WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MAXINE CORENTE, *Applicant*

vs.

AETNA; ACE AMERICA INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ9551349
Fresno District Office

OPINION AND DECISION GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Third Findings of Fact, Award and Order of July 31, 2023, wherein it was found that applicant's November 26, 2012 injury had caused new and further disability and had now apparently caused permanent disability of 26%. The WCJ's finding in this regard is, "The Disability Evaluation Unit rated the new Panel QME report as 16.01.02.02-19–[4]23-111G-26-26:0%, with the undersigned incorporates into these Findings, subject to credit for the initial Permanent Disability Findings." (Finding No. 9.) Although it appears that the WCJ found in the Opinion on Decision that the permanent disability is subject to some form of apportionment (Opinion on Decision at p. 9), this does not appear to be reflected in the decision.

Previously, in a Second Findings of Fact, Award and Order of October 25, 2021 the WCJ had found that applicant's injury had caused new and further permanent disability so that the injury had now caused permanent disability of 26% before apportionment or reduction. Originally, in a stipulated Award of March 2, 2017, it was found that, while employed on November 26, 2012 as a claims benefit specialist, applicant sustained industrial injury to her right wrist in the form of carpal tunnel syndrome, causing compensable permanent disability of 7%. The parties' stipulation to 7% permanent disability was based on the September 26, 2016 report of agreed medical evaluator Max Moses, M.D., who had found 50 percent apportionment to non-industrial factors. The parties thus stipulated to the following rating formula: .50 (16.01.05.00 -- 9[5] 11 -- 111G -- 13 -- 13) -- 7%.

Defendant filed a Petition for Reconsideration of the Second Findings of Fact, Award and Order of October 25, 2021. In an Opinion and Decision After Reconsideration of December 14, 2022, we rescinded the Second Findings of Fact, Award and Order and returned this matter to the trial level for further development of the record and analysis of whether the applicant sustained new and further disability between the date of the March 2, 2017 stipulated award and the November 26, 2017 statutory five-year limit (Lab. Code, § 5410) for new and further disability to arise from an injury. We also sent the matter back for clarification of the apportionment findings.

Defendant now raises nearly identical issues to the issues raised in the prior reconsideration proceedings. We have not received an Answer. It appears that the WCJ who issued the Second and Third decision has retired, and a different WCJ has filed a Report and Recommendation on Petition for Reconsideration.

Despite sending this matter back for development of the record and analysis on the issues of whether applicant sustained any new and further disability and apportionment, it does not appear that this was ever done. With regard to the issue of new and further disability, no new evidence was procured, and the analysis erroneously focuses on whether a timely Petition to Reopen was filed and whether that Petition contained the requisite specificity, rather than the issue of whether applicant's condition worsened during the statutory time period. With regard to apportionment, the WCJ's findings became less clear rather than more clear. We will therefore grant reconsideration, rescind the WCJ's decision, and again return this matter for further development of the record, analysis, and decision. We quote the relevant portions of our previous Opinion after Reconsideration below. While our directive to further develop the record is addressed to all parties, we reiterate the axiom that the applicant has the burden of proof. (Lab. Code, § 5705; see § 3202.5.)

> We will rescind the WCJ's decision and return this matter to the trial for further proceedings and decision, so that the WCJ may address the defendant's contentions in the first instance.
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> As the Court of Appeal has held, in order for new and further disability to be compensable, an applicant, "must not only have filed a petition to reopen within five years from the date of injury, but must also have suffered a 'new and further disability' within that five-year period, unless there is otherwise 'good cause' to reopen the prior award. (*Ruffin v. Olson Glass Co.* (1987) 52 Cal.Comp.Cases 335, 343 [Appeals Bd. en banc].) An injured worker therefore

cannot confer jurisdiction on the Board by filing a petition to reopen an award before the five-year period has expired for anticipated new and further disability to occur thereafter. (*Ibid.*)" (*Sarabi v. Workers' Comp. Appeals Bd.* (2007) 151 Cal.App.4th 920, 926 [72 Cal.Comp.Cases 778]; *Applied Materials v. Workers' Comp. Appeals Bd. (D.C.)* (2021) 64 Cal.App.5th 1042, 1080 [86 Cal.Comp.Cases 331].) Applicant need not have sustained compensable temporary or permanent disability during the five year period. Thus, there is no requirement that applicant's condition be permanent and stationary prior to the expiration of the five year period. However, there must be evidence of a "demonstrable change in the employee's condition, including a gradual increase in disability [or] a new need for medical treatment" occurring prior to the expiration of the five-year period. (*Applied Materials v. Workers' Comp. Appeals Bd.* (2021) 64 Cal.App.5th 1042, 1080 [279 Cal.Rptr.3d 728].)

The WCJ did not analyze this issue in the Report. We note that defendant did not raise this issue at trial. However, since the issue is jurisdictional, it cannot be waived, and may be raised for the first time on reconsideration. (*Carillo v. H.P. Hood, LLC* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 249 [Appeals Bd. panel]). We therefore return this matter to the trial level so that the WCJ may analyze and decide this issue in the first instance. We note that whether applicant's condition worsened during the period between the original stipulated Award and the expiration of the jurisdictional five-year period may require further development of the record. We take no position on this issue.

We also note that applicant continued working for the employer herein. Thus, to the extent that applicant did not sustain new and further disability between the issuance of the stipulated Award and the expiration of the jurisdictional period, it should be determined whether applicant sustained a new industrial injury and resultant disability. We express no opinion on any of these issues.

With regard to apportionment, defendant is incorrect when it argues that the stipulation to 50% apportionment in the original stipulated Award applies to any subsequent new and further disability. The defendant incorrectly cites to *Bernal v. Workers' Comp. Appeals Bd.* (1982) 47 Cal.Comp.Cases 792, 793 (writ den.). In *Bernal*, in the original award, applicant's overall disability was rated at 24½%, but was found to be subject to apportionment of 30 percent to nonindustrial factors, thus reducing applicant's compensable permanent disability to 17¼%. Applicant filed a Petition to Reopen, and applicant's permanent disability was found to have increased to permanent total (100%) disability. Although the reporting physicians in the reopening proceedings opined that apportionment to nonindustrial factors was not indicated, in *Bernal* we found that the 7¼% found apportionable in the original award was required to be apportioned from the final award after reopening. Thus, in *Bernal*, the 100% permanent disability rating was reduced to 92¾%. We did not find that

applicant's entire award of disability was subject to 30% apportionment, which would have reduced the award to 70%.

Defendant also cites to *City of St. Helena v. Workers' Comp. Appeals Bd. (Putzier)* (1997) 62 Cal.Comp.Cases 968 (writ den.). It is not clear in the short digest summary of *Putzier* whether the WCJ held that the apportionment determination in the original award applied only to the permanent disability in the original award, or also to any new and further disability. A California Compensation Cases digest of a "writ denied" case is not binding precedent on the Appeals Board, especially one, like *Putzier*, where a WCJ's Report was adopted without further comment, and in which the summary of the case's facts and disposition make it impossible to discern the holding. (*MacDonald v. Western Asbestos Co.* (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].) We decline to follow *Putzier* for the proposition that a stipulation to apportionment in an award applies also to subsequent new and further permanent disability. While any apportionment decision is *res judicata* as to the permanent disability in the original decision, and may only be revisited if good cause exists under Labor Code section 5803, any apportionment of new and further disability is determined de novo. Thus, to the extent that there was any new and further permanent disability, the 6% reduction of permanent disability previously stipulated to must be reflected in any future award, unless section 5803 good cause exists to revisit it, but the existence or nonexistence of apportionment of the new and further disability is to be determined by the physicians reporting in the reopening proceedings.

We note that, while the WCJ purported to apply the above principles in the Opinion on Decision, it is unclear whether these principles were properly applied. We cannot discern what percentage of permanent disability or monetary amount of indemnity was actually awarded. Confusingly, the WCJ found "Applicant's counsel to be entitled to a fee based on the increased Permanent Disability (i.e., 26:0% less 7:0% previously stipulated, reduced by 15% based on the return-to-work, offer)." However, only by way of example, assuming applicant is found to have sustained new and further disability after the reanalysis mandated herein, and the same 26% overall disability is found, the proper calculation would be to decrease the 26% overall permanent disability by the 6% non-industrial disability stipulated to in the original award. (See *Bernal*, *supra*.) Then, defendant would be given credit for payments previously made under the original award. Thus, only by way of example, the proper award here would have been 20% permanent disability after apportionment, less credit for payments already made under the original award. We note that it is the WCJ's duty to issue a clear and sufficient award (see Lab. Code, § 5313), in particular one that could be enforced as a judgment if necessary (see Lab. Code, § 5806, 5807). "Awards of the board 'are subject to those general legal principles which circumscribe and regulate the judgments of all judicial tribunals.' [Citations.] Accordingly, they must be sufficiently certain to permit

enforcement…." (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 557 [47 Cal.Comp.Cases 145].)

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Third Findings of Fact, Award and Order of July 31, 2023 is **GRANTED**.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Third Findings of Fact, Award and Order of July 31, 2023 is hereby **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings and decision consistent with the opinion herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 20, 2023

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

MAXINE CORENTE
BOSQUEZ & SIEMENS
BRADFORD & BARTHEL

DW/pm

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