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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MYRTLE VARGAS,

Applicant,

vs.

ATASCADERO STATE HOSPITAL, Legally Uninsured; and STATE COMPENSATION INSURANCE FUND (Adjusting Agent),

Defendant(s).

Case No. GRO 0016640

OPINION AND ORDER DENYING PETITION FOR REMOVAL (EN BANC)

Applicant has filed a Petition for Removal[1] challenging the Workers' Compensation Administrative Law Judge's (WCJ's) order at a hearing on applicant's petition to reopen, authorizing defendant to obtain supplemental medical reports to address the new apportionment provisions of Senate Bill (SB) 899.[2]

Because of the important legal issues presented, and in order to secure uniformity of decision in the future, the Chairman of the Appeals Board, upon a majority vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision. (Section 115.)[3]

We conclude that the WCJ's order is correct, and therefore we will deny applicant's petition for removal. In so doing, we hold that:

(1) The new apportionment provisions of SB 899 apply to the issue of *increased* permanent disability alleged in any petition to reopen (see sections 5803, 5804, 5410) that was pending at the time of the legislative enactment on April 19, 2004, regardless of date of injury;

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[1] See Labor Code section 5310. Unless otherwise specified, all further statutory references are to the Labor Code.

[2] Stats. 2004, ch. 34, §35, enacted April 19, 2004.

[3] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 313, fn. 5 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236]; see also Govt. Code, § 11425.60(b).)

(2) Consistent with Section 47 of SB 899, the new apportionment statutes cannot be used to revisit or recalculate the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004; and

(3) In applying the new apportionment provisions to the issue of *increased* permanent disability, the issue must be determined without reference to how, or if, apportionment was determined in the original award.

BACKGROUND

On March 22, 1995, applicant sustained an admitted injury to her left upper extremity and neck. Subsequently she underwent cervical spine surgery by Dr. Kissel, a neurosurgeon. By Findings and Award (F&A) dated January 21, 1998, the WCJ found that applicant also sustained injury to her left ear, and that the 1995 injury resulted in permanent disability of 67%. The permanent disability was determined by "baseball arbitration" under former Section 4065.[4] That is, applicant had submitted a proposed standard rating of 80% for the neck, 20% for the left upper extremity, and 5% for the left ear, which, after adjustment for age and occupation, and application of the Multiple Disabilities Table (MDT), produced a permanent disability rating of 97%. Defendant had submitted a proposed standard rating of 60% for the neck and 1% for the left ear, which adjusted to 67%. (Defendant's proposed rating did not include a rating for the left upper extremity.) The WCJ chose defendant's proposed rating because it was closest to a recommended rating obtained by the WCJ, which rated the disability at 65% standard, adjusting to 71%. The recommended rating was based on the work restrictions and objective and subjective factors of disability for the neck and left upper extremity set forth in Dr. Kissel's May 8, 1996 report, as well as the factors of disability set forth in the June 30, 1997 defense QME report of Dr. Di Bartolomeo

[4] Enacted 1993 and repealed 2002, the statute provided, in relevant part, that "(a) […] where either the employer or the employee have obtained evaluations of the employee's permanent impairment and limitations from a [QME] under Section 4061 and either party contests the…medical evaluation of the other party, the [WCJ] or the appeals board shall be limited to choosing between either party's proposed permanent disability rating. [¶] "(b) The employee's permanent disability benefit awarded under paragraph (a) shall be adjusted based on the disability rating selected by the appeals board. […]" (See *Britt v. Workers' Comp. Appeals. Bd.* (2001) 66 Cal.Comp.Cases 1182 [writ denied].)

with regard to the left ear.

As to the neck and left upper extremity, the objective factors included minimal limitation in range of motion of the cervical spine. The subjective factors included moderate and intermittent neck pain which occurs with any type of activity for greater than one hour length of time, and applicant having some days with moderate to severe pain on an occasional basis. The work restriction was a limitation to semi-sedentary work, with an inability to perform work reaching above head or with repetitive bending and twisting of the cervical spine and difficulty with computer work activity, which would exacerbate applicant's symptoms.

As to the left ear, the factors of disability included an "audiometric demonstration of a sloping high frequency auditory deficit" as well as "mild left tinnitus and/or myoclonus, and generalized left ear pain."

According to the Disability Evaluator ("rater"), the left ear factors rated 0%. Thus, the recommended rating of 71% was based on the neck and left upper extremity disability.[5]

In his Opinion on Decision, the WCJ stated that the permanent disability award was based on "the finding of the factors of disability, the recommended rating of those factors of disability, and [because] the defendant's proposed rating was closer to the true disability than the applicant's proposed rating."

There was no apportionment in the F&A of January 21, 1998.

Applicant filed a timely Petition to Reopen under sections 5803, 5804 and 5410, alleging that her condition had worsened, resulting in new and further temporary[6] and permanent disability, and that she had seen Dr. Kissel again. Later the petition was amended to include an allegation of

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[5] The formula used by the rater was as follows:

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     7.-65%-35F-65-71:0
  18.1-65%-35F-65-71:0    71:0
            1/2 (0:0)      0:0
                              71:0
        3.1-0%-35J-0            0:0
                                  71:0
  MULTIPLE DISABILITIES TABLE
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[6] The claim for temporary disability was resolved by interim litigation that is now final, so that only the claim for increased permanent disability remains outstanding.

psyche injury, and the parties eventually stipulated to compensable consequence injuries to the psyche and TMJ syndrome (jaw injury). They also agreed to Dr. Di Bartolomeo as the AME for the left ear injury and Dr. Wells as the AME for the psyche injury.

Applicant filed a Declaration of Readiness to Proceed (DOR), and the petition to reopen proceeded to hearing on March 2, 2004. The DOR included reference to a medical report from Dr. Gabriel, a dentist. Defendant raised the issue of apportionment, and the WCJ delayed submission to allow defendant to file a medical report from Dr. Adler, the defense QME on the TMJ claim.

On April 8, 2004, the WCJ served rating instructions and a recommended rating of 91:2%.[7]

With respect to the neck and left upper extremity, the instructions were identical to the 1998 instructions, but the rating was done by a different rater, who now rated the neck and left upper extremity disability using a standard rating of 60%, adjusting to 67%, as compared with the 1998 recommended rating of 65% standard, adjusting to 71%.

For the left ear, the instructions referred to the March 7, 2002 report of Dr. Di Bartolomeo, which included as a factor of disability an average 19 decibel reduction of hearing of the right ear and 2% loss of hearing of the left ear.

For the psyche injury, the instructions were based on the August 2, 2002 report of Dr. Wells, which described impairment in the eight work function categories ranging from none, to very slight to slight.

For the TMJ injury, the instructions relied on the objective factors of disability and restrictions described in the October 6, 2003 report of Dr. Gabriel. The restrictions included "no cradling the phone between the facial, neck, shoulder musculature; avoidance of excessive talking of twenty minutes straight, without a ten minute rest; improper posture due to a non-ergonomically

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[7] The formula used by the rater was as follows:

1.4 – 8% -35J-14- 17:2
2% (3.111-15%-25J-23-28:0) 0:2
4.5-30%-35J-41- 47:2
7.-60%-35F-60-67:0
18.1-60%-35F-60-67:0 67:0
1/2 (0:0) 0:0
67:0
MULTIPLE DISABILITY TABLE: 91:2

designed environment; restricted from pushing, pulling, and lifting objects more than ten pounds; avoidance of cold environment, which will cause increased myofacial pain; avoidance of emotional stress that would give rise to nervousness, irritability and tension such as working close deadlines, dealing with contentious, unreasonable or otherwise exasperating members of the public and work that requires precision and attention to detail under distracting conditions."

On April 12, 2004, applicant filed a DOR, requesting cross-examination of the rater.[8] On April 15, the District Office served notice of hearing for cross-examination of the rater set for May 20, 2004. On April 19, 2004, SB 899 was enacted. On April 23, 2004, the WCJ informed the parties that he would apply the new law of apportionment under SB 899, and that further development of the record would be addressed at the May 20 hearing. At that hearing, the WCJ issued the following ruling:

> "Defendant's request to leave the record open to obtain supplemental reports from Dr. Wells and Dr. Di Bartolomeo regarding the 4-19-04 change in the law regarding apportionment is granted. Defendant is allowed 30 days to submit the additional reports or show good cause for an extension of time to do so. Applicant has the right to obtain rebuttal to these reports.
>
> "Applicant informs WCAB that if the record is left open she is informally indicating depositions of Dr. Kissel on 6-30-04, of Dr. Wells on 7-21-04, Dr. DeBartolomeo [sic] on 7-2-04, and Dr. Gabriel on 6-25-04."

Applicant filed a timely Petition for Removal, contending, in substance, that the new law of apportionment cannot be applied retroactively where the medical reports were prepared[9] before the enactment of SB 899, and that when the WCJ vacated submission and allowed further development of the record, he violated applicant's right to an expeditious and unencumbered hearing under the California Constitution, as well as her statutory right, under section 5313, to a prompt determination of the merits.

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[8] The basis for applicant's objection to the instructions/rating was not specified. However, there may be an issue as to how the neck/upper extremity disability can be less now than what it was in 1998, based on the same factors of disability.

[9] Subdivision (b) of section 4663 states, "[a]ny physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability."

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The Appeals Board invited briefs from the workers' compensation community to address the issues raised by the petition. Defendant, State Compensation Insurance Fund (SCIF), then filed a response. The Board also received and considered briefs from the California Workers' Compensation Institute, the California Self-Insurers Association, and the Law Office of Ernest A. Canning.

DISCUSSION

(1) The New Apportionment Provisions Of SB 899 Apply To The Issue Of *Increased* Permanent Disability Alleged In Any Petition To Reopen (See Sections 5803, 5804, 5410) That Was Pending At The Time Of The Legislative Enactment On April 19, 2004, Regardless Of Date Of Injury.

In *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906 [70 Cal.Comp.Cases 787], wherein a petition to reopen was pending on the date of SB 899's enactment, the Court held that the apportionment provisions of SB 899 must be applied to all cases not yet final at the time of the legislative enactment on April 19, 2004, regardless of the earlier dates of injury and any interim decision. (See also, *Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274 [70 Cal.Comp.Cases 133] (in which the Court reached a similar conclusion wherein a petition to reopen was pending on the date of SB 899's enactment); cf., *Rio Linda Union School Dist. v. Workers' Comp. Appeals Bd.* (*Scheftner*) (2005) 131 Cal.App.4th 517 [70 Cal.Comp.Cases 999].)

Accordingly, and consistent with the principles stated in *Marsh,* we conclude that the new apportionment provisions of SB 899 apply to the issue of *increased* permanent disability alleged in any petition to reopen (see sections 5803, 5804, 5410) that was pending at the time of the legislative enactment on April 19, 2004, regardless of date of injury.

In this case, applicant's petition to reopen was pending on April 19, 2004, so the new apportionment provisions apply, and the WCJ correctly granted defendant's request to obtain supplemental reports from its medical evaluators to address apportionment under the new law.

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(2) Consistent With Section 47 Of SB 899, The New Apportionment Statutes Cannot Be Used To Revisit Or Recalculate The Level Of Permanent Disability, Or The Presence Or Absence Of Apportionment, Determined Under A Final Order, Decision, Or Award Issued Before April 19, 2004.

Marsh, Kleemann and *Scheftner* make it clear that the apportionment provisions of SB 899 may not be used to reopen an award of permanent disability that was final as of April 19, 2004.

Section 47 of SB 899 states:

> "The amendment, addition, or repeal of, any provision of law made by this act shall apply prospectively from the date of enactment of this act, regardless of the date of injury, unless otherwise specified, *but shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board*." (Italics added.)

The second clause of Section 47 precludes using the new statutes to establish a basis to reopen the original existing award.

In *Marsh*, it was noted that the Court in *Kleemann* examined the phrase, "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision or award," and explained that this "language resembled that generally applied when the WCAB exercises its continuing jurisdiction to readdress a prior WCAB determination within five years from the date of injury for good cause or new and further disability" under Sections 5410, 5803 and 5804. (*Marsh, supra,* 130 Cal.App.4th at p. 914 [70 Cal.Comp.Cases at pp. 792-793].)

In *Kleemann*, the Court also commented that "applying apportionment under new sections 4663 and 4664 does not in this case reopen, rescind, alter or amend a previous 'existing order, decision, or award' of permanent disability. *There is no reimbursement of previously awarded compensation under the new statutes…*" (127 Cal.App.4th at pp. 287-288 [70 Cal.Comp.Cases at pp. 143-144], italics added.) Thus, if Kleemann's case had involved 'reimbursement of previously awarded compensation,' the Court may have precluded application of new sections 4663 and 4664. The Court's negative reference to 'reimbursement of previously awarded compensation' supports the conclusion that the new apportionment sections cannot be used to reach back and reduce the original award, or revisit the basis for that award.

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In *Scheftner*, the Court said in a similar vein:

> "…And so we can presume the Legislature in using the entire phrase 'shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award of the Workers' Compensation Appeals Board' was intentionally referring to the continuing jurisdiction authority of the WCAB under sections 5803 and 5804…The language chosen by the Legislature, read as a complete phrase, indicates the Legislature did not want the changes of law made by Bill No. 899 to be the basis for reopening cases otherwise concluded under the workers' compensation procedures for decision (§ 5313), reconsideration (§ 5900), and judicial review (§ 5950)." (131 Cal.App.4th at pp. 530-531 [70 Cal. Comp. Cases at p. 1009].)

Further, in considering the scenario of a concluded workers' compensation case subject only to the continuing jurisdiction of the WCAB, but with the case properly reopened for good cause, the Court stated that the Legislature "may not intend in such situation to backtrack and require reassessment of causation of the permanent disability to apply the new apportionment law." (*Scheftner*, *supra,* 131 Cal.App.4th at p. 532 [70 Cal.Comp.Cases at p. 1010].)[10]

Accordingly, we conclude, consistent with Section 47 of SB 899, that the new apportionment statutes cannot be used to revisit or recalculate the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004.

(3) In Applying The New Apportionment Provisions To The Issue Of *Increased* Permanent Disability, The Issue Must Be Determined Without Reference To How, Or If, Apportionment Was Determined In The Original Award.

The WCJ has not issued a final order on applicant's petition to reopen. We observe, however, that apportionment of the *increased* permanent disability alleged in applicant's petition to reopen may include not only disability that could have been apportioned prior to SB 899, but may also include disability that formerly could not have been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions). (See *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc].)

[10] See also *Draper v. Workers' Comp. Appeals Bd*. (1983) 147 Cal.App.3d 502, 508 [48 Cal.Comp.Cases 748, 753], wherein the Court stated that the Appeals Board "cannot...go behind [a prior] award and speculate as to what other determination might have been made at that time."

In this case, to the extent that applicant's neck and upper extremity injury may have resulted in *increased* permanent disability, any such *increased* disability will be subject to apportionment under the new law, provided there is substantial medical evidence establishing that these other factors have caused *increased* permanent disability. Consistent with part (2) of this opinion, however, the new apportionment statutes cannot be used to revisit or recalculate the level of permanent disability, or the presence or absence of apportionment, determined under a final order, decision, or award issued before April 19, 2004.

(4) Application Of These Principles To the Present Case.

The WCJ was correct in authorizing further development of the record, because the issue of applicant's *increased* permanent disability, if any, must be determined using the new apportionment provisions, and the reporting physicians have yet to address the issue.

In this regard, after applicant filed her petition to reopen, the parties stipulated to compensable consequence injuries to the psyche and TMJ syndrome (jaw injury). There is no existing order, decision, or award of permanent disability concerning the compensable consequence injuries, and the WCJ has not issued a final order on them in connection with applicant's petition to reopen. Moreover, there are no medical reports in the WCAB's present record that address the issue of apportionment of the psyche or TMJ disability, if any, in accordance with the new apportionment statutes and in accordance with the standards set out in *Escobedo*.

Finally, we deny applicant's contention that application of SB 899 in the reopening proceedings will result in a denial of her constitutional and statutory rights to expeditious proceedings and a prompt determination. Similar contentions were rejected in *Kleemann*, *Marsh* and *Scheftner.*

For the foregoing reasons,

IT IS ORDERED, as the Appeals Board's decision en banc, that applicant's Petition for Removal be, and the same hereby is, **DENIED.**

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WORKERS' COMPENSATION APPEALS BOARD (EN BANC)

/s/ Joseph M. Miller

JOSEPH M. MILLER, Chairman

/s/ William K. O'Brien

WILLIAM K. O'BRIEN, Commissioner

/s/ James C. Cuneo

JAMES C. CUNEO, Commissioner

/s/ Janice J. Murray

JANICE J. MURRAY, Commissioner

/s/ Frank M. Brass

FRANK M. BRASS, Commissioner

I CONCUR,

(See attached Concurring Opinion)

/s/ Merle C. Rabine

MERLE C. RABINE, Commissioner

/s/ Ronnie G. Caplane

RONNIE G. CAPLANE, Commissioner

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

4/11/2006

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES AS SHOWN ON THE OFFICIAL ADDRESS RECORD, EXCEPT LIEN CLAIMANTS

JL/ams

CONCURRING OPINION OF COMMISSIONER RABINE

I reluctantly concur under compulsion of *Marsh*. Even though the parties did not raise the issue of the applicability of the apportionment statutes of SB 899 to petitions to reopen, and even though the Court does not address that issue specifically in its opinion, there is no doubt that the Court held that "the apportionment provisions of SB 899 must be applied to all cases such as Marsh's [that is, cases where a petition to reopen is pending] not yet final at the time of the legislative enactment . . ." (130 Cal.App.4th at p. 909 [70 Cal.Comp.Cases at p. 788].) We are an "inferior court," and we are "jurisdictionally required to adhere to and follow the decisions of the Court of Appeal." (*Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377, 384, fn. 5 [61 Cal.Comp.Cases 554].)

But if I were writing on a clean slate, I would read the plain language of Section 47 of SB 899 to forbid application of the apportionment provisions to petitions to reopen awards that issued prior to April 19, 2004.

The history of workers' compensation reform from 1989 to 2004 is a history of increasing, sometimes bewildering complexity. Nonetheless, where there is more than one possible reading of a legislative provision, I would apply Occam's razor ("Entities should not be multiplied unnecessarily")[11] and prefer the simpler to the more complicated. Here, Section 47 provides that the apportionment provisions "shall not constitute good cause to reopen or rescind, alter, or amend any existing order, decision, or award . . ." The issue of good cause to reopen is precisely the issue that is pending in this case, and the simplest reading of Section 47 is that the new apportionment statutes do not apply.

As it happens, the new and further disability, if any, in this case appears to be attributable to compensable consequences (TMJ, psyche). Therefore, the application of the apportionment statutes to these disabilities would be no more complicated than to disabilities subject to initial determination (that is to say, very complicated). But in the garden-variety petition to reopen,

[11] See Eco, *Il nome della rosa* (1980).

where there is, for example, a back injury with a pre-existing disease process not subject to apportionment at the time of the original award, the evaluating physicians will have to determine not only whether there is any new and further disability, but also whether any of that disability is attributable to the natural progression of the underlying disease process from the date of the original award through the date of the subsequent evaluation. It is conceivable that physicians will be able to make these determinations, but the difficulty is extraordinary.

As the Court in *Marsh* stated, there is a "finite number of cases blind-sided by SB 899's adoption[.]" (130 Cal.App.4th at p. 916 [70 Cal.Comp.Cases at p. 795]). The number of cases that involve petitions to reopen awards that issued prior to April 19, 2004 is a mere subset of that finite number. I do not believe that the level of complexity required by this decision, with which I agree, is required by a plain reading of Section 47. But that train has already left the station.

/s/ Merle C. Rabine
MERLE C. RABINE, Commissioner

/s/ Ronnie G. Caplane
RONNIE G. CAPLANE, Commissioner

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4/11/2006

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JL/ams