

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

NERISSA WATSON, *Applicant*

vs.

**LOS ANGELES COUNTY PROBATION DEPARTMENT, permissibly self-insured,
administered by SEDGWICK CLAIMS, *Defendants***

**Adjudication Number: ADJ9694061
Marina del Rey District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seek removal¹ in response to the Findings and Order (F&O), issued on November 2, 2023, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a Detention Services Officer by the Los Angeles County Probation Department sustained injury to her right wrist, right hand, left knee, heart, lungs, psyche, headaches and gastrointestinal system, and did not sustain injury to her right knee. The WCJ further determined that the order of submission should be vacated, and the record developed with respect to the apportionment opinions of the orthopedic Agreed Medical Evaluator (AME).

Applicant avers that further development of the record is unnecessary and will result in significant prejudice and irreparable harm to applicant.

We have not received an Answer from any party. The WCJ prepared a Report and Recommendation on Petition for Removal (Report), recommending applicant's petition be granted.

We have considered the allegations of the Petition for Removal and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based

¹ Commissioner Sweeney, who was previously a member of this panel, no longer served on the Worker's Compensation Appeals Board. Another panelist has been assigned in her place.

on our review of the record and the WCJ's analysis of the petitioner's arguments in the report, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings and decision consistent with this opinion.

BACKGROUND

Applicant claimed injury to the right wrist, right hand, left knee, heart and lungs, while employed as a Detention Services Officer for the Los Angeles County Probation Department from October 1, 2009 to January 1, 2011.

On July 13, 2015, the parties stipulated that applicant sustained permanent disability arising out of and the course of employment to to her right wrist/right hand, left knee, heart and lungs. The stipulations were approved by a WCJ and an Award issued the same day.

On August 31, 2015, applicant filed a Petition to Reopen alleging interim change in her condition resulting in new disability and need for medical treatment.

The parties have selected Howard Greils, M.D., as the AME in psychiatry, Mark Hyman, M.D., as the AME in internal medicine, and Stephen Wertheimer, M.D., as the AME in orthopedic medicine. Applicant has also obtained reporting from vocational expert Enrique Vega.

On March 6, 2019, the parties proceeded to trial, stipulating that applicant sustained injury to her right wrist, right hand, left knee, heart and lungs, psych, headaches, and gastrointestinal system. (Minutes of Hearing and Summary of Evidence (Minutes), dated March 6, 2019, at p. 2:5.) The parties placed in issue, in relevant part, injury to the right knee, permanent disability, apportionment, the need for further medical treatment and attorney fees.

On June 18, 2019, the WCJ ordered the submission vacated and further ordered development of the record, to include supplemental reporting from orthopedic AME Dr. Wertheimer. (Findings and Order, June 18, 2019, Order Nos. 1, 4 and 5.)

On November 14, 2019, the matter was again heard at trial, and on December 6, 2019, the parties submitted the matter for decision. (Minutes of Hearing (Further), November 14, 2019, at p. 1:22.)

On February 25, 2020, the WCJ vacated the submission, noting that defendant may not have filed a trial brief. (Order for Defendants to File a Trial Brief; Amended Order Vacating Submission; Order of Submission, dated February 25, 2020, at pp. 1-2.)

On March 13, 2020, the WCJ submitted the matter for decision. (*Ibid.*)

On May 22, 2020, the WCJ ordered the submission vacated, and ordered that the vocational expert reevaluate the applicant. (Findings and Order, dated May 22, 2020, Finding of Fact Nos. 1 and 2.)

On December 7, 2020, the matter was again heard at trial and on December 11, 2020, the matter was submitted for decision. (Minutes of Hearing (Further), dated December 7, 2020, at p. 1:23.)

On March 10, 2021, the WCJ issued her Findings and Order, vacating the order submitting, and further ordering that the internal medicine and orthopedic AMEs prepare supplemental reporting addressing “apportionment to each separate date of injury pursuant to *Benson*.” The psychiatric AME was directed to prepare a supplemental report “explaining ‘how’ and ‘why’ the nonindustrial factors did not cause disability.” (Findings and Order, March 10, 2021, Order No. 2.)

On April 5, 2021, applicant sought removal in response to the WCJ’s March 10, 2021 decision, averring no good cause for development of the record. (Petition for Removal, dated April 5, 2021.)

On January 31, 2022, we affirmed the WCJ’s Findings and Order. (Opinion and Decision After Reconsideration, dated January 31, 2022.)

On July 19, 2022, the Court of Appeal denied applicant’s Petition for Writ of Review.

On August 14, 2023, the parties proceeded to trial and offered additional reporting into evidence. Applicant withdrew her claim of injury to the right knee. (Minutes of Hearing (Further), dated August 14, 2023, at p. 2:1.) The parties submitted the matter for decision. (*Id.* at p. 1:22.)

On November 2, 2023, the WCJ issued the F&O, ordering in relevant part that the August 14, 2023 submission be vacated, and directing the orthopedic AME to “write a supplemental report with a complete *Benson* analysis which includes the right hand/wrist and assesses apportionment to each separate date of injury.” (F&O, Finding of Fact No. 2.)

Applicant’s November 27, 2023 Petition for Removal (Petition) avers the WCJ’s F&O will result in significant prejudice and irreparable harm, and that the finding of no industrial injury to the right knee is unsupported in the record. (Petition, at p. 1:23.)

The WCJ’s Report observes that the decisions of the Appeals Board must be based on an accurate and fully developed evidentiary record, and that following further reflection on the issues raised by applicant, the WCJ recommends the Petition be granted.

DISCUSSION

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment (AOE/COE), jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [210 Cal. Rptr. 3d 101, 81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petitioner challenging a hybrid decision only disputes the WCJ's determination regarding interlocutory issues, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions.

Here, the WCJ's decision includes, *inter alia*, findings of injury and employment. Injury and employment are threshold issues fundamental to the claim for benefits. Accordingly, the WCJ's decision is a final order subject to reconsideration rather than removal.

Although the decision contains a finding that is final, defendant is only challenging an interlocutory finding/order vacating the submission for development of the record. (Lab. Code, § 5701.) Therefore, the removal standard applies to our review. (See *Gaona, supra*.)

The F&O vacates the order submitting the case for decision and orders the orthopedic AME to prepare supplemental reporting addressing “a complete *Benson* analysis which includes hand/wrist and assesses apportionment to each separate date of injury.” (F&O, Finding of Fact No. 2.)

In *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] (*Benson*), the Court of Appeal determined that because “a system of apportionment based on causation requires that each distinct industrial injury be separately

compensated based on its individual contribution to a permanent disability,” Labor Code² sections 4663 and 4664 require apportionment to each distinct industrial injury causing permanent disability. (*Id.* at p. 1560.) However, the court in *Benson* also affirmed that the burden of proving apportionment of permanent disability rests with the defendant(s). (*Ibid.*; Lab. Code, § 5705; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].)

Section 5705 provides that the burden of proof rests with the party with the affirmative of the issue. (Lab. Code, § 5705.) In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc) (*Escobedo*), we explained that pursuant to section 5705, the applicant has the burden of establishing the percentage of permanent disability directly caused by the industrial injury, while the defendant has the burden of establishing the percentage of disability caused by other factors. (*Id.* at p. 612.) We also discussed the options available to the parties in addressing issues of apportionment:

These burdens apply whether there is one reporting physician (e.g., an agreed medical evaluator or a panel QME) or more than one reporting physician. Where a dispute arises on the issue of apportionment to industrial or non-industrial causation, a party's options include but are not limited to: (1) doing nothing, based on a belief that the assessment of the relative industrial and non-industrial causation percentages by the physician(s) upon whom it intends to rely is the most persuasive substantial medical evidence; (2) obtaining a supplemental report to clarify or bolster the percentage causation determination of the physician upon who it intends to rely or, if there is more than one physician, to rebut the opposing physician's percentage causation determinations; or (3) cross-examining the physician(s) by deposition for the same reasons.

(*Id.* at p. 613.)

We acknowledge that section 4663(b) requires that “[a] physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.” (Lab. Code, § 4663(b).) However, the *Benson* court addressed the issue as follows:

[T]here 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

² All further references are to the Labor Code unless otherwise noted.

has failed to meet its burden of proof, a combined award of permanent disability may still be justified.

(*Benson, supra*, at p. 1560.)

Thus, an applicant is entitled to an unapportioned award where a party fails to meet its affirmative burden of establishing apportionment between industrial injuries, or to prior injuries or to nonindustrial factors. We applied this analysis in *Dileva v. Northrop Grumman Systems Corp.* (2015) 2015 Cal. Wrk. Comp. P.D. LEXIS 99 (Appeals Board panel decision), writ den. sub nom. *Northrop Grumman Systems Corp. v. Workers' Comp. Appeals Bd. (Dileva)* (2015) 80 Cal.Comp.Cases 749. Therein, we affirmed the WCJ's joint award of permanent disability arising out of applicant's three claimed injuries, where the treating psychiatric AME was unable to parcel out the respective percentages each of the three injuries contributed to applicant's overall permanent disability. (*Id.* at p. 752.)

We reached a similar holding in *Fields v. City of Cathedral City* (2013) 2013 Cal. Wrk. Comp. P.D. LEXIS 103 (Appeals Board panel decision), writ den. sub nom. *City of Cathedral City v. Workers' Comp. Appeals Bd. (Fields)* (2013) 78 Cal.Comp.Cases 696, wherein we affirmed the WCJ's joint award of permanent disability as between applicant's specific and cumulative injuries, when the AME in internal medicine was unable to parcel out the percentages each injury contributed to applicant's overall permanent disability. (See also *Alea North American Insurance Co. v. Workers' Comp. Appeals Bd. (Herrera)* (2018) 84 Cal.Comp.Cases 17 [2018 Cal. Wrk. Comp. LEXIS 123]; *Vizcarra v. Master Toys & Novelties, Inc.* (November 21, 2023, ADJ7810002, ADJ7982917) [2023 Cal. Wrk. Comp. P.D. LEXIS 311]; *Khammash v. State of Cal. Dept. of Transp.* (September 28, 2023, ADJ7358979, ADJ7183934, ADJ7358844, ADJ7358858) [2023 Cal. Wrk. Comp. P.D. LEXIS 307]; *cf. Padilla v. Workers' Comp. Appeals Bd.* (2017) 82 Cal.Comp.Cases 400 [2017 Cal. Wrk. Comp. LEXIS 22].)

Here, the F&O vacated the submission of the matter for decision on the grounds that the record required further development to address apportionment. (F&O, Finding of Fact No. 2.) However, as was explained in *Benson, supra*, and *Escobedo, supra*, when the employer has failed to meet its burden of proof, a combined award of permanent disability is appropriate. (*Escobedo, supra*, at p. 613; *Benson, supra*, at p. 1560; see also *Kopping, supra*, at p. 1115.)

In meeting that burden of proof, defendant's options included doing nothing based on a belief that the physician(s) upon whom it intended to rely were persuasive and substantial medical

evidence, or obtaining supplemental reporting, or deposing the evaluating physicians. (*Escobedo, supra*, at p. 613.) In addition, the WCJ has previously ordered the parties to obtain supplemental reporting addressing apportionment, resulting in the admission of six additional AME reports. (Findings and Order, March 10, 2021, Order No. 2; Minutes, at p. 2:3.)

We therefore conclude that the order to develop the record with respect to apportionment will result in irreparable harm to applicant. The Appeals Board does not have a duty to develop the record where a party who has the burden of proof recognizes the insufficiency of the record and does not take appropriate action. (*Lozano v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 970 [2002 Cal. Wrk. Comp. LEXIS 1420] (writ den.))

Accordingly, we will grant reconsideration, and applying the removal standard, rescind the F&O, and return this matter for further proceedings and to issue a decision on the current record, consistent with this opinion. Any person aggrieved by the decision may thereafter timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that the reconsideration of the decision of November 2, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of November 2, 2023 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings and decision by the WCJ.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 23, 2024

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

**NERISSA WATSON
BURGIS AND ASSOCIATES
RK LAW**

SAR/abs

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