WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JILL WEATHERS (FALASCA), *Applicant*

vs.

CARDINALE AUTOMOTIVE GROUP; REPUBLIC INDEMNITY COMPANY, and ALLIANZ INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ2024623 (SAL 0070543), ADJ4652674 (SAL 0070542)
Salinas 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 May 21, 2019, the Presiding Workers' Compensation Judge ("PWCJ") found that applicant, while employed as a human resources/payroll employee by Cardinale Automotive Group on July 11, 1995 (ADJ4652674, insurer Republic Indemnity Company) and on January 15, 1996 (ADJ2024623, insurer Allianz Insurance Company), sustained industrial injury to her right knee per the Amended Findings and Award of February 2, 2005, and that in ADJ2024623, applicant sustained industrial injury to her left knee, psyche and complex regional pain syndrome ("CRPS"), causing permanent disability of 100% under the 1978 Schedule for Rating Permanent Disabilities. In his Opinion on Decision, the PWCJ also found that "apportionment [of permanent disability] is 100% to the injury of January 5, 1996 in ADJ2024623MF based upon the opinion of Dr. Brose [pain specialist]," and that "[a]lthough the issue of [Labor Code section 3208.3(d)] is largely moot for permanent disability purposes…applicant did sustain a compensable psychiatric injury based [on her] credible testimony that she worked for over six months."[1]

Allianz Insurance Company ("Allianz") filed a timely petition for reconsideration of the PWCJ's decision. Allianz contends that the PWCJ's findings of CRPS, 100% permanent

[1] Section 3208.3(d) states in pertinent part, "no compensation shall be paid…for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous."

disability, and 100% apportionment of liability to Allianz for the January 15, 1996 injury in ADJ2024623 are not supported by substantial evidence. Allianz further contends that the PWCJ erred in applying *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] and in rejecting apportionment under *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113]. Allianz also contends that applicant failed to establish employment for six months as required by Labor Code section 3208.3(d), that Labor Code section 4056 should be applied to applicant's claim,[2] and that further development of the record is justified.

Applicant and Republic Indemnity Company ("Republic") filed answers.

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

We have considered the allegations of the Petition for Reconsideration filed by Allianz and the contents of the PWCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in said Report, which we adopt and incorporate on all issues except the PWCJ's reliance on Dr. Brose to find permanent and total disability in ADJ2024623, we will affirm the Findings and Award of May 21, 2019 except for that finding. Specifically, within section III(A)(3) of the PWCJ's Report, we do not adopt or incorporate the first full paragraph and the italicized subparagraph under it, as originally found in that section. We also do not adopt or incorporate that part of the original heading of section III(A)(3) stating, "[t]he WCJ's finding of 100% permanent total disability is based on substantial evidence pursuant to Dr. Brose's report[.]"

However, we do agree with the PWCJ's discussion in section III(A)(3) rejecting Allianz's reliance upon Labor Code section 4056 and *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680]. Likewise, the PWCJ correctly rejects Allianz's contention that the diagnosis of CRPS cannot support an award of permanent disability because it is not a body part listed in the 1978 PDRS or Labor Code section 4662(a). In addition, we agree with the PWCJ's apportionment of all permanent disability to the injury of January 5, 1996, consistent with *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1260 (82 Cal.Comp.Cases 679) [where injured employee sustains permanent disability due to industrial injury and medical treatment rendered to treat that

[2] Section 4056 provides: "No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued, or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the appeals board, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury."

injury, employer is liable for both the treatment and any disability arising directly from the treatment, without apportionment].[3]

For the reasons set forth below, however, we disagree with the PWCJ's reliance on Dr. Brose's medical report of October 25, 2007 to find applicant permanently and totally disabled in ADJ2024623. On that issue, we conclude that further development of the record is required. We will amend the PWCJ's decision to rescind and defer his finding on permanent disability in ADJ2024623, and we will return this matter to the trial level for further proceedings and new decision on permanent disability and attorney's fees in that case number.

As discussed in the PWCJ's Opinion on Decision and Report, he found applicant permanently and totally disabled based on the October 25, 2007 medical report of Dr. Brose, the Agreed Medical Evaluator ("AME") in pain medicine. In that report, Dr. Brose opined in relevant part: "[Due to] the combination of [applicant's] pain, her learned disabilities, and her view that pain is evidence of new and/or potential tissue damage, we need to believe that until or unless [applicant] can work through her denial with the level of acceptance and enter into a rehabilitation program, she must considered as non-competitive in the open labor market. I see this being predominantly related to her persistent pain and her ongoing psychosocial dysfunction arising from that pain. […] Until or unless [applicant undertakes a pain rehabilitation program], I believe that [applicant] cannot be considered in all earnest as an appropriate candidate for return to any kind of gainful employment." (Exhibit 31, p. 10.)

Although an AME's opinion ordinarily is followed because the AME has been chosen by the parties for that physician's expertise and neutrality (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114]), it is the WCAB, and not the AME, who is the ultimate trier-of-fact. (See *Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54 Cal.Comp.Cases 251]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792–793 [52 Cal.Comp.Cases 419]; *Johns-Manville Products Corp. v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740, 753 [43 Cal.Comp.Cases 1372].) Accordingly, the WCAB is not bound by the opinion of an AME; rather, its only obligation is to

[3] Under the circumstances of this case, the PWCJ's apportionment of all permanent disability to the injury of January 5, 1996 is consistent with *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) (2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467]. In *Justice*, the Court of Appeal stated, "*Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability." (49 Cal.App.5th at 615.)

give consideration to the AME's opinion. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 241 [58 Cal.Comp.Cases 323].)

In this case, we have given due consideration to Dr. Brose's opinion on permanent disability and we find it problematic in several respects. To begin with, Dr. Brose's opinion is almost fifteen years old, so it is stale, even though applicant's trial testimony of October 17, 2016 seems to indicate her pain symptoms and minimal functioning have not changed much over the years. (See *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 (36 Cal.Comp.Cases 93) [medical opinions based on facts no longer germane are not substantial evidence].)

Further, although the PWCJ found applicant's pain symptoms credible based on her trial testimony of October 17, 2016, Dr. Brose does not clearly state that applicant's pain and/or CRPS themselves are disabling factors as described in the 1978 PDRS.[4] We also note that the doctor's opinion seems to derive not from his own expertise in pain medicine, but from applicant's belief that her pain is totally disabling. Dr. Brose adds that applicant is "non-competitive in the open labor market" based on "her persistent pain and her ongoing psychosocial dysfunction arising from that pain," yet psychiatry is outside Dr. Brose's area of expertise. The PWCJ should further develop the record by obtaining a supplemental report from Dr. Brose, so the doctor can comment on work preclusions based on his expertise in pain medicine. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].)

In reference to Dr. Brose's conclusion that applicant is "non-competitive in the open labor market," we note that our Supreme Court stated in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587], "[j]ust as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating." Thus, evidence

[4] For instance, Dr. Brose's October 25, 2007 opinion does not mention factors of disability such as immobility or instability of the knee joint, as set forth in disability numbers 21.3 and 21.4 of the 1978 Schedule for Rating Permanent Disabilities (1990 Ed., p. 15). Under Table 21 of the 1978 Schedule, note (a) states that generally, factors to be considered in connection with impairment of function of the lower extremities may include "pain, tenderness or numbness and their effect on such activities as standing, walking, climbing, squatting, kneeling, and lifting, carrying, pushing or pulling of weights." Although Dr. Brose discussed the extent of applicant's pain symptoms, he did not elaborate on their effect on the activities described in the 1978 Schedule.

of a worker's amenability to vocational rehabilitation, or lack thereof, is admissible to determine permanent disability under the 1978 PDRS.

Although an evaluating physician may be qualified to opine that an injured employee is so disabled by the industrial injury that she is incapable of working in the open labor market (*Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550, 553-556 [Appeals Board en banc]), Dr. Brose's opinion raises more questions than it answers on this point. Specifically, Dr. Brose does not explain his conclusion that "until or unless [applicant] can work through her denial with the level of acceptance and enter into a rehabilitation program, she must considered as non-competitive in the open labor market." As noted before, Dr. Brose described the extent of applicant's pain but failed to explain how it translates into factors of disability, undermining his assessment that applicant is permanently and totally disabled. In light of this, we conclude that a sound determination of permanent disability may require an opinion from an independent vocational expert, which we leave to the discretion of the PWCJ. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 (66 Cal.Comp.Cases 1290) [Board may not leave undeveloped matters which its acquired specialized knowledge identifies as requiring further evidence]; *Harvey v. Baker Places* (2020) 2020 Cal. Wrk. Comp. P.D. LEXIS 279, citing *County of San Mateo v. Workers' Comp. Appeals Bd.* (*Belmont*) (2014) 79 Cal.Comp.Cases 719 (writ den.) [vocational rehabilitation expert is qualified to opine that pain or other limitations may preclude injured employee from vocational rehabilitation].)

Turning to the issue of psychiatric disability, we note that Dr. Segal, the AME in psychiatry, most recently addressed permanent disability in his report dated November 27, 2015. (Exhibit W42, pp. 11-13.) Dr. Segal assessed applicant with factors of disability ranging from very slight impairment to moderate impairment in eight work function categories. (1978 Schedule for Rating Permanent Disabilities (1990 Ed., p. 1-B.) Dr. Segal further commented, "if one summates the orthopedic, pain specialist, and psychiatric ratings, it approximates her rather poor overall level of functioning." (Exhibit W42, p. 12.) Aside from the fact that Dr. Segal is not an orthopedic or pain specialist, his assessment that applicant has a "poor overall level of functioning" is too vague to support a finding of psychiatric disability. Otherwise, Dr. Segal did not provide an opinion about applicant's work status or work ability. Therefore, the PWCJ should further develop the record by obtaining a supplemental report from Dr. Segal to more specifically describe applicant's psychiatric disability, including her ability to work and her ability to participate in

vocational rehabilitation. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].)

In summary, we conclude that further development of the record is required on the nature and extent of permanent disability in ADJ2024623. The PWCJ should obtain supplemental opinions from Dr. Brose and Dr. Segal, and the PWCJ also should consider obtaining an opinion from an independent vocational expert, consistent with our discussion above. For the reasons stated in the PWCJ's Report, this reopening of the record does not include reopening the record as requested by Allianz in its petition for reconsideration. We express no final opinion on permanent disability in ADJ2024623. When the PWCJ issues a new finding, any aggrieved party may seek reconsideration as provided by Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of May 21, 2019 is **AFFIRMED**, except that paragraph (C) of the Award is **RESCINDED** and **DEFERRED**, and Findings of Fact 9, 11 and 13 are **RESCINDED** and **REPLACED** by the following Findings of Fact:

FINDINGS OF FACT

9. The issue of permanent disability in ADJ2024623 is deferred pending further proceedings and new determination by the PWCJ, jurisdiction reserved.

11. The issue of attorney's fees is deferred pending further proceedings and new determination by the PWCJ, jurisdiction reserved.

13. The issue of an award for Stephen Sprenkle/Sprenkle, Georgariou & Dilles is deferred pending further proceedings and new determination by the PWCJ, 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 new determination of permanent disability by the PWCJ in ADJ2024623, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
May 24, 2022

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

JILL WEATHERS (FALASCA)
HAWORTH BRADSHAW
KARASOFF & ASSOCIATES
SPRENKLE, GEORGARIOU & DILLES

JTL/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Defendant, Allianz Insurance Company, has filed a timely, verified petition for reconsideration which contends that (1) the WCJ erred by finding that applicant sustained injury AOE/COE to complex regional pain syndrome (CRPS) and 100% apportionment to the injury on 01/05/96 during coverage by Allianz; (2) the WCJ failed to issue DEU rating instructions pursuant to *Fitzpatrick* before issuing the Findings and Award; (3) applicant's psychiatric injury is excluded pursuant to Labor Code Section 3208.3 (d) because applicant was not employed for six months before the injury; and (4) the record should be reopened for further development of the record. Applicant has filed an answer and codefendant Republic Indemnity Company has also filed an answer to Allianz's petition.

II
BACKGROUND

Applicant, Jill Falasca, while employed as a human resource/payroll clerk for Cardinale Automotive Group on 07/11/95 (ADJ465674) and on 01/05/96 (ADJ2024623MF) sustained admitted injuries to her right knee. (See Amended Findings, Award and Order dated 02/02/05.) Republic Indemnity Company provided workers compensation coverage for the 07/11/95 injury in ADJ4652674 and Allianz Insurance Company provided coverage for the 01/05/96 injury in ADJ2024623MF.

The evidence on the total number of days applicant worked for Cardinale Automotive Group is in conflict. Applicant testified that she worked for Cardinale for nine months before the injury and specifically that she was employed between May 1995 through February 1996. (Summary of Evidence, 10/17/16, p. 2: 15-16; p. 5: 1-3.) According to the history obtained by Perry Segal, M.D., applicant was only employed for 11 days before her first injury. (Report, Dr. Segal, 08/04/04, p. 2; Exh. W-1; see also report, Michael Post, M.D., 11/20/13, p. 79; Exh. W17.) Applicant kept working after her first injury until 10/13/95 when she went off work and was paid temporary total disability by Republic Indemnity Company during the period 10/13/95 through 11/09/95. Applicant then returned to work and was paid wage loss temporary disability during the period 11/10/95 through 01/04/96. (See defendant's Petition for Reconsideration, p. 3; see Republic's Answer to Petition for Reconsideration re: factual error, pp. 1-2.)

After the first injury an MRI of the right knee disclosed the following findings:

> "*There is an area of intrameniscal signal in the posterior horn of the medial meniscus. This does not definitely communicate with an anterior margin. The anterior and posterior cruciate ligaments appear intact. Small joint effusions present. Impression: small joint effusion. NO definite evidence of meniscal tear.*" (Report, Michael Post, M.D., 12/24/18, p. 10; Exh. J-1.)

Applicant has had multiple knee surgeries. On 10/13/95 applicant had an arthroscopic procedure performed by Dr. Dauphine consisting of a partial anterior and central synovectomy and chondroplasty of the patella with Grade III chondromalacia. (Report, Dr. Post, 1/10/14, p. 11; Exh. W-16.) Applicant sustained a second injury on 01/05/96 involving a slip and fall, and thereafter, on 02/15/96 Dr. Dauphine performed a right knee arthroscopic surgery with partial anterior and central synovectomy and lateral release (patellar realignment procedure). (report, Dr. Post, 12/24/18, p. 10; Exh. J-2.)

After her second right knee surgery Dr. Dauphine noted findings which were possibly indicative of RSD (reflex sympathetic dystrophy):

> "*She has an aching in the back of her knee . . . .on examination she has a "cool right knee"….the possibility of meniscal derangement is present based on the MRI. Clinically she may have RSD or other neurological causes of her complaints.*" (Report, Dr. Post, 12/24/18, p. 11; Exh. J-1.)

A diagnosis of complex regional pain syndrome was made by Dr. Silberman at St. Mary's Spine Center in a report dated 10/31/01:

> "*On 01/05/96 she slipped and fell on a wet carpet, landing on her knees. She subsequently had two further arthroscopic surgeries on the right. She was diagnosed with reflex sympathetic dystrophy or complex regional pain syndrome type I in the right lower extremity.*" (Summarized by Dr. Post, 12/24/18, p. 12; Exh. J-1.)

Dr. Post also emphasized that Ms. Falasca had a significant decline in her condition after the 01/05/96 injury.

> "*Her functional decline accelerated dramatically after the 01/05/96 traumatic slip–and–fall. By Ms. Falasca's report, she had a significant increase in pain after that injury.*" (Report, Dr. Post, 12/24/18, p. 14; Exh. J-1; deposition, Dr. Post, 09/20/18, p. 7; Exh. J-4.)

Dr. Post also confirms that even if the 1995 injury had never occurred that the injury on 01/05/96 by itself would have resulted in a surgical repair of the right knee:

> "*I was asked hypothetically that if the 1995 injury had never occurred and that they were dealing with one injury on 01/05/96, and whether the nature of that injury alone would have required some type of surgical repair, I responded 'yes'.*" (Report, Dr. Post, 12/24/18, p.15; Exh. J-1.)

Dr. Post also emphasized that he agrees with the diagnosis of complex regional pain syndrome. (Deposition, Dr. Post, 09/20/18, p. 22; Exh. J-4; report, Dr. Post, 12/24/18, p. 15; Exh. J-1.)

The parties have utilized four agreed medical examiners in this case: The original orthopedic AME was Walter Silberman, M.D. After Dr. Silberman passed away the parties agreed to use Charles

Borgia, M.D., as an AME. Dr. Borgia prepared reports during the period 2003 through 2010. When Dr. Borgia retired, Dr. Post became the third and current orthopedic AME. William Brose, M.D., was designated by the parties as the pain medicine AME. Although defendant objected to a psychiatric injury under Labor Code Section 3208.3 (d) – alleging less than six months of employment – the parties nevertheless designated Perry Segal, M.D., as the psychiatric AME. (Defendants petition for reconsideration, p. 4: 8-25.)

The above matters were set for trial on various issues including temporary disability, need for medical treatment and application of Labor Code Section 3208.3 (d) on 12/10/04. In an Amended Findings, Award and Order on 02/02/05 the WCJ determined that Labor Code Section 3208.3 does not constitute a defense to an award of medical treatment or temporary disability. Applicant did not testify at trial regarding the period of employment and the issue of injury to psyche was deferred and no specific finding was made on whether applicant had worked for the employer for six months. (See Findings, Award and Order dated 02/02/05.)

After extensive medical treatment and periods of temporary disability the two cases were set for trial on 09/01/16 on various issues including parts of body injured. Defendants denied injury to applicant's left knee, complex regional pain syndrome and psyche. Additional issues included temporary disability, permanent disability, apportionment, need for medical treatment, applicability of Labor Code Section 3208.3 (d), Labor Code Section 4056 and 4062 (b) as well as the *Benson* decision. The matter was continued for further trial on 10/17/16 at which time applicant testified that she was hired at Cardinale in 1995 and worked for approximately nine months. Applicant also testified that she has difficulty sleeping because of pain. After breakfast she will go back to bed and then arise for lunch. After lunch she returns to bed. She only showers once or twice a week because of pain from the water hitting her leg. She experiences painful sensations of pins, needles and staples. (Summary of Evidence, 10/17/16, pp. 2-3.) Applicant also testified that she needs assistance to get into and out of bed. She is not able to do housework because of pain. She does very little driving. After dinner she will go back to bed. She takes multiple medications including OxyContin and Trazodone. (Summary of Evidence, supra, p. 4.)

On cross-examination applicant estimated that she was employed for approximately nine months between May 1995 and February 1996. (Summary of Evidence, supra, p. 5: 1-3.) Applicant also testified that Dr. Miner has recommended that she reduce her medication, however, she continues to take the same frequency and amount of medication that Dr. Miner previously prescribed. (Summary of Evidence, supra, p. 7: 8-11.)

Applicant's residual disability and ability to function has been described by all of the AME's. Dr. Brose confirms that applicant suffers from Complex Regional Pain Syndrome in her right leg. (Report, 10/25/07, p. 1 and p. 7; Exh. W-31.)

Dr. Brose also confirms that applicant is not competitive in the open labor market and that she is not able to work at any kind of gainful employment:

> "*While I understand and respect Dr. Borgia's perceptions as an orthopedist that Ms. Falasca would perhaps be capable of sedentary work from an objective perspective, the combination of this patient's pain, her learned disabilities and her*

view that pain is evidence of new and/or potential tissue damage, we need to believe that until or unless this patient can work through her denial with the level of acceptance and enter into a rehabilitation program, she must be considered as non-competitive in the open labor market. I see this being predominantly related to her persistent pain and her ongoing psychosocial dysfunction arising from that pain. I am hopeful that at some point in the future, at a time perhaps to be characterized by Dr. Miner, when the patient has accepted her disability, it would be appropriate for her to be considered as a candidate for a pain rehabilitation program such as I had promoted earlier with her attempt at participation at Stanford and subsequently the Bay Area Pain Program.
Until or unless that can occur, I believe that this patient cannot be considered in all earnest as an appropriate candidate for return to any kind of gainful employment." (Report, Dr. Brose, 10/25/07, p. 10; Exh. W-31.)

Dr. Brose also concludes that applicant's CRPS is caused solely by the 01/05/96 injury:

"*As consequence, I find that the causation of the patient's Complex Regional Pain Syndrome based on reasonable medical probability is from the January 5, 1996, fall and the subsequent February 14, 1996, operative treatment that is complicated by the evolution of the Complex Regional Pain Syndrome as described.*" (Report, Dr. Brose, 02/12/19, p. 7: Exh. J-5.)

Dr. Brose originally apportioned applicant's permanent total disability as follows: 10% to the 07/11/95 injury and 90% to the 01/05/96 injury. After reviewing additional medical information in the scientific literature, Dr. Brose concludes that applicant's CRPS was caused solely by the 01/05/96 injury. Under causation of disability, Dr. Brose makes the following statement:

"*As a result, the current scientific opinion is that the primary trauma that most closely precedes the development of the syndrome is characterized as causative." (Report, Dr. Brose, 05/24/18, p. 7; Exh. J-6.)*

* * * *

However, as I review the information now in light of the evolution of science of causation described above I believe that the preponderance of medical evidence would support the CRPS as a direct consequence of the 1996 surgery and not the 1995 surgery." (Report, Dr. Brose, supra, p. 7; Exh. J-6.)

* * * *

I am therefore left with the impacts of the injury and subsequent evolution of a nearly complete recovery from the original 1995 injury and subsequent arthroscopic surgery and virtually total disability arising as a consequence of the 1996 slip and fall. I believe that the derivative consequences of the subsequent surgeries while well planned add little to the apportionment argument in that the primary mechanism of a complex regional pain syndrome creating such persistent pain is via nervous system reaction and that while that nervous system reaction may have congenital and genetically acquired and non-industrial risk factors that

> *would need to be satisfied for its development, it is in fact the timing of the February 15, 1996 surgery that appears to trigger the change.*" (Report, Dr. Brose, supra, p. 8; Exh. J-6.)

During his deposition Dr. Brose confirms that the 1996 surgery led to the development of applicant's CRPS. (Deposition, 10/23/18, p. 18: 6-17; Exh. J-3.) Dr. Brose also states that the 1996 injury caused the need for the 1996 surgery. (Deposition, supra, p. 18: 18-22; Exh. J-3.) He also testified that the 1995 injury did not cause the need for the 1996 right knee surgery. (Deposition, supra, p. 19: 11-21; Exh. J-3.)

Dr. Brose also explains why he has the necessary training and expertise to express an opinion on apportionment for applicant's knee surgeries:

> "*Because of my familiarity with the case and with what I understand from my dialogue over the course of the 18 years as occurred between me and the various orthopedic physicians who have discussed the case through our reports.*" (Deposition, supra, p. 21: 11-22; p. 22: 11-19; Exh. J-3.)

Even after considering the fact that applicant had one centimeter of atrophy but full range of motion in a Grade two to three swelling on 01/03/96, Dr. Brose still concludes that the February 1996 surgery was caused solely by the 01/05/96 injury. (Deposition, Dr. Brose, supra, p. 32: 6-25; p. 33: 1-23; Exh. J-3.) Dr. Dauphine's chart notes indicate that Dr. Dauphine did not intend to pursue further surgery until the 01/05/96 slip and fall created a new reason for the surgery. (Deposition, Dr. Brose, supra, p. 34: 20-25; p. 35: 1; Exh. J-3.)

Dr. Brose also emphasizes that he has evaluated approximately 300 knee injuries as a qualified medical examiner or agreed medical examiner during the course of his career. (Deposition, supra, p. 37: 10-20; Exh. J-3.) He also provides a detailed explanation for why applicant's CRPS was caused solely by the February 1996 surgery. He emphasizes that this opinion is not based on speculation but rather on the current state of the art. (Deposition, supra, p. 41: 3-18.)

Dr. Post disagrees with Dr. Brose and in his opinion the 07/11/95 injury along with the 01/05/96 injury contributed to the need for the February 1996 surgery. Dr. Post apportioned permanent disability as follows: 10% to the 07/11/95 injury and 90% to the 01/05/96 injury. However, Dr. Post also concedes that the 01/05/96 injury standing alone – even if applicant had not previously been injured on 07/11/95 – would have caused the need for the February 1996 surgery. (Report, Dr. Post, 12/24/18, p. 15: Exh. J-1.)

Dr. Post also provides an alternative level of permanent disability. He concludes that applicant is limited to sedentary work and in addition she should be allowed to use a cane when ambulating for safety. (Report, Dr. Post, 01/10/14, p. 24; Exh. W-16.)

Based in part on Dr. Brose's well-reasoned opinions and based upon applicant's credible testimony at trial, the WCJ determined that applicant was 100% permanently and totally disabled and that the disability was apportioned solely to the 01/05/96 injury. The WCJ also determined that applicant had sustained a compensable injury to her psyche because she had worked for the

employer for more than six months before the injury on 01/05/96. It is from this determination that defendant Allianz has filed its petition for reconsideration.

III
DISCUSSION

A. The WCJ's determination that applicant was an employee for six months pursuant to Labor Code Section 3208.3 (d) is supported by applicant's credible testimony at trial.

Defendant contends that the WCJ's finding that applicant worked the requisite six months under Labor Code Section 3208.3 is inconsistent with the WCJ's Opinion on Decision which accompanied the 02/02/05 Findings and Award. It is important to note that the issue of injury to psyche was deferred at the time of the original hearing and the Amended Findings Award and Order. There was no testimony by applicant at that time. The only determination by the judge was that Labor Code Section 3208.3 (d) did not support a defense to the award of temporary disability and medical treatment. For this reason, the WCJ did not have to make a decision regarding applicant's length of employment.

At the time of the trial on 10/17/16, the issue of applicant's period of employment was raised and applicant testified that she worked for the employer for nine months before her injury on 01/05/96. Applicant was questioned several times on this issue and she was consistent in her testimony that she worked for nine months before the injury. (Summary of Evidence, 10/17/16, p. 2: 15-16; p. 4: 21; p. 5: 2-3.)

The information in the medical reports of Dr. Segal and Dr. Post was not persuasive because that information was contradicted by applicant's testimony at trial. The WCJ had the opportunity to observe the demeanor of the applicant on the witness stand and to weigh her testimony in connection with her manner on the stand. Accordingly, the WCJ's findings on witness credibility are entitled to great weight. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal 3rd 312, 90 Cal. Rptr. 355 [35 Cal Comp. Cases 500, 524].)

The WCJ determined that applicant had worked more than six months and more than 182 days. This conclusion was based on the following facts. Before the 07/11/95 injury applicant testified that she worked for nine months before the 1/5/96 injury. This means that she worked 31 days in May, 30 days in June and 10 days in July before the 07/11/95 injury. This amounts to a total of 71 days of work before the first injury. After the 07/11/95 injury applicant worked for an additional 21 days in July, 31 days in August, 30 days in September and 12 days in October before she went on temporary disability status. This constitutes an additional 94 days of employment after the first injury.

Applicant then received temporary total disability indemnity from Republic during the period 10/13/95 through 11/09/95 and then returned to work on 11/10/95 and continued working on a part-time basis (and receiving wage loss temporary disability) during the period 11/10/95 through 01/04/95. (See Republic's Answer to Petition for Reconsideration Re: Factual Error, dated 06/21/19.)

This means that after 11/09/95 that applicant worked 21 days in November, 31 days in December and 5 days in January 1996 for an additional 57 days of employment. After adding these various periods of employment the following calculations appear warranted: 71 days before the 07/11/95 injury, 94 days between 07/11/95 and 10/13/95 and an additional 57 days from 11/10/95 through 01/05/96. The total number of days worked before 01/05/96 is 222 days which satisfies the six months requirement of Labor Code Section 3208.3.

2. Multiple physicians including Dr. Post, Dr. Brose, Dr. Miner, Dr. Silberman and Dr. Borgia have confirmed the diagnosis of a Complex Regional Pain Syndrome (CRPS).

Defendant contends that the diagnosis by Dr. Brose of complex regional pain syndrome is incorrect. This argument is misplaced because multiple physicians have reached the same diagnosis. Dr. Post testified in deposition that complex regional pain syndrome was an established diagnosis in this case. (Deposition, 09/20/18, supra, p. 22: 3-11; Exh. J-4.) Dr. Post also confirms the diagnosis of reflex sympathetic dystrophy in his reports dated 11/20/13, (Diagnosis No. 5 at p. 78; Exh. W-17; and report, 12/24/18; p. 16; Exh. J-1.) Bradley Carpentier, M.D., also provides a diagnosis of reflex sympathetic dystrophy which is a diagnosis similar to complex regional pain syndrome:

> "*As you will recall, this is a 35 – year old white female with a diagnosis of right lower extremity reflex sympathetic dystrophy she carries back to an injury she sustained due to a slip and fall while employed at Cardinalli (sic) Motor Group.*" (Report, 09/29/03; Exh. W-3.)

Charles Borgia, M.D., the agreed medical examiner during the period 2006 through 2010 provides an orthopedic impression that applicant has probable CRPS. (Report, 01/20/10, p. 11; Exh. W-18.) Dr. Borgia also summarizes a treatment report from Dr. Maureen Miner dated 04/10/08 which indicates that applicant has CPRS. (Report, 05/12/08, p. 2; Exh. W-19.) Dr. Borgia also summarizes a report from Dr. Gerbino which makes a diagnosis of CPRS. (Report, Dr. Borgia, 04/14/06, p. 1; Exh. W-24.) Dr. Borgia, Dr. Brose and Dr. Post are all agreed medical examiners and their conclusions are entitled to great weight and should ordinarily be followed by the Appeals Board. (*Power v. Workers Comp. Appeals Bd.* (1986) 51 Cal. Comp. Cases 114, 117.) Furthermore, defendant has presented no medical evidence to contradict the diagnosis of Complex Regional Pain Syndrome.

3. […] [non-applicability of] the decision in *California Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Board (Fitzpatrick).*

> […]
>
> Labor Code Section 4056 provides as follows:
>
> "*No compensation is payable in case of the death or disability of an employee when his death is caused, or when and so far as his disability is caused, continued or aggravated, by an unreasonable refusal to submit to medical treatment, or to any surgical treatment, if the risk of the treatment is, in the opinion of the appeals*

board, based upon expert medical or surgical advice, inconsiderable in view of the seriousness of the injury."

Defendant's reliance on Labor Code Section 4056 is misplaced because the specific language precluding compensation in that section requires expert medical evidence that applicant's disability is caused, continued or aggravated by an unreasonable refusal to submit to medical treatment. Defendant has introduced no medical evidence that applicant's permanent total disability was caused by an unreasonable refusal to submit to medical treatment. Defendant has the burden of proof on this issue and defendant has failed to meet its burden of proof.

Defendant's reliance on the decision in *California Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal. App. 5th 607 is similarly misplaced because the facts in *Fitzpatrick* are distinguishable from the facts in the present case. In Fitzpatrick applicant's permanent disability was rated under the 2005 rating schedule whereas applicant's disability in the instant case is based on the rating schedule in effect prior to 01/01/05.

Defendant also contends that Dr. Brose's finding of 100% permanent total disability is not substantial evidence because it is based on the diagnosis of CRPS which is not a body part listed in the 1978 rating manual or Labor Code Section 4662 (a). This argument is unavailing based on the decision in *General Motors Corp. v. Workers' Comp. Appeals Bd. (Petty)* (W/D-2003) 68 Cal. Comp. Cases 1864. In that case applicant was awarded 100% permanent total disability based on an injury to multiple body parts including RSD (a condition also diagnosed in this case and similar to CRPS) based on the medical opinions of Dr. Salick who concludes that applicant is permanently totally disabled. RSD is not a body part listed in the rating manual and yet the Appeals Board awarded applicant 100% permanent total disability. (*Petty, supra*, 68 Cal. Comp. Cases at p. 1865.)

4. The WCJ's decision to apportion all of applicant's permanent disability to the 01/05/96 injury is supported by Dr. Brose's well-reasoned opinions and it is consistent with the decisions in *Benson and Hikida*.

Dr. Brose provides a cogent, well-articulated explanation for his conclusions that applicant's permanent total disability is the result of CRPS which developed as a result of the 02/15/96 right knee surgery which was caused solely by the 01/05/96 knee injury. He supports his opinion by reference to current scientific opinion that the trauma that most closely precedes development of the CRPS syndrome is characterized as the causative factor. Based upon his review of the chronology of events in this case and the preponderance of medical evidence the concludes that applicant's CRPS is a consequence of the 1996 surgery which was caused by the 01/05/96 and not caused by the 1995 surgery. (Report, Dr. Brose, 05/24/18, p. 7; Exh. J-6.) During his deposition Dr. Brose was questioned extensively about his opinions in this regard and he continued to support his conclusion that the 01/05/96 injury, and the resulting surgery on 02/15/96, were the sole cause of applicant's CRPS and applicant's 100% permanent total disability. (Deposition, supra, 10/23/18, pp. 18-33; Exh. J-3.) (See Evidence Code Section 720; *Anaya, supra*.) It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (See *Place v. Workers' Comp. Appeals Bd.* (1970) 3 Cal. 3d 372, 35 Cal. Comp. Cases 525.)

The WCJ's decision to apportion 100% of applicant's permanent total disability to the 01/05/96 injury is also consistent with the rationale in *Hikida v. Workers Comp. Appeals Bd.* (2017) 12 Cal. App. 5th 1249, 219 Cal. Rptr. 3d 654, 82 Cal. Comp. Cases 679. In the *Hikida* case applicant's permanent total disability was caused not by her carpal tunnel condition but rather by the CRPS resulting from the medical treatment which the employer provided. (*Hikida, supra,* 82 CCC at p. 688.) For this reason the appellate court refused to apportion 10% of applicant's permanent disability to the non-industrial condition. The facts in the instant case are remarkably similar to the facts in the *Hikida* case. In this case Dr. Brose has concluded that applicant's permanent total disability is caused solely by the CRPS which was necessary as a result of the 01/05/96 injury. Since the employer in this case was required to provide the surgery to applicant's knee, and since there is no apportionment of medical treatment, and since Dr. Brose concludes that surgery was solely the result of the 01/05/96 injury, it was appropriate for the WCJ to apportion all of applicants permanent total disability to the 01/05/96 injury during coverage by Allianz.

The *Benson* holding is not inconsistent with the WCJ's decision because the WCJ did not combine disabilities from two separate injuries. Instead the WCJ apportioned all of applicant's permanent total disability to the 01/05/96 injury based upon the well-reasoned opinions of Dr. Brose.

5. Dr. Brose utilized the correct standard as enunciated in the *Hikida* decision to apportion 100% of applicant's permanent total disability to the 01/05/96 injury.

Defendant correctly points out that Dr. Brose originally apportioned applicant's permanent disability as follows: 10% to the 07/11/95 injury and 90% to the 01/05/96 injury. However, after reviewing additional medical information and literature, Dr. Brose concludes that applicant's CRPS was caused solely by the 01/05/96 injury which resulted in the need for knee surgery on 02/15/96. His revised opinions are based on the evolution on the science of causation which affixes responsibility for the development of CRPS on the trauma which most clearly precedes onset of CRPS. In this case the causative trauma is the 02/15/96 surgery which was caused solely by the 01/05/9 injury. (Report, Dr. Brose, 05/24/18, p. 7; Exh. J-6.) Although Dr. Post provided a different opinion on apportionment, even Dr. Post conceded that the 01/05/96 injury standing alone – even without the previous 07/11/95 injury-- would have caused the need for knee surgery in February 1996. (Report, Dr. Post, 12/24/18, p. 15; Exh. J-1.) Dr. Brose's reasoning is based on a review of the medical and scientific literature and his familiarity with the facts in this case. His opinion constitutes substantial evidence in support of the award.

6. The WCJ did not err by failing to issue DEU instructions before issuing the Findings and Award.

The WCJ is recognized as having a special expertise in rating permanent disability and, therefore, the WCJ is allowed to rate an employee's permanent disability without obtaining a formal rating from the DEU. (*Blackledge v. Bank of America* (en banc 2010) 75 Cal. Comp. Cases 613, 625; see also *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal. 3rd 162, 176, 93 Cal. Rptr. 15 [36 Cal. Comp. Cases 93, 100.].)

Furthermore, defendant was not prejudiced because a formal DEU rating had previously been issued with a rating of 100% permanent total disability.

7. Defendant has failed to establish a reasonable basis for reopening the case for further development of the record.

Defendant has requested that the record be reopened to obtain medical treatment records since January 2018 and to produce testimony from two Allianz claims examiners regarding lack of medical treatment since 2017. Defendant also seeks to admit additional documentary evidence of medical treatment benefits paid by Allianz to show that there were no industrial treatment bills paid during 2018 through 2019.

Defendant has not explained why these witnesses and the additional documentary evidence were not produced at the hearing on 04/02/19 when the matter was submitted for decision. The appeals board may not use its powers to develop the record to rescue a party who fails to present evidence at trial. (*San Bernardino Community Hospital v. Workers Comp. Appeals Bd. (McKernan)* (1999) 74 Cal. App. 4th 928, 88 Cal. Rptr. 2nd 516, 64 Cal. Comp. Cases 986, 991.) It is also an abuse of discretion for the appeals board to allow development of the record in order to relieve a party from complying with Labor Code Section 5502 (d) (3) in the absence of showing good cause. (See *McKernan, supra,* 64 Cal. Comp. Cases 986.) Furthermore, the appeals board may not reopen the record if the party made a tactical decision not to pursue discovery before trial. (*Telles Transport v. Workers Comp. Appeals Bd.) (Zuniga)* (2001) 92 Cal. App. 4th 1159, 112 Cal. Rptr. 2d 540, 66 Cal. Comp. Cases 1290.)

Defendant has the burden of proof in this case to show that the evidence of medical treatment payments in 2018 through 2019 and medical reports from treating physician during this period were not available or could not have been discovered with due diligence. (*McKernan, supra,* 64 Cal. Comp. Cases at p. 992; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (en banc 2002) 67 Cal. Comp. Cases 138, 142, fn. 4.)

Defendant has failed to explain why the witnesses and the documentary evidence could not have been produced at the time the matter was submitted for decision on 04/02/19 and therefore defendant has failed to meet its burden of proof in this regard.