnel syndrome was apportionable between industrial and nonindustrial causes. However, petitioner's permanent total disability was caused not by her carpal tunnel condition, but by the CRPS resulting from the medical treatment her employer provided. The issue presented is whether an employer is responsible for both the medical treatment and any disability arising directly from unsuccessful medical intervention, without apportionment. For the reasons discussed below, we conclude it is.[13]

Section 4600 requires the employer to provide medical treatment "reasonably required to cure or relieve the injured worker from the effects of his or her injury ." (See also § 4601 [stating that treatment by consulting physician and certain other medical providers requested by the employee "shall be at the expense of the employer"].) Although the wording of this provision has changed over the years, it consistently has been interpreted to require the employer to pay for all medical treatment "[o]nce it has been established that an industrial injury contributed to an employee's need for [it] ." (Rouseyrol v. Workers' Comp. App. Bd. (1991) 234 Cal.App.3d 1476, 1485; accord, Granado v. Workmen's Comp. App. Bd. (1968) 69 Cal.2d 399, 405-406 (Granado); Sanchez v. Brooke (2012) 204 Cal.App.4th 126, 140-141; Boehm & Associates v. Workers' Comp. Appeals Bd. (2003) 108 Cal.App.4th 137, 142; Buhlert Trucking v. Workers' Comp. Appeals Bd. (1988) 199 Cal.App.3d 1530, 1532; Deauville v. Hall (1961) 188 Cal.App.2d 535, 540-541.)

In Granado, the Supreme Court provided the following rationale for its conclusion that "medical expense is not apportionable": "If medical expense reasonably necessary to relieve from the industrial injury were apportionable, a workingman, who is disabled, may not be able to pay his share of the expense and thus forego treatment. Moreover, the uncertainties attendant to the determination of the proper apportionment might cause employers to refuse to pay their share until there has been a hearing and decision on the question of apportionment, and such delay in payment may compel the injured workingman to forego the prompt treatment to which he is entitled." (Granado, supra, 69 Cal.2d at pp. 405-406.)

It also has long been the rule that "the aggravation of an industrial injury or the infliction of a new injury resulting from its treatment or examination are compensable under the provisions of the Workmen's Compensation Act and, therefore, within the exclusive cognizance of the Industrial Accident Commission."[14] (Fitzpatrick v. Fidelity & Casualty Co. of New York (1936) 7 Cal.2d 230, 232; accord, Nelson v. Associated Indem. Corp. (1937) 19 Cal.App.2d 564, 566.) Aggravation of the original industrial injury by medical treatment is considered "a foreseeable consequence of the original compensable injury, compensable within the workers' compensation proceeding and not the proper subject of an independent common law damage proceeding against the employer." (National v. Certainteed Corp. (1978) 84 Cal.App.3d 813, 817.) Accordingly, "an employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury, whether the doctor was furnished by the employer, his insurance carrier, or was selected by the employee." (Fitzpatrick v. Fidelity & Casualty Co. of New York, supra, at pp. 233-234.)

In Deuville v. Hall, supra, 188 Cal.App.2d 535, the court explained that depriving the employee of compensation for aggravation of an industrial injury resulting from negligent medical treatment could lead to "an action in a court of law against an employer for the latter's negligence in providing that medical treatment." (Id. at pp. 540-541.) Such "independent suits" would "ultimately result in a breakdown in the system of compensation for industrial injuries and create unwarranted confusion and increased unnecessary litigation ." (Id. at p. 541; see also Noe v. Travelers Ins. Co. (1959) 172 Cal.App.2d 731, 737 ["[I]f delay in medical service attributable to a carrier could give rise to independent third party court actions, the system of workmen's compensation could be subjected to a process of partial disintegration. In the practical operation of the plan, minor delays in getting medical service, such as for a few days or even a few hours, caused by a carrier, could become the bases of independent suits, and these could be many and manifold indeed. The uniform and exclusive application of the law would become honeycombed with independent and conflicting rulings of the courts. The objective of the Legislature and the whole pattern of workmen's compensation could thereby be partially nullified"].)

Here, there is no dispute that the disabling carpal tunnel syndrome from which petitioner suffered was largely the result of her many years of clerical employment with Costco. It followed that Costco was required to provide medical treatment to resolve the problem, without apportionment. The surgery went badly, leaving appellant with a far more disabling condition -- CRPS -- that will never be alleviated. California workers' compensation law relieves Costco of liability for any negligence in the provision of the medical treatment that led to petitioner's CRPS. It does not relieve Costco of the obligation to compensate petitioner for this disability without apportionment.

Our review of the authorities convinces us that in enacting the "new regime of apportionment based on causation," the Legislature did not intend to transform the law requiring employers to pay for all medical treatment caused by an industrial injury, including the foreseeable consequences of such medical treatment. Pre-2004 law constraining the application of apportionment in the award of permanent disability benefits was based primarily on the interpretation of former sections 4663 and 4750, which were eliminated or fundamentally altered by the 2004 amendments. The longstanding rule that employers are responsible for all medical treatment necessitated in any part by an industrial injury, including new injuries resulting from that medical treatment, derived not from those statutes, but from (1) the concern that applying apportionment

principles to medical care would delay and potentially prevent an injured employee from getting medical care; and (2) the fundamental proposition that workers' compensation should cover all claims between the employee and employer arising from work-related injuries, leaving no potential for an independent suit for negligence against the employer. Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment. Accordingly, the WCJ erred in relying on the 2004 amendment to support apportioning petitioner's award, and the Board erred in upholding his decision.

DISPOSITION

The order of the Board on reconsideration is annulled. The matter is remanded to the Board for further proceedings consistent with the view expressed in this opinion. Petitioner shall recover her costs.

CERTIFIED FOR PUBLICATION

FOOTNOTES

1. Costco is adjusted by respondent Helmsman Management Services (Helmsman). We granted permission to California Applicants' Attorneys Association to file an amicus curiae brief in support of petitioner.

2. Pursuant to stipulation of the parties, the WCJ found that petitioner "sustained injury arising out of and in the course of employment to her cervical spine, thoracic spine, upper extremities, . psyche, fingers, [and] elbows ." He further found that she suffered from employment-related headaches, memory loss, sleep disorder, and "deconditioning." Petitioner claimed to have other medical conditions, including hypertension and irritable bowel syndrome, but the WCJ did not find them employment related.

3. Medical reports indicate petitioner was considered temporarily totally disabled at this time. Medical treatment was provided under the auspices of workers' compensation law. (See Labor Code, § 4600.) (Undesignated statutory references are to the Labor Code.)

4. Petitioner was also evaluated by a vocational expert who found her permanently and totally disabled, without access to any occupation in the open labor market.

5. Section 4662, subdivision (a) provides: "Any of the following permanent disabilities shall be conclusively presumed to be total in character: . (2) Loss of both hands or the use thereof."

6. Respondents Costco and Helmsman filed an answer. The Board submitted a letter to the court stating it would not answer the petition because "the decisions of the [WCJ] and the Appeals Board provide the reasons and record for the [Board's] decision in this case ." The letter stated: "When the Appeals Board denied reconsideration of the WCJ's August 3, 2016 Decision on October 25, 2016, the August 3, 2016 Decision of the WCJ became the final decision of the [Board] in this case for purposes of appellate review."

7. In Safeway Stores, the court agreed to decide whether the worker's injury arose out of and in the course of employment. (Safeway Stores, supra, 104 Cal.App.3d at p. 533.) Since then, courts have defined "threshold issue[ ]" to include whether California workers' compensation law applied to a professional athlete who played a single game in California (Federal Insurance Co. v. W.C.A.B. (Johnson) (2013) 221 Cal.App.4th 1116, 1119-1122); whether an employer failed to reject the worker's claim within the requisite statutory period (Maranian, supra, 81 Cal.App.4th at pp. 1080-1081); and whether a worker of less than six months was barred from recovering compensation benefits for a claimed psychological injury (Wal-Mart Stores, Inc. v. Workers' Comp. Appeals Bd. (2003) 112 Cal.App.4th 1435, 1438, fn. 3 (Wal-Mart Stores)). Courts have found that the determination whether a psychiatric injury is industrial is not a threshold issue (Ogden Entertainment Services v. Workers' Comp. Appeals Bd., supra, 233 Cal.App.4th at pp. 986-987), and that an order denying a petition to strike a physician's report and remove her as an AME is not a threshold issue (Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona) (2016) 5 Cal.App.5th 658, 662).

8. We observe that in the authorities relied on by respondents, the courts saved an otherwise premature appeal by deeming the issue involved a "threshold issue." (Safeway Stores, supra, 104 Cal.App.3d at pp. 531, 535; Maranian, supra, 81 Cal.App.4th at p. 1070; Wal-Mart Stores, supra, 112 Cal.App.4th at p. 1438, fn. 3; Kosowski v. Workers' Comp. Appeals Bd. (1985) 170 Cal.App.3d 632, 636; Duncan v. Workers' Comp. Appeals Bd. (2008) 166 Cal.App.4th 294, 299; see also Matea v. Workers' Comp. Appeals Bd. (2006) 144 Cal.App.4th 1435, 1442, fn. 3; Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal.App.4th 1099, 1105, fn. 6.) Respondents have not cited -- and we have not found -- a case in which an appellate court has dismissed an applicant's petition for review because an earlier Board order remanding a case for further proceedings was determined to have resolved a threshold issue. Courts should be cautious in finding a "threshold issue" where such finding will deprive a party of the right to an appeal.

9. Former section 4663 provided: "In case of aggravation of any disease existing prior to a compensable injury, compensation shall be allowed only for the proportion of the disability due to the aggravation of such prior disease which is reasonably attributed to the injury." (Stats. 1937, ch. 90, § 4663, p. 284.)

10. Former section 4750 provided: "An employee who is suffering from a previous permanent disability or physical impairment and sustains permanent injury thereafter shall not receive from the employer compensation for the later injury in excess of the compensation allowed for such injury when considered by itself and not in conjunction with or in relation to the previous disability or impairment. [¶] The employer shall not be liable for compensation to such an employee for the combined disability, but only for that portion due to the later injury as though no prior disability or impairment had existed." (Stats. 1945, ch. 1161, § 1, p. 2209.)

11. Section 4663 currently provides that "[a]pportionment of permanent disability shall be based on causation" and "[a] physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability" which "must include an apportionment determination" stating "what approximate percentage of the permanent 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 both before and subsequent to the industrial injury, including prior industrial injuries."Section 4664 provides: "(a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment. [¶] (b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof. [¶] (c)(1) The accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662. "

12. The Board had come to a similar conclusion in Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, in which it stated: "[I]n [enacting the 2004 changes], . the Legislature intended to expand . the scope of legally permissible apportionment. . [S]ection 4663(c) provides for apportionment based on 'what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.' . [T]his language appears to reflect a legislative intent to enlarge the range of factors that may be considered in determining the cause of permanent disability ." (Id. at pp. 616-617, italics omitted.)

13. Petitioner and amicus curiae contend this issue has been resolved, citing County of Sacramento v. WCAB (Chimeri) (2010) 75 Cal.Comp.Cases 159, Nilsen v. Vista Ford (Oct. 26, 2012, W.C.A.B. No. ADJ630145) 2012 Cal. Wrk. Comp. P.D. LEXIS 528, Moran v. Dept. of Youth Authority (Jan. 21, 2011, W.C.A.B. Nos. ADJ2192153, ADJ710643) 2011 Cal. Wrk. Comp. P.D. Lexis 43, and Steinkamp v. City of Concord (Mar. 30, 2006, W.C.A.B. Nos. OAK 316754, WCK 0028639, WCK 0031066, WCK 0050335) 2006 Cal. Wrk. Comp. P.D. LEXIS 24. In Chimeri, the employee became disabled after breaking his foot at work, which led him to suffer CRPS and become addicted to pain medication. The permanent total disability there was 100 percent work related. In Nilsen, the employee similarly suffered a serious injury at work leading to CRPS and dependency on pain medication. The defendant sought to attribute some of the disability to the employee's pre-existing back condition, but the Board found no evidence that his preexisting back condition had contributed to his disability. In Moran, the employee suffered two injuries at work, and the issue was whether apportionment between the prior injury and the current injury was warranted. The Board found the defendant had failed to meet its burden of proving the prior injury overlapped the current one. Of the cited cases, only Steinkamp addressed the issue squarely. There, the employee's cumulative knee injury was the result of various factors, some industrial and some not. He underwent knee surgery, which led to permanent disability. The Board concluded apportionment was not warranted because "medical treatment is not apportionable." However, Steinkamp was not designated a significant panel decision and its precedential value is limited.Petitioner further contends this matter was resolved in Escobedo v. Marshalls, in which the Board stated: "Section 4663(a)'s statement that the apportionment of permanent disability shall be based on 'causation' refers to the causation of the permanent disability, not causation of the injury, and the analysis of the causal factors of permanent disability for purposes of apportionment may be different from the analysis of the causal factors of the injury itself." (Escobedo v. Marshalls, supra, 70 Cal.Comp.Cases at p. 607.) In Escobedo, the employee's disability was not the result of medical treatment. The Board addressed apportionment where the disability was caused 50 percent by an industrial injury and 50 percent by a preexisting degenerative condition. " '[A]n opinion is not authority for a proposition not therein considered.' " (Westly v. Board of Administration (2003) 105 Cal.App.4th 1095, 1112.)

14. The Industrial Accident Commission was replaced by the Board in 1966. (Ramirez v. Workers' Comp. Appeals Bd. (2017) 10 Cal.App.5th 205, 220, fn. 7.)

MANELLA, J.

We concur: EPSTEIN, P. J. WILLHITE, J.

City of Jackson v. Workers' Comp. Appeals Bd., 11 Cal. App. 5th 109

Court of Appeal of California, Third Appellate District

April 26, 2017, Opinion Filed

Civil No. C078706

Reporter
11 Cal. App. 5th 109 * | 216 Cal. Rptr. 3d 911 ** | 82 Cal. Comp. Cases 437 *** | 2017 Cal. App. LEXIS 383 ****

CITY OF JACKSON, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and CHRISTOPHER RICE, Respondents.

Subsequent History: Rehearing Denied by Court of Appeal May 18, 2017; Review Denied August 9, 2017
Time for Granting or Denying Hearing Extended City of Jackson v. Workers' Comp. Appeals Bd. & Christopher Rice, 2017 Cal. LEXIS 5383 (Cal., July 19, 2017)
Review denied by City of Jackson v. Workers' Comp. Appeals Bd. & Christopher Rice, 2017 Cal. LEXIS 6151 (Cal., Aug. 9, 2017)

Prior History: [****1] W.C.A.B. No. ADJ8701016—WCJ Joseph S. Samuel (SAC); W.C.A.B. Panel: Chairwoman Caplane, Commissioner Lowe, Deputy Commissioner Gondak [see Rice v. City of Jackson, 2015 Cal. Wrk. Comp. P.D. LEXIS 57 (Appeals Board noteworthy panel decision)]

Disposition: Original proceedings to review a decision of the Workers' Compensation Appeals Board. Writ of review *issued*, WCAB's decision *annulled*, matter *remanded* with directions, and costs *awarded* to petitioner.

Core Terms

apportionment, disability, genetics, disease, degenerative, causation, activities, factors, apportioned, cervical, permanent disability, nonindustrial, preexisting, studies, personal history, Cases, medical evidence, applicant's, causes, reconsideration, heredity, degenerative disease, industrial, repetitive, diagnosis, pathology, medical probability, impermissible, heritability, neck

Case Summary

Overview
HOLDINGS: [1]-Apportionment of permanent disability in a workers' compensation case may be properly based on genetics or hereditability; [2]-A qualified medical evaluator (QME) properly apportioned an employee's disability when she concluded his disability, i.e., his debilitating neck, arm, hand, and shoulder pain preventing him from performing his job activities, was caused only partially (17 percent) by his work activities, and was caused primarily (49 percent) by his genetics; [3]-The QME's combined reports sufficed as substantial medical evidence to justify apportioning 49 percent of the employee's disability to non-industrial factors, as her diagnosis was based on medical history, physical examination, and diagnostic studies, and her conclusion was based on published medical studies that were cited in her report, in addition to an adequate medical history and examination.

Outcome
California Workers' Compensation Appeals Board's order anulled and matter remanded.

LexisNexis® Headnotes

Workers' Compensation & SSDI > Administrative Proceedings > Judicial Review > Standards of Review
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HN1 **Judicial Review, Standards of Review**
An appellate court reviews the California Workers' Compensation Appeals Board's factual findings for substantial evidence, but the court reviews its legal decisions de novo. More like this Headnote

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Workers' Compensation & SSDI > Benefit Determinations > Cumulative & Successive Disabilities
View more legal topics

HN2 **Benefit Determinations, Cumulative & Successive Disabilities**
Since the enactment of Senate Bill No. 899 (2003-2004 Reg. Sess.), apportionment of permanent disability is based on causation, and the employer is liable only for the percentage of permanent disability directly caused by the industrial injury. Apportionment may be based on other factors that caused the disability, including the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event, pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions. Precluding apportionment based on impermissible immutable factors would preclude apportionment based on the very factors that the legislation now permits, i.e., apportionment based on pathology and asymptomatic prior conditions for which the worker has an inherited predisposition. There is no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics. More like this Headnote

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Civil Procedure > Appeals > Amicus Curiae

HN3 **Appeals, Amicus Curiae**
Amicus curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered. More like this Headnote

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Workers' Compensation & SSDI > Compensability > Arising Out of Employment > Causation
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HN4 **Arising Out of Employment, Causation**
Lab. Code, § 4663, subd. (a), provides that apportionment of permanent disability must be based on causation. Causation in this context means causation of the permanent disability. The California Workers' Compensation Appeals Board has stated 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. More like this Headnote

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Workers' Compensation & SSDI > Benefit Determinations > Permanent Partial Disabilities
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HN5 **Benefit Determinations, Permanent Partial Disabilities**
"Disability" as used in the workers' compensation context includes two elements: (1) actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting therefrom, and (2) physical impairment of the body that may or may not be incapacitating. Permanent disability is the irreversible residual of an injury, and permanent disability payments are intended to compensate for physical loss and loss of earning capacity. More like this Headnote

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Workers' Compensation & SSDI > Benefit Determinations > Cumulative & Successive Disabilities
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HN6 **Benefit Determinations, Cumulative & Successive Disabilities**
Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion. The California Workers' Compensation Appeals Board has opined that in order for a medical opinion to constitute substantial evidence, it must be predicated on reasonable medical probability. It must also set forth the reasoning behind the physician's opinion. In the context of an apportionment determination, the opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. A medical opinion must be framed in terms of reasonable medical probability, must not be speculative, must be based on pertinent facts and on adequate examination and history, and must set forth the reasoning in support of its conclusions. A medical report is not substantial medical evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. More like this Headnote

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Headnotes/Syllabus

Summary
[*109] CALIFORNIA OFFICIAL REPORTS SUMMARY

In a workers' compensation proceeding involving a city employee, the Workers' Compensation Appeals Board disregarded the apportionment determination of the qualified medical evaluator (QME) on the ground the determination was not substantial medical evidence and directed the workers' compensation administrative law judge to make an award of unapportioned disability. The QME had

concluded that the employee's disability—neck, shoulder, arm, and hand pain—was caused by cervical degenerative disc disease, and that the disease, in turn, was caused in large part by heredity or genetics. The QME thus had assigned causation 49 percent to the employee's personal history, which included, but was not limited to, the genetic cause of the degenerative disease.

The Court of Appeal annulled the board's order and remanded the matter. The court held that apportionment may be properly based on genetics or hereditability. The court saw no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment for a preexisting degenerative disease caused by heredity or genetics. Contrary to the board's opinion, the QME properly apportioned disability because she did not apportion causation to injury rather than disability. The QME's reports reflected, without speculation, that the employee's disability was the result of cervical radiculopathy and degenerative disc disease. Her diagnosis was based on medical history, physical examination, and diagnostic studies that included X-rays and magnetic resonance imaging scans. The QME determined that 49 percent of the employee's condition was caused by heredity, genomics, and other personal history factors. Her conclusion was based on published medical studies that were cited in her report, in addition to an adequate medical history and examination. The QME's combined reports were more than sufficient to meet the standard of substantial medical evidence. (Opinion by Blease ▾, Acting P. J., with Hoch ▾ and Renner ▾, JJ., concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) **(1) Workers' Compensation § 106—Permanent Disability—Apportionment—Causation—Heredity or Genetics.**

Since the enactment of Senate Bill No. 899 (2003–2004 Reg. Sess.), apportionment of permanent disability is based on causation, and the employer is liable only for the percentage of permanent disability directly caused by the industrial injury. Apportionment may be based on other factors that caused the disability, including the natural progression of a nonindustrial condition or disease, a preexisting disability, or a postinjury disabling event, pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions. Precluding apportionment based on impermissible immutable factors would preclude apportionment based on the very factors that the legislation now permits, i.e., apportionment based on pathology and asymptomatic prior conditions for which the worker has an inherited predisposition. There is no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics.

CA(2) **(2) Workers' Compensation § 106—Permanent Disability—Apportionment—Causation.**

Lab. Code, § 4663, subd. (a), provides that apportionment of permanent disability must be based on causation. Causation in this context means causation of the permanent disability. The Workers' Compensation Appeals Board has stated 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.

CA(3) **(3) Workers' Compensation § 2—Disability—Elements—Permanent.**

"Disability" as used in the workers' compensation context includes two elements: (1) actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting therefrom, and (2) physical impairment of the body that may or may not be incapacitating. Permanent disability is the irreversible residual of an injury, and permanent disability payments are intended to compensate for physical loss and loss of earning capacity.

CA(4) **(4) Workers' Compensation § 106—Disability—Medical Opinion—Substantial Evidence—Apportionment Determination.**

Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion. The Workers' Compensation Appeals Board has **[*111]** opined that in order for a medical opinion to constitute substantial evidence, it must be predicated on reasonable medical probability. It must also set forth the reasoning behind the physician's opinion. In the context of an apportionment determination, the opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the board can determine whether the physician is properly apportioning under correct legal principles. A medical opinion must be framed in terms of reasonable medical probability, must not be speculative, must be based on pertinent facts and on adequate examination and history, and must set forth the reasoning in support of its conclusions. A medical report is not substantial medical evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess.

CA(5) **(5) Workers' Compensation § 106—Disability—Medical Opinion—Substantial Evidence—Apportionment Determination—Heredity or Genetics.**

A qualified medical evaluator's reports reflected, without speculation, that an employee's disability was the result of cervical radiculopathy and cervical degenerative disc disease. Her diagnosis was based on medical history, physical examination, and diagnostic studies that included X-rays and magnetic resonance imaging scans. The qualified medical evaluator determined that 49 percent of the employee's condition was caused by heredity, genetics, and other personal history factors. Her conclusion was based on medical studies that were cited in her report, in addition to an adequate medical history and examination. The qualified medical evaluator's combined reports were more than sufficient to meet the standard of substantial medical evidence.

[Herlick, California Workers' Compensation Law (6th ed. 2016) ch. 7, § 7.40; Hanna, Cal. Law of Employee Injuries and Workers' Compensation Law (2017) ch. 8, § 8.06; 2 Witkin, Summary of Cal. Law (11th ed. 2017) Workers' Compensation, § 338.]

▼ California Compensation Headnotes/Summary

Headnotes

Permanent Disability > Apportionment > Substantial Medical Evidence > Genetics

Court of Appeal, annulling WCAB's decision after reconsideration and remanding matter to WCAB with instructions to deny reconsideration, held that apportionment may be properly based on genetics/hereditability, that qualified medical evaluator properly apportioned applicant's permanent disability, and that her opinion was based on substantial medical evidence, when Court of Appeal found that applicant, while employed by defendant, incurred cumulative trauma injury AOE/COE to his neck, that qualified medical evaluator opined that applicant's post-neck surgery pain was caused, 17 percent each, by applicant's employment, by his previous employment, and by his personal activities, and 49 percent by his personal history, "including genetic issues," that in *Escobedo v. Marshalls* (2005) 80 Cal. Comp. Cases 604 (Appeals Board en banc opinion) WCAB held that SB 899 permits apportionment based on "the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event, ... pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions," that precluding apportionment based on "impermissible immutable factors," as argued by defendant in present case, would preclude apportionment based on "the very factors that the legislation now permits, i.e., apportionment based on pathology and asymptomatic prior conditions for which the worker has an inherited predisposition," that the Court of Appeal perceived "no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics," that qualified medical evaluator properly apportioned causation of applicant's disability rather than, as stated in WCAB's opinion, on causation of applicant's injury, and that qualified medical evaluator's apportionment was based on substantial medical evidence.

[See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1], [2][a], 8.06[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40[2], [3], 7.41[3].]

Counsel: Lenahan, Lee, Slater & Pearse and Charles S. Templeton for Petitioner.

Finnegan, Marks, Theofel & Desmond and Ellen Sims Langille for California Chamber of Commerce as Amicus Curiae on behalf of Petitioner. **[*112] [*112]** [***438]

No appearance for Respondent Workers' Compensation Appeals Board.

Mastagni Holstedt, Eric D. Ledger and Edward W. Lester for Respondent Christopher Rice.

William A. Herreras for California Applicants' Attorneys Association as Amicus Curiae on behalf of Respondent Christopher Rice.

Judges: Opinion by Blease, Acting P. J., with Hoch and Renner, JJ., concurring.

Opinion by: Blease, Acting P.J.

Opinion

[**912] **BLEASE, Acting P. J.**—In this workers' compensation proceeding we granted the writ of review of the employer, City of Jackson (City), after the Workers' Compensation Appeals Board (Board) disregarded the apportionment determination of the qualified medical evaluator (QME) on the ground the determination [**913] was not substantial medical evidence and directed the workers' compensation administrative law judge (ALJ) to make an award of unapportioned disability.

[***439]

The QME concluded that the employee's disability—neck, [****2] shoulder, arm, and hand pain—was caused by cervical degenerative disc disease, and that the disease, in turn, was caused in large part by heredity or genetics. The QME thus assigned causation 49 percent to the employee's personal history, which included, but was not limited to, the genetic cause of the degenerative disease. The ALJ agreed with the QME's apportionment, but the Board did not.

The Board concluded the QME could not assign causation to genetics because that is an "impermissible immutable factor[]." The Board also concluded that by relying on the employee's genetic makeup, the QME apportioned the causation of the injury rather than the extent of his disability. Finally, the Board concluded the QME's determination was not substantial medical evidence.

We disagree with each of the Board's conclusions and shall annul its order and remand with directions to deny reconsideration.

FACTUAL AND PROCEDURAL BACKGROUND

Christopher Rice worked for the City as a police officer. He started employment with City as a reserve officer in August 2004 and became full time in 2005. He sustained injury to his neck arising out of and in the course of his employment during the cumulative period ending [****3] April 22, 2009, at which time Rice was 29 years old.

[*113] [*113]

Before undergoing neck surgery, Rice was examined by QME Dr. Sloane Blair in November 2011. Dr. Blair examined Rice and reviewed his medical records. Rice's injury was cumulative, i.e., he had not suffered an exact or isolated injury.[1] Rice and his treating physician believed his pain was a consequence of repetitive bending and twisting of his head and neck.

An X-ray showed degenerative disc disease. Dr. Blair diagnosed Rice with cervical radiculopathy and cervical degenerative disc disease.[2]

As is relevant to the issue of apportionment, Dr. Blair found Rice's condition was caused by: (1) his work activities for the City; (2) his prior work activities; (3) his personal activities, including prior injuries and recreational activities; and (4) his personal history, in which category Blair included "heritability and genetics," Rice's "history of smoking," and "his diagnosis of lateral epicondylitis [commonly known as tennis elbow]." Dr. Blair apportioned each factor equally at 25 percent.

Dr. Blair reevaluated Rice in May 2013 following his neck surgery. Her diagnosis was unchanged and the four causes contributing to the diagnosis were [****4] [***440] unchanged, but the apportionment was changed. Dr. Blair stated, "Since his evaluation on 11.7.11, there are specific publications that have lent even more support to the causation of genomics/genetics/heritable issues in terms of his injury." Dr. Blair listed three such studies and stated that because [**914] more recent studies supported "genomics as a significant causative factor in cervical spine disability," her apportionment changed to 17 percent each to Rice's employment with City, previous employment, and personal activities, and 49 percent to his personal history, "including genetic issues."

In response to questions from Rice's attorney, Dr. Blair prepared a supplemental report, in which she affirmed that she could state "to a reasonable degree of medical probability that genetics has played a role in Mr. Rice's injury," despite the fact that there is no way to test for genetic factors. Citing to the referenced medical studies, Dr. Blair stated that one of them said "heritability was ... 73 percent in the cervical spine. ... [S]moking, age, and work are only a small percentage of disc disease and most of it is familial." Another source cited the role of heritability in disc degeneration [****5] as 75 percent, and the other stated it was 73 percent. Dr. Blair **[*114] [*114]** cited a fourth article that claimed "'[t]win studies demonstrate that degeneration in adults may be explained up to 75 percent by genes alone.'" The same study found environmental factors to contribute little or not at all. Dr. Blair stated that while these studies supported an apportionment of 75 percent to personal history, she decided to err on the side of the patient in case there was some unknown "inherent weakness" in the study, and decided that 49 percent was the "lowest level that could reasonably be stated." Dr. Blair stated that even without knowing the cause of Rice's father's back problems, the evidence of Rice's degenerative disc disease having a predominantly genetic cause was "fairly strong" where there is no clear traumatic injury, as in Rice's case.

The ALJ found that Dr. Blair did not provide "sufficient information to identify the nature of any prior cervical problems and 'how and why' any such problems are related to applicant's current level of permanent disability." Accordingly, the ALJ concluded that Dr. Blair's apportionment of 17 percent to prior work activities and 17 percent to prior activities was not [****6] based on substantial evidence. This conclusion is not part of this writ proceeding. The ALJ further found City had carried its burden of showing apportionment as to 49 percent attributable to genetic factors, and this is the determination at issue here.

Rice filed a petition for reconsideration before the Board, arguing that the 49 percent apportionment to genetic risk factors was not substantial medical evidence because there was no evidence Rice's family had a history of cervical degenerative disc disease, and there was no genetic test for degenerative disc disease. The Board granted the petition for reconsideration and eventually ordered the matter returned to the trial level for an unapportioned award of permanent disability. The Board reasoned that "finding causation on applicant's 'genetics' opens the door to apportionment of disability to impermissible immutable factors. ... Without proper apportionment to specific identifiable factors, we cannot rely upon Dr. Blair's determination as substantial medical evidence to justify apportioning 49% of applicant's disability to non-industrial factors."

[***441]

DISCUSSION

I

Standard of Review

HN1 We review the Board's factual findings for substantial [****7] evidence, but we review its legal decisions de novo. (**[*115]** *Department of Rehabilitation v. Workers' Comp. Appeals Bd.* (2003) 30 Cal.4th 1281, 1298 [135 Cal. Rptr. 2d 665, **[*115]** 70 P.3d 1076]; *Le Vesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [83 Cal. Rptr. 208, 463 P.2d 432].) [**915] This case turns on the Board's legal decisions.

II

Apportionment May Be Properly Based on Genetics/Hereditability

The Board opined without explanation that apportioning causation to "'genetics' opens the door to apportionment of disability to impermissible immutable factors." We perceive no impermissible apportionment here, and the Board's prior apportionment decisions under similar circumstances belies the validity of its statement.

Prior to 2004, when the Legislature enacted Senate Bill No. 899 (2003–2004 Reg. Sess.), apportionment based on causation was prohibited. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1326 [57 Cal. Rptr. 3d 644, 156 P.3d 1100] (*Brodie*).) A disability that resulted from both industrial and nonindustrial causes was apportionable only if the nonindustrial portion would have resulted from the normal progression of the nonindustrial disease. (*Ibid.*) This meant employers were liable for the entire disability if the disability arose in part from an interaction between an industrial cause and a nonindustrial cause, but the nonindustrial cause alone would not have given rise to a disability. (*Ibid.*) Thus, an employer was liable for the entire disability if an industrial injury aggravated a previously [****8] existing nonindustrial condition. (*Ibid.*)

For example, in *Zemke v. Workmen's Comp. App. Bd.* (1968) 68 Cal.2d 794, 796 [69 Cal. Rptr. 88, 441 P.2d 928] (*Zemke*), the worker suffered an injury to his back when he lifted a barrel at work. Three doctors agreed that the worker had a preexisting "arthritic condition" that was asymptomatic before the injury. (*Id.* at p. 797.) The doctors variously described the preexisting condition as osteoarthritic changes and degenerative disc disease. (*Id.* at pp. 797–798.) The Board, following the doctors' opinion on apportionment, found that 50 percent of the

worker's disability was attributable to the preexisting condition. (*Id.* at p. 797.) The Supreme Court annulled the Board's ruling, holding that, "'the employer takes the employee subject to his condition when he enters the employment, and that therefore compensation is not to be denied merely because the workman's physical condition was such as to cause him to suffer a disability from an injury which ordinarily, given a stronger and healthier constitution, would have caused little or no inconvenience.'" (*Id.* at p. 800.) *Zemke* was [***442] superseded by the enactment of Senate Bill No. 899 (2003–2004 Reg. Sess.). (*Brodie, supra*, 40 Cal.4th at p. 1326.)

[*116] [*116]

CA(1) **(1)** ***HN2*** Since the enactment of Senate Bill No. 899 (2003–2004 Reg. Sess.), apportionment of permanent disability is based on causation, and the employer [****9] is liable only for the percentage of permanent disability directly caused by the industrial injury. (*Brodie, supra*, 40 Cal.4th at pp. 1324–325.) Apportionment may now be based on "'other factors'" that caused the disability, including "the natural progression of a non-industrial condition or disease, a preexisting disability, or a post-injury disabling event[,] ... pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions ... ." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617–618 (*Escobedo*).) Precluding apportionment based on "impermissible immutable factors" would preclude apportionment based on the very factors that the legislation now permits, i.e., apportionment based on pathology and [**916] asymptomatic prior conditions for which the worker has an inherited predisposition.

The Board's ruling indicates that it believes "genetics" is not a proper factor on which to base causation. However, since 2004 it has allowed apportionment based on such a factor, even though it may not have used the term "genetics."

In *Kos v. Workers' Comp. Appeals Bd.* (2008) 73 Cal.Comp.Cases 529, 530 (*Kos*) the worker developed back and hip pain while working as an office manager. She was diagnosed with "multilevel degenerative disease," and the medical evaluator found that the underlying degenerative disc disease was not caused by work activities, [****10] but that the worker's prolonged sitting at work "'lit up'" her preexisting disc disease. (*Id.* at pp. 530, 531.) The medical evaluator testified that the worker's "pre-existing genetic predisposition for degenerative disc disease would have contributed approximately 75 percent to her overall level of disability." (*Id.* at p. 531.) Nevertheless, the ALJ found no basis for apportioning the disability. (*Id.* at p. 532.) The Board granted reconsideration and rescinded the ALJ decision. (*Id.* at p. 532.) The Board stated that in degenerative disease cases, it is incorrect to conclude that the worker's permanent disability is necessarily entirely caused by the industrial injury without apportionment. (*Id.* at p. 533.) Thus, in *Kos*, the Board had no trouble apportioning disability where the degenerative disc disease was caused by a "pre-existing genetic predisposition." (*Id.* at p. 531.)

In *Escobedo, supra*, 70 Cal.Comp.Cases at pages 608, 609, the ALJ apportioned 50 percent of the worker's knee injury to nonindustrial causation based on the medical evaluator's opinion that the worker suffered from """significant degenerative arthritis."" The Board stated: "In this case, the issue is whether an apportionment of permanent disability can be made based on the preexisting arthritis in applicant's knees. Under pre-[Senate Bill No.] [****11] 899 [(2003–2004 Reg. Sess.)] apportionment law, there would have been a **[*117] [*117]** question of whether this would have constituted an impermissible apportionment to pathology or causative factors. [Citations.] Under [Senate Bill No.] 899 [(2003–2004 Reg. Sess.)], however, apportionment now can be based on non-industrial pathology, if it can be [***443] demonstrated by substantial medical evidence that the non-industrial pathology has caused permanent disability. [¶] ... [¶] ... Thus, the preexisting disability may arise from any source—congenital, developmental, pathological, or traumatic." (*Id.* at pp. 617–619.) We perceive no relevant distinction between allowing apportionment based on a preexisting congenital or pathological condition and allowing apportionment based on a preexisting degenerative condition caused by heredity or genetics.

In *Acme Steel v. Workers' Comp. Appeals Bd.* (2013) 218 Cal.App.4th 1137, 1139 [160 Cal. Rptr. 3d 712], the medical examiner apportioned 40 percent of the worker's hearing loss to "'congenital degeneration'" of the cochlea. (*Id.* at p. 1139.) The ALJ nevertheless refused to apportion the disability, and the Board denied the employer's petition for reconsideration. (*Id.* at pp. 1140–1141.) The Court of Appeal granted the employer's writ of review and remanded the matter to the Board, holding Labor Code sections 4663 and 4664 required apportionment [****12] for the nonindustrial cause due to congenital degeneration where substantial medical evidence showed 100 percent of the hearing loss could not be attributed to the industrial cumulative trauma. (*Acme Steel*, at pp. 1142–1143.) Again, we see no relevant distinction between apportionment for a preexisting disease that is congenital and degenerative, and apportionment [**917] for a preexisting degenerative disease caused by heredity or genetics. [3]

III

Dr. Blair Properly Apportioned Disability

The Board's opinion stated: "[R]elying upon applicant's genetic makeup leads Dr. Blair to apportion the causation of applicant's injury rather than **[*118] [*118]** apportionment of the extent of his disability." The facts of this case do not support the Board's legal conclusion.

HN4 ***CA(2)*** **(2)** Labor Code section 4663, subdivision (a) provides: "Apportionment of permanent disability shall be based on causation." In *Escobedo, supra*, 70 Cal.Comp.Cases at page 611, the Board came to the obvious conclusion that causation in this context means causation of the permanent disability. The Board stated 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 [***444] applicant's *permanent disability* is causally related to his or her injury." (*Ibid.*) [4] While this might be true, Dr. Blair's [****13] analysis was not mistaken in this case.

HN5 ***CA(3)*** **(3)** "Disability" as used in the workers' compensation context includes two elements: "(1) actual incapacity to perform the tasks usually encountered in one's employment and the wage loss resulting therefrom, and (2) physical impairment of the body that may or may not be incapacitating." (*Allied Compensation Ins. Co. v. Industrial Acc. Com.* (1963) 211 Cal.App.2d 821, 831 [27 Cal. Rptr. 918].) Permanent disability is ""the irreversible residual of an injury,"" and permanent disability payments are intended to compensate for physical loss and loss of earning capacity. (*Brodie, supra*, 40 Cal.4th at p. 1320.) Here, Dr. Blair identified Rice's disability as neck pain and left arm, hand, and shoulder pain, which prevented him from sitting for more than two hours per day, lifting more than 15 pounds, and any vibratory activities such as driving long distances. All of these activities were included in Rice's job description.

Rice's *injury*, on the other hand, was a cumulative injury, which Dr. Blair stated Rice acknowledged was not an exact or isolated injury, but which he believed was a consequence of repetitive motion primarily resulting from his employment. Thus, the injury was repetitive motion. Dr. Blair did not conclude, as the Board apparently determined, that the repetitive motion [****14] (the injury) was caused by genetics. Rather, Dr. Blair properly concluded that Rice's *disability*, i.e., his debilitating neck, arm, hand, and shoulder pain preventing him from performing his

job activities, was caused only partially (17 percent) by his [**918] work activities, and was caused primarily (49 percent) by his genetics. Contrary to the Board's opinion, Dr. Blair did not apportion causation to injury rather than disability.

[*119] [*119]

IV

Dr. Blair's Opinion Is Based on Substantial Medical Evidence

The Board found that Dr. Blair's report did not suffice as "substantial medical evidence to justify apportioning 49% of [Rice's] disability to non-industrial factors." We disagree.

HN6 ***CA(4)*** **(4)** Substantial evidence is relevant evidence a reasonable mind might accept as adequate to support a conclusion. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164 [193 Cal. Rptr. 157, 666 P.2d 14].) In *Escobedo, supra*, 70 Cal.Comp.Cases at page 620, the Board opined that in order for a medical opinion to constitute substantial evidence, it must be predicated on reasonable medical probability. It must also set forth the reasoning behind the physician's opinion. (*Id.* at p. 621.) In the context of an apportionment determination, the opinion must "disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable [***445] disability, [****15] and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles." (*Ibid.*) A medical opinion must be framed in terms of reasonable medical probability, must not be speculative, must be based on pertinent facts and on adequate examination and history, and must set forth the reasoning in support of its conclusions. (*Ibid.*) A medical report is not substantial medical evidence "if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Id.* at p. 620.)

Dr. Blair's diagnosis was that Rice's disability was the result of cervical radiculopathy and cervical degenerative disc disease. The apportionment determination that is relevant here is that part of the causation that Dr. Blair listed as "personal history." Dr. Blair initially apportioned 25 percent of the cause of disability to personal history. Her explanation was that studies indicate that heredity and genetics are significant causes of degenerative diseases of the spine, such as that exhibited by Rice. Dr. Blair also included in the personal history category [****16] Rice's history of smoking and previous diagnosis of lateral epicondylitis.

In a supplemental report, Dr. Blair stated that there is evidence in the literature that repetitive activity "has a link to degenerative disease." She stated that some of Rice's work activities could be associated "with work-related repetitive causation," thus work-related activities could not be eliminated as a potential cause.

[*120] [*120]

In a subsequent, postsurgical evaluation, Dr. Blair opined that the causes of Rice's disability remained the same, but the apportionment had changed. It changed because Dr. Blair became aware of three medical publications, which she named, that indicated the role of heredity in causing degenerative disc disease was greater than Dr. Blair previously realized. Because of these publications, Dr. Blair apportioned 49 percent of Rice's disability "to his personal history, including genetic issues, and 17 percent each to his employment with the City of Jackson, his previous employment history, and his personal injuries."

Dr. Blair attempted to explain her change of apportionment in a subsequent supplemental report. She was asked how she [**919] could state to a reasonable degree of medical probability that [****17] genetics played a role in Rice's injury. She responded that she could do so because medical studies showed that the role of "heritability" in degenerative disc disease had been found to be between 73 and 75 percent. One of the studies, which was conducted using twins, found: "'In comparison, suspected environmental factors were found to contribute little (e[.]g. physical loading, cigarette smoking, age[,] 2–7 percent variation) or not at all (e[.]g. whole body vibration associated with exposure to motor vehicle use).['] ... '[t]here is some variation with respect to the level of the spine, but the effects are small compared with the ability to predict degenerative changes based on family data.'"

Dr. Blair stated that, given the medical literature, "... I think I can say to a reasonable degree of medical probability that genetics has played a role in Mr. Rice's injury. In fact, I think that your counterparts on the other side of this issue could come back to me and essentially say that I have not ascribed a significant [***446] enough percentage to that amount. However, I always try and err on the side of the patient. ... In my effort to err on the side of the patient, I decided against .63, .73, [****18] 74, 75 percent because of perhaps some inherent weaknesses in the study, although I really do not know of any, and the fact that there are multiple sources does not really indicate any, but nevertheless, ... I decided on 49 percent as the lowest level that could reasonably be stated." Dr. Blair went on to say that even without researching Rice's family history, "the evidence is fairly strong that there is predominantly genetic causation, unless there is a clear traumatic injury, which, in Mr. Rice's case, there was not."

Rice incorrectly asserts that "Dr. Blair concluded that genetics plays a role in approximately 63–75 percent of degenerative disc disease cases." Dr. Blair's findings do not indicate that approximately 75 percent of degenerative disc disease *cases* are caused wholly by genetics, the other approximately 25 percent of *cases* being caused wholly by other factors. Instead, she indicated that degenerative disc disease in adults "'may be explained up to **[*121] [*121]** 75 percent by genes alone.'" In other words, *every* case of degenerative disc disease in adults is caused in part by genetics or heredity, and the other part by other factors. This is also the reason that Rice's claim that [****19] Dr. Blair's opinion lacked evidentiary support is wrong. Rice argues Dr. Blair cannot have known his degenerative disc disease was caused by genetics because she never researched his familial medical history. It was unnecessary for Dr. Blair to conduct such an analysis because her research indicated that genetics or heredity was a majority factor in *all* cases of degenerative disc disease. This explains Dr. Blair's response to Rice's attorney's request that Dr. Blair consider a hypothetical in which one patient has cervical degenerative disease caused by genetics and the other one has the disease caused by environmental factors. She responded that such a hypothetical situation would never be seen in practice and that the assumption was not reasonable.

Dr. Blair's reports meet all of the requirements of *Escobedo*. Dr. Blair expressly stated that confidence in her opinion was predicated on a reasonable degree of medical probability. Dr. Blair gave the reasoning behind her opinion—the published medical studies—and even named the studies and the pages relied upon. Her opinion disclosed familiarity with the concept of apportionment. Labor Code section 4663 states that apportionment is based on causation, and that [****20] "[a] physician shall make an apportionment determination by finding what approximate percentage of [**920] the permanent 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, subd. (c).)

Dr. Blair's reports reflect an understanding that apportionment is based on the cause of the disability, and the necessity of determining what percentage was caused by Rice's employment. She explained that the causation of his disability stemmed from work activities with the City, prior work activities, prior personal injuries, and personal history. Included in the causes listed as personal history were "heritability and genetics" as supported by medical studies, Rice's brief history of smoking, and his prior diagnosis of lateral epicondylitis.

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CA(5) (5) Dr. Blair's reports reflect, without speculation, that Rice's disability is the result of cervical radiculopathy and cervical degenerative disc disease. Her diagnosis was based on medical history, physical examination, and diagnostic studies that included X-rays and MRI's (magnetic resonance imaging scans). She determined that 49 percent [****21] of his condition was caused by heredity, genomics, and other personal history factors. Her conclusion was based on medical studies that were cited in her report, in addition to an adequate medical history and examination. Dr. Blair's combined reports are more than sufficient to meet the standard of substantial medical evidence.

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DISPOSITION

The Workers' Compensation Appeals Board's opinion and decision after reconsideration that was filed January 30, 2015, and that granted reconsideration, is annulled and the matter is remanded to the Board to deny reconsideration. Petitioner is awarded costs.

Hoch, J., and Renner, J., concurred.

A petition for a rehearing was denied May 18, 2017, and the petition of respondent Christopher Rice for review by the Supreme Court was denied July 9, 2017, S242344.

Footnotes

1 "An injury may be either: (a) 'specific,' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) 'cumulative,' occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment." (Lab. Code, § 3208.1.)

2 Cervical radiculopathy is a "[d]isease or abnormality of a spinal nerve root at its origin in the cervical spine." (1 Schmidt, Attorney's Dict. of Medicine, Illustrated (2010) p. C-175.)

3 The California Applicants' Attorneys Association filed an amicus curiae brief arguing apportionment to genetics is unlawful invidious discrimination pursuant to Government Code section 11135, which prohibits government programs or activities from discrimination on the basis of, inter alia, physical disability or genetic information. We decline to address this argument because it was not raised by petitioner. HN3 "'Amicus Curiae must accept the issues made and propositions urged by the appealing parties, and any additional questions presented in a brief filed by an amicus curiae will not be considered.' [Citations.] Otherwise, amicus curiae, rather than the parties themselves, would control the issues litigated." (*Lance Camper Manufacturing Corp. v. Republic Indemnity Co.* (2001) 90 Cal.App.4th 1151, 1161, fn. 6 [109 Cal. Rptr. 2d 515].)

4 In a later case, the Board recognized that just because causation of the injury is not necessarily the same as causation of the disability does not mean the two *cannot* be the same. (*Kos, supra*, 73 Cal.Comp.Cases at p. 533.)