

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

JULIE VIOR, *Applicant*

vs.

**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, Permissibly Self-Insured,
administered by SEDGWICK CMS, *Defendants***

**Adjudication Numbers: ADJ8555784, ADJ9828972 (MF)
Santa Barbara 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.¹

On January 19, 2021, the workers' compensation administrative law judge ("WCJ") issued Findings and Awards in two case numbers.

In ADJ9828972, the WCJ found, in relevant part, that applicant, while employed as a painter during the period February 20, 1996 through February 25, 2015, sustained industrial injury to her elbows, wrists, hands and right shoulder, and that as a result of this injury applicant is entitled to an award of permanent and total disability under the 2005 Schedule for Rating Permanent Disabilities ("PDRS"), without apportionment to a September 21, 2010 Stipulated Findings & Award for 68.5% permanent disability under the 1997 PDRS. (The September 21, 2010 Award resulted from a prior cumulative trauma injury during the period March 1, 1995 through February 29, 1996 to applicant's bilateral wrists, bilateral thumbs, and bilateral elbows, in ADJ5521632.)

In ADJ8555784, the WCJ found, in relevant part, that applicant, while employed as a painter during the period February 20, 1996 through February 25, 2015, sustained industrial injury to her elbows, wrists, and hands, resulting in permanent disability of 13%.

¹ Commissioner Marguerite Sweeney signed the Opinion and Order Granting Petition for Reconsideration dated April 6, 2021. As Commissioner Sweeney is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

Defendant filed a timely petition for reconsideration of the WCJ's decisions. Defendant contends that the WCJ erred in relying upon applicant's credibility as a trial witness because she never testified at trial. Defendant further contends that the WCJ erred in disallowing apportionment in ADJ9828972 because Dr. Newton, who reported as a "regular physician," provided substantial medical evidence of apportionment pursuant to Labor Code section 4663. Defendant also contends that there are clerical errors in the WCJ's decisions, and that applicant's trial brief contained misstatements of fact.

Applicant filed an answer.

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

Defendant filed a request for permission to file a supplemental petition, along with the proposed supplemental petition. Therein defendant contends that the WCJ's decisions violate Labor Code section 4664(c)(1), which prohibits lifetime awards exceeding 100% permanent disability for injuries "to any one region of the body." We have exercised our discretion under WCAB Rule 10964 to accept and consider defendant's supplemental petition. (Cal. Code Regs., tit. 8, § 10964(a).)

At the outset, we note that in ADJ8555784, the Findings and Award erroneously carries over from the Findings and Award in ADJ9828972 the date of injury and the injured body parts, as well as other errors. Whether these are mere clerical errors or not, they need correction in order to match the stipulations of the parties made at trial on September 22, 2020. In ADJ8555784, the parties stipulated that applicant, while employed as a painter on February 9, 2011, sustained industrial injury to her right knee. (Minutes of Hearing, 9/22/20, 3:22-24.) We further note that the remainder of the WCJ's substantive findings in ADJ8555784 are not challenged by defendant upon reconsideration. Therefore, we will amend the Findings and Award in ADJ8555784 to correct the errors noted above. Otherwise, we affirm the Findings and Award in ADJ8555784.

As for the Findings and Award in ADJ9828972, we conclude there are unresolved issues of permanent disability and apportionment that require further inquiry and determination by the WCJ. Therefore, we will affirm the undisputed findings of the Findings and Award in ADJ9828972 but amend it to defer the issues of permanent disability and apportionment (and attorney's fees) pending further proceedings and new determination of those issues by the WCJ.

In reference to the issue of apportionment under Labor Code section 4663, defendant points out that Dr. Newton, who was selected by the WCJ to serve as the "regular physician," apportioned

50% of applicant's right elbow impairment to the first cumulative trauma injury (March 1, 1995 through February 29, 1996) and 50% of this impairment to the second cumulative trauma injury; Dr. Newton apportioned 100% of applicant's left elbow impairment to the first cumulative trauma injury; and Dr. Newton apportioned 50% of applicant's right hand/wrist and left hand impairments to the first cumulative trauma injury and 50% to the second cumulative trauma injury. (Exhibit 6, Newton report dated 12/17/19, pp. 2-3.)

Defendant contends that the above apportionment findings of Dr. Newton constitute substantial evidence pursuant to Labor Code section 4663 and/or *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 (74 Cal.Comp.Cases 113) [requiring apportionment of disability between injuries].² The WCJ's Report is not responsive to this contention, but it needed to be. Therefore, we conclude that the issue of apportionment under section 4663 must be revisited by the WCJ at the trial level. In this regard, we note that page two of Dr. Newton's December 17, 2019 report offers what appears to be some "boilerplate" medical language that nonetheless includes some reasoning about "how and why the [applicant's disabilities are] causally related to [each of her] industrial [injuries]," consistent with *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc). The WCJ must revisit and resolve whether Dr. Newton's reporting constitutes substantial evidence of apportionment under section 4663, pursuant to the standards set forth in *Escobedo*.

In addition, we find several outstanding issues concerning apportionment under Labor Code section 4664. The record reflects that in ADJ5521632, the parties resolved applicant's prior claim of cumulative trauma injury by entering into the approved Stipulations and Award dated September 21, 2010. Therein the parties stipulated that applicant sustained industrial injury to her elbows, wrists and thumbs during the period March 1, 1995 through February 29, 1996, resulting in permanent disability of 68.5% under the 1997 PDRS. (Defense Exhibit A.)

² Defendant alleges that permanent disability must be apportioned between four injuries. However, it is uncertain how defendant tallies up four injuries. At trial on September 22, 2020, the parties stipulated that applicant sustained industrial injury to her right knee on February 9, 2011 (ADJ8555784); consistent with *Benson* the WCJ issued a separate Award of 13% permanent disability for this injury (albeit needing correction of the injured body part and date of injury). Otherwise, the trial minutes of September 22, 2020 show only two other cumulative trauma injuries at issue – an industrial injury to applicant's elbows, wrists and thumbs from March 1, 1995 through February 29, 1996, resulting in stipulated permanent disability of 68.5% (ADJ5521632), and another injury to applicant's elbows, wrists and hands during the period February 20, 1996 through February 25, 2015, with "shoulders" being a disputed body part (not a separate injury) and the WCJ finding injury to the right shoulder. The parties and the WCJ should clarify the number of injuries actually at issue, in further proceedings at the trial level.

Although defendant unquestionably has the burden of proving apportionment, it is likewise beyond question that under section 4664(b), there is a conclusive presumption that the permanent disability set forth in the Stipulations and Award of September 21, 2010 still exists. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].)

In *Kopping*, the Court of Appeal interpreted section 4664(b) as requiring defendant to prove two things: (1) the existence of the prior permanent disability award; and (2) the extent of the overlap, if any, between the prior disability and the current disability. (*Ibid.*)

In this case, the first prong is established, as previously noted. As for the second prong, we discussed before that Dr. Newton apportioned 50% of applicant's right elbow impairment to the earlier cumulative trauma injury and 50% of this impairment to the subsequent cumulative trauma injury; the doctor apportioned 100% of applicant's left elbow impairment to the earlier cumulative trauma injury; and the doctor apportioned 50% of applicant's right hand/wrist and left hand impairments to the earlier cumulative trauma injury and 50% to the subsequent cumulative trauma injury. (Exhibit 6, Newton report dated 12/17/19, pp. 2-3.)

However, we conclude that further inquiry is required on the extent of the overlap, if any, between applicant's prior disability and her current disability. The issue is complex due to the fact that the prior Stipulated Award of 68.5% permanent disability was based on the 1997 PDRS rating regime, with its work restrictions and similar factors of disability. Here, however, Dr. Newton described applicant's present permanent disability under the 2005 PDRS rating regime, with its consideration of the Activities of Daily Living and evaluation of Whole Person Impairment.

Nonetheless, defendant asserts that in his report dated March 22, 2016, Dr. Newton found overlapping disabilities between the two cumulative trauma injuries to applicant's right wrist and bilateral elbows. (See Petition for Reconsideration at 6:26-7:4, referencing Exhibit 1 - Newton report dated 3/22/16, pp. 14-16.) In that report, however, Dr. Newton did not describe applicant's pre-existing permanent disability of 68.5% in terms of Whole Person Impairment(s) assessable under the rating regime encompassed by the 2005 PDRS.

Yet Dr. Newton did state that applicant sustained grip loss as a result of the subsequent cumulative trauma injury to her bilateral elbows, and that she has residual pain in her bilateral wrists. The incidence of grip loss and pain are factors that may indicate the existence of ratable disability or impairment under both the 1997 and 2005 rating regimes. Therefore, we conclude that the issue of overlapping disabilities (if any) occasioned by the prior and subsequent cumulative

traumas requires further inquiry and resolution by the WCJ. We agree with the approach taken by the Board in *Richard v. City of Los Angeles* (2022) 2022 Cal. Wrk. Comp. P.D. LEXIS 287, wherein the panel explained:

We have previously held that a permanent disability rated under the 1997 PDRS would be properly apportioned to an award of permanent disability rated pursuant to the 2005 PDRS, if the prior disability could be converted to an impairment under the 2005 PDRS utilizing the same method as the current disability. (See *Robinson v. Workers' Comp. Appeals Bd.* (2011) 76 Cal.Comp.Cases 847, 851 (writ den.)) The parties need to ask the doctor to review the available medical records regarding the previous injuries, and then, if possible, to rate applicant's left ankle disability, caused by each of the injuries, using factors identified in the 2005 PDRS, and then to address apportionment as appropriate.³

In the instant case, we similarly conclude that the WCJ needs to request Dr. Newton to review the available medical records regarding the prior cumulative trauma injury and if possible, rate the disabilities caused by each of the two cumulative trauma injuries, using factors identified in the 2005 PDRS so as to address the issue of apportionment under section 4664(b).⁴

However, the issue of overlapping disabilities (if any) does not end our inquiry into other issues of permanent disability and apportionment that we find to be of relevance in this case.

Under Labor Code section 4664(c)(1)(E), “[t]he accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee’s lifetime unless the employee’s injury or illness is conclusively presumed to be total in character pursuant to Section 4662. As used in this section, the regions of the body are the following: [...] The upper extremities, including the shoulders.”

On one hand, defendant contends in its supplemental petition that the WCJ’s decision in ADJ9828972 violates section 4664(c)(1)(E) because it allows the accumulation of permanent disability awards for applicant’s upper extremities (the prior one for 68.5%, the present one for 100%) to exceed 100% over her lifetime. On this view, if the provision is applicable and no

³ See also, *Pappas v. County of Santa Barbara* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 558.

⁴ As noted in applicant’s answer, Dr. Newton himself inquired “whether the applicant was given an impairment rating for her prior injuries.” (Exhibit 2, Newton report dated 7/13/16, pp. 16-17.) It appears the answer to that question is no. However, to the extent applicant implies that defendant thereafter waived the issue, we disagree. Dr. Newton presently is not precluded from reviewing the medical record to determine whether he can provide such an impairment rating in reference to the prior cumulative trauma injury. (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 should identify as requiring further evidence].)

apportionment is found, applicant may be limited to an award of 31.5% permanent disability in ADJ9828972.

On the other hand, section 4664(c)(1) incorporates section 4662, subdivision (a)(2) of which may be relevant here. This subdivision provides that the loss of both hands or the use thereof is a permanent disability that “shall be conclusively presumed to be total in character [.]”

Dr. Newton provided individual Whole Person Impairment assessments for applicant’s upper extremities as follows: right elbow (12%), right wrist (19%), right hand (7%), left elbow (6%), left hand (10%), and right shoulder (7%). (Exhibit 5, Newton report dated 10/9/19, p. 19; Exhibit 8, Newton deposition of 10/31/18, p. 65.) These impairment assessments represent significant disability in applicant’s hands, but it is uncertain whether Dr. Newton opined that she lost the use of both hands in contemplation of section 4662(a)(2). As previously discussed, Dr. Newton will be asked to provide an opinion on overlapping disabilities (if any), so he also should be asked to provide a medical opinion on whether applicant has lost the use of both hands.

To summarize the foregoing issues, we conclude that the WCJ must address whether or not section 4664(c)(1)(E) applies. The prior stipulated Award of 68.5% permanent disability for the earlier cumulative trauma injury - all to the upper extremities - must be considered, unless the WCJ determines that applicant has lost the use of both hands, which would generate a conclusive presumption of permanent and total disability pursuant to section 4662(a)(2). Otherwise, it appears that only 31.5% permanent disability (100%-68.5%) may be available to award for the subsequent cumulative trauma in ADJ9828972. Further, if section 4664(c)(1) does apply, it appears there would be no basis for apportionment under section 4663 because the prior Stipulated Award already accounts for it. However, the WCJ also must consider that if he finds applicant has lost the use of both hands, which justifies a presumed permanent and total disability, then there can be no apportionment of that disability. As mentioned before, the WCJ should further develop the medical record, as necessary or appropriate, to resolve the issues discussed in this opinion. (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 [Appeals Board en banc].)

Finally, we note applicant’s answer alleges that the record justifies a finding she sustained a single cumulative trauma injury to her upper extremities over her entire career as a painter for defendant. Although the stipulations of record contradict this allegation, we conclude that the WCJ should address and resolve it in light of the following discussion.

In the approved Stipulations and Award dated September 21, 2010 in ADJ5521632, the parties stipulated that applicant sustained industrial injury to her elbows, wrists and thumbs during the period March 1, 1995 through February 29, 1996, resulting in permanent disability of 68.5% under the 1997 PDRS. (Defense Exhibit A.) At trial of the instant matter (ADJ9828972), the parties further stipulated that applicant sustained industrial injury to her elbows, wrist, and hands during the period February 20, 1996 through February 25, 2015. Thus, the stipulations of record show that the parties stipulated to two cumulative trauma injuries, both involving the upper extremities, the first of which was settled with an approved Award of 68.5% permanent disability.

The general rule is that stipulations are binding on the parties absent a showing of good cause. (*Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784 [52 Cal.Comp.Cases 419]; *Brannen v. Workers' Comp. Appeals Bd.* (1996) 46 Cal.App.4th 377 (61 Cal.Comp.Cases 554) [party not permitted to withdraw from stipulation absent showing of good cause].)

In this case, applicant alleges that there is good cause to disregard the stipulations to two cumulative trauma injuries because “there was no gap,” and even an overlay of nine days, between the two injuries; and because the first injury may have extended through November 1999, when treating physician Behrman issued his permanent and stationary report. The merit of these allegations is undetermined, but we agree that the WCJ should consider and resolve them. (See also, *Fireman's Fund Ins. Co. v. Workers' Comp. Appeals Bd.* (2010) 181 Cal.App.4th 752, 770 (75 Cal.Comp.Cases 1) [“When parties stipulate and settle a workers' compensation case, they also have a justified interest in maintaining their resolution of the case.”].)

It should be noted that we express no final opinion on the issues of permanent disability or apportionment in ADJ9828972. When the WCJ issues new findings on them, any aggrieved party may seek reconsideration as provided in 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 January 19, 2021 in ADJ8555784 is **AFFIRMED**, except that said decision is **AMENDED** in the following particulars:

FINDINGS

1. Applicant, while employed on February 9, 2011 as a painter, Occupational Group 380, at Santa Barbara, California by the Regents of the University of California, sustained injury arising out of and in the course of employment to her right knee.

6. The prior injury was resolved by way of Stipulated Findings and Award dated September 21, 2010 resulting in an Award of 68.5% permanent disability.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of January 19, 2021 in ADJ9828972 is **AFFIRMED**, except that paragraphs (A) and (E) of the Award are **RESCINDED AND DEFERRED** with jurisdiction reserved to the trial level, and Findings 6, 8, 11, 12 and 15 are **AMENDED** to read as follows:

FINDINGS

6. The prior injury was resolved by way of Stipulated Findings and Award dated September 21, 2010 resulting in an Award of 68.5% permanent disability.

8. The last day applicant physically worked for defendant employer was February 25, 2015.

11. The issue of permanent disability is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

12. The issue of apportionment is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved.

15. The issue of attorney's fees 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 new decision on permanent disability, apportionment and attorney's fees by the WCJ in ADJ9828972, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 3, 2023

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

**JULIE VIOR
HOURIGAN, HOLZMAN & SPRAGUE
TOBIN LUCKS**

JTL/ara

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