WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHARLOTTE UTSEY, ***Applicant***

vs.

NATIONAL COURIER SYSTEMS; and SUPERIOR NATIONAL INSURANCE, in liquidation, administered by CALIFORNIA INSURANCE GUARANTEE ASSOCIATION; CITY OF OAKLAND, permissibly self –insured, administered by JT2 INTEGRATED RESOURCES, ***Defendants***

Adjudication Numbers: ADJ3762315 (OAK 0266269), ADJ946031 (SFO 0394259)
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of September 30, 2019, the Workers' Compensation Judge (WCJ) issued findings in two case numbers.

In ADJ946031, the WCJ found that on November 2, 1994, applicant, while employed as a courier by National Courier Systems, then insured by Superior National Insurance, in liquidation and administered by California Insurance Guarantee Association (CIGA), sustained industrial injury to her bilateral knees, bilateral wrists, right elbow, right ankle, left foot, bilateral arms, and bilateral shoulders, and that applicant's earnings at the time of injury were $189.00 per week, warranting temporary disability indemnity payable at the rate of $126.00 per week and permanent disability indemnity payable at the rate of $98.00 per week.

In ADJ3762315, the WCJ found that on May 4, 1999, applicant, while employed as a control parking technician by the City of Oakland, sustained industrial injury to her lumbar spine, bilateral shoulders, bilateral knees, bilateral wrists, right elbow, bilateral arms, right ankle, and left foot, and that applicant's earnings at the time of injury were $514.41 per week, warranting temporary disability indemnity payable at the rate of $342.94 per week and the "statutory maximum for permanent disability." In ADJ3762315, the WCJ also found that the correct rate of

payment of temporary total disability indemnity is $449.28 per week, and that temporary disability benefits are payable at the weekly rate of $449.28 for any temporary disability paid two years after the date of injury with the City of Oakland. In addition, the WCJ found that "as a result of all of applicant's alleged dates of injuries, applicant is 100% permanently totally disabled without apportionment."

In the Findings and Award of September 30, 2019, the WCJ also issued a Joint Award, which provided that the Award was made "against National Courier Systems, Superior National Insurance in liquidation, administered by California Insurance Guarantee Association *and* City of Oakland, permissibly self-insured, administered by JT2 Integrated Resources[.]" (Italics added.)

The City of Oakland ("petitioner") filed a timely petition for reconsideration of the WCJ's decision. Petitioner contends, in substance, that the WCJ erred in rejecting the apportionment opinion of Dr. Mandell, the Agreed Medical Evaluator (AME) in orthopedics, who apportioned liability to three separate and distinct injuries, and to non-industrial causes. Petitioner further contends that the WCJ erred in relying on a single document to increase applicant's temporary disability rate for all payments after 2001, that the document is not substantial evidence because it included the range of pay for applicant's position eighteen years after the time of injury, and that the parties limited the time period in dispute to a single year.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We begin by noting that in her Report, the WCJ states in relevant part, "it would be in the benefit of all parties to return this matter for further development of the record both on the issue of correct earnings as well as on the issue [of] apportionment." Based on our review of the record, we agree with the WCJ's recommendation as just stated. However, we do not adopt or incorporate the WCJ's Report because it is skeletal and not in compliance with WCAB Rule 10962. (Cal. Code Regs., tit. 8, § 10962.)

We further note that in reference to the issue of earnings, the WCJ stated in her Opinion on Decision, "applicant should have been paid temporary disability benefits at $449.28 for any temporary disability paid after May 4, 2001." The WCJ further stated that this determination was "based on the documentary evidence presented by applicant," but the WCJ did not otherwise specify the evidence she relied upon. As a result, we are prevented from ascertaining the basis for the WCJ's determination of the temporary disability indemnity rate. (See *Evans v. Workmen's*

Comp. Appeals Bd. (1968) 68 Cal.2d 753, 755 (33 Cal.Comp.Cases 350, 351): [The WCJ's Opinion on Decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful."].) For this reason, and in view of the WCJ's admission in her Report that the record requires further development on the issue of earnings, we will rescind the WCJ's finding on this issue and return this matter to the trial level for further proceedings and new finding on the issues of earnings and the temporary disability indemnity rate.

Turning to the issues of permanent disability and apportionment, the Minutes of Hearing of August 1, 2019 reflect that the parties stipulated, as to the specific injury of November 2, 1994 (ADJ946031), that "applicant's overall permanent disability is 100 percent prior to apportionment," with the issues of permanent disability and apportionment being raised in both case numbers. Thus, applicant's permanent and total disability may be subject to apportionment in two ways: (1) between the two industrial injuries; and (2) to non-industrial "other factors" under Labor Code section 4663.

We also note that the WCJ's Opinion on Decision includes some confusing statements on permanent disability and apportionment. Referring to the two specific industrial injuries, the WCJ states, "[i]t is because of all of the injuries *combined* that applicant is 100% totally *temporarily* disabled on a *permanent* basis." (Italics added.) Referring to Dr. Mandell's opinion on apportionment, the WCJ then states, "[s]ince it is the *synergistic* effect of all body parts injured that caused applicant's total disability, apportioning each body part separately [as attempted by Dr. Mandell] does not calculate." In the former statement, the WCJ seems to confuse temporary and permanent disability, while referring to the combined effects of applicant's injuries. In the latter statement, the WCJ refers to the *synergistic* effects of the injured body parts as a reason for rejecting Dr. Mandell's apportionment. However, this may not be a valid reason for disallowing apportionment if the *combined* injuries resulted in permanent and total disability, per the WCJ's former statement referred to above. We conclude the WCJ must revisit and clarify her approach to resolving the issue of apportionment in both case numbers.

In addition, we note the WCJ's Opinion on Decision disallows apportionment based on non-industrial factors, and between the two injuries. At the same time, it appears the WCJ issued a joint Award against both employers, National Courier Systems and the City of Oakland, but without apportioning liability between them. This is contrary to *Benson v. Workers' Comp.*

Appeals Bd. (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113]. In *Benson*, the Court of Appeal concluded that pursuant to Senate Bill 899 enacted in 2004, the law of apportionment mandates that multiple injuries ordinarily require separate permanent disability awards. However, the Court also stated that "there may be limited circumstances…when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified." (170 Cal.App.4th at 1560.)

In this case, the WCJ rejected apportionment between injuries notwithstanding Dr. Mandell's having done so in his deposition. (Joint Exhibit 102, pp. 21-26.) Further, the WCJ applied the "*Benson* exception" (physician cannot parcel out causation percentages for each injury) without citing to *Benson* and without citing evidence demonstrating that the effects of applicant's two industrial injuries are "inextricably intertwined." (See *Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 (51 Cal.Comp.Cases 114) [AME's opinion ordinarily is followed because the AME has been chosen by the parties for the AME's expertise and neutrality.].)

Accordingly, we conclude that the WCJ must revisit the issue of apportionment to resolve the outstanding questions discussed above. As suggested in the WCJ's Report, she may further develop the medical record on the issue of apportionment as she deems necessary or appropriate. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].)

Finally, we note that while this matter was pending on reconsideration, applicant's attorney filed a petition to be relieved as applicant's attorney of record. The WCJ should address and resolve the petition in further proceedings at the trial level, with notice and opportunity to be heard to the appropriate parties.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of September 30, 2019 is **AFFIRMED**, except that the Award is **RESCINDED AND DEFERRED PENDING FURTHER PROCEEDINGS AND ISSUANCE OF NEW AWARD BY THE WCJ, JURISDICTION RESERVED,** and the Findings are **AMENDED** in the following particulars:

FINDINGS

5. Per stipulation (5) entered into by the parties on August 1, 2019 under the heading of case number ADJ946031, applicant's overall permanent disability is 100 percent prior to apportionment. The outstanding issues relevant to apportionment are deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

6. The correct rate of payment of temporary total disability is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

9. The issue of the weekly rate at which temporary disability benefits are payable for any temporary disability paid two years after the date of injury with the City of Oakland is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the trial level for further proceedings and determination of all outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 21, 2022

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

CHARLOTTE UTSEY
FETTNER & LEMMON INC.
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP
MULLEN & FILIPPI (2)

JTL/ara

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
CS