

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

JAIME SANCHEZ, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS, legally uninsured, administered by
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ10530086, ADJ10530072
Van Nuys 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 Awards of May 5, 2021, the workers' compensation judge ("WCJ") issued decisions in two case numbers. In ADJ10530072, the WCJ found that applicant, while employed as a correctional officer on June 23, 2016, sustained industrial injury to his brain/neurocognitive system, psyche, urological system, dysphasia, and speech, resulting in permanent and total disability. In ADJ10530086, the WCJ found that applicant, while employed as a correctional officer during the period January 1, 1999 through June 23, 2016, sustained industrial injury to his neck, right elbow, right shoulder, right wrist, right hand, right ankle, right foot, right knee, upper back, lower back, brain, hypertension and coronary artery disease, causing permanent partial disability of 85%. In ADJ10530086, the WCJ also found that "there is no substantial medical evidence of injury to the left shoulder, psyche [or] cardiovascular system."

Defendant filed a timely Petition for Reconsideration of the WCJ's decisions. Defendant contends that the stroke suffered by applicant does not fall within the presumption of total disability due to a brain injury, resulting in permanent mental incapacity under Labor Code section 4662(a)(4).¹ Defendant further contends that the medical opinions of Drs. Grodan and

¹ Section 4662(a)(4) provides as follows: "(a) Any of the following permanent disabilities shall be conclusively presumed to be total in character: [...] (4) An injury to the brain resulting in permanent mental incapacity."

Chodakiewitz justify a single award for applicant's two industrial injuries, that the permanent impairments should be added rather than combined to determine overall permanent disability, and that the overall permanent impairment is less than 100% if the impairments are combined rather than added.

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report"). The Report is a copy of the WCJ's Opinion on Decision. Thus the Report does not comply with WCAB Rule 10962(b), which states that a WCJ's Report must include "[a] discussion of the support in the record for the findings of fact and the conclusions of law that serve as a basis for the decision or order *as to each contention raised by the petition* [.]" (Cal. Code Regs., tit. 8, § 10962, italics added.)

As discussed below, we have reviewed the record and applicable law, and we find various unresolved issues in both cases that must be revisited and resolved by the WCJ in further proceedings at the trial level. We will affirm the undisputed parts of the WCJ's decision in ADJ10530072, rescind the WCJ's decision in ADJ10530086, and we will return the outstanding issues in both cases to the trial level for further proceedings and new findings by the WCJ.

IN ADJ10530086, THE WCJ MUST DISPEL CONFUSION FOUND IN HIS FINDINGS AND AWARD.

In ADJ10530086, the WCJ did not determine all the issues presented to him at trial, as required by Labor Code section 5815. In addition to the admitted body parts included in the WCJ's Findings and Award, applicant claimed and defendant disputed injury to his left shoulder, left knee, heart, psyche, urological system, and cardiovascular system. (Minutes of [Trial] Hearing, 12/20/20, pp. 3-4.) Although the WCJ apparently denied applicant's claims of injury to his left shoulder, psyche and cardiovascular system by stating that no substantial medical evidence supported them, the WCJ evidently neglected to determine the claims of injury to applicant's left knee, heart, and urological system. Further still, the WCJ's formal rating instructions in ADJ10530086 evidently requested a formal rating for the claims of injury to applicant's heart and urological system, among other body parts, but the heart and urological system were not included in the WCJ's finding on industrial injury. Upon reconsideration, "the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further [inquiry or] evidence." (*Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 [66 Cal.Comp.Cases 1290].) For this reason, the confusion in the WCJ's Findings and

Award in ADJ10530086 cannot stand. We will return this matter to the WCJ to ascertain that: (1) all the body parts raised by the parties are clearly and definitively determined by the WCJ; and (2) the permanent disability rating aligns with all the industrially injured body parts and vice-versa.

IN ADJ10530072, SEVERAL ISSUES MUST BE REVISITED AND REDETERMINED BY THE WCJ.

Defendant contends that the brain injury resulting from applicant's stroke did not result in permanent mental incapacity and therefore is not conclusively presumed to be total in character, as determined by the WCJ in his Opinion on Decision. (Lab. Code, § 4662(a)(4).) We observe that the contention appears to be based on defense counsel's opinion of applicant's medical condition and resulting permanent disability, which is not substantial evidence. In addition, the WCJ indicates in his Opinion on Decision (p. 13) that even without the presumption under section 4664(a)(4), the medical opinions of Dr. Grodan and Dr. Chodakiewitz, in conjunction with the opinion of applicant's vocational expert (Enrique Vega), justify a finding that applicant is permanently and totally disabled. Thus, the issue of whether applicant is entitled to the conclusive presumption of section 4664(a) may be academic. As further discussed below, however, there are other issues in this case that are not academic and must be revisited and re-determined by the WCJ. Therefore, we express no final opinion on the applicability of the presumption afforded by section 4664(a). The WCJ may revisit this issue as necessary or appropriate, in conjunction with his consideration and resolution of the other outstanding issues in ADJ10530072.

Defendant next contends that the medical evidence justifies a combined award of permanent disability for the two distinct industrial injuries suffered by applicant. Based upon our review of the record, however, this issue may not necessarily be resolved by resort to the medical evidence alone.

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

the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified.” (170 Cal.App.4th at 1560.)

The instant case presents the peculiar circumstance of the defendant, rather than the applicant, attempting to establish the “*Benson* exception” pursuant to which a single permanent disability may be issued for the two injuries in question. Since defendant would be the beneficiary of the reduced liability inherent in a single award, we believe that defendant has the burden of proof to establish the applicability of the *Benson* exception. We are further persuaded that this issue raises a subsidiary issue that has yet to be addressed by the WCJ. That is, the WCJ must consider the effect of defendant’s trial stipulation that applicant did in fact sustain two distinct industrial injuries, even though it appears the medical evidence shows a significant relationship between the two injuries.² 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 merely because new expert had different medical opinion].) Under the circumstances of the instant matter, we are persuaded that the WCJ must address the issue of whether defendant’s attempt to establish the *Benson* exception of one award, on the premise that the two injuries are “inextricably intertwined,” requires defendant to make a showing of good cause to disregard its stipulation to two distinct injuries. Again, we express no final opinion on this issue.

Defendant also contends that the permanent impairments resulting from applicant’s stroke should be combined rather than added. The overall guiding principle is that the goal of formulating a valid impairment rating under *Milpitas Unified School Dist. v. Workers’ Comp. Appeals Bd. (Almaraz-Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] is to approximate the rating that accurately reflects the injured employee’s actual impairment, which may or may not be the highest rating, depending on the facts of the case at hand. (*City of Sacramento v. Workers’ Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360, 1364-1365 [79 Cal.Comp.Cases 1].)

² It appears that applicant’s stroke on June 23, 2016 was due, at least in part, to uncontrolled hypertension, which in turn was due, in part, to the cumulative stress of applicant’s employment. Likewise for applicant’s coronary artery disease, which appears to be a presumptive industrial injury. (Exhibit R2, QME report of Dr. Grodan dated January 18, 2017, p. 37.) Similarly, it appears that applicant’s hypertension is, in turn, partially causative of his stroke, which has resulted in neurological and cognitive disabilities. (Exhibit V, medical report of Dr. Nobandegani dated August 28, 2019, p.17; exhibit S1, medical report of Dr. Chodakiewitz dated August 27, 2019, p.38.)

In the context of combining versus adding permanent impairments, the Appeals Board panel in *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.) adopted the WCJ's approach of adding permanent disabilities rather than combining them under the Combined Values Chart ("CVC");³ the basis for addition rather than combination of the disabilities was "the synergistic effect of one hip injury upon another opposite hip injury." Specifically, the Board panel adopted the following analysis provided by the WCJ:

Turning to Dr. Cheng's determination that simple addition of applicant's left and right hip impairments provided a more accurate depiction of his overall impairment than application of the reduction formula, the WCJ stated in relevant part:

Dr. Cheng points to the synergistic effect of one hip injury upon another opposite hip injury. I agree. It appears logical that a person who is able to compensate through the opposite member for an injury to one limb is to some extent less disabled or impaired than someone who cannot so compensate.

...

I remain persuaded that the QME has appropriately determined that the impairment resulting from applicant's left and right hip injuries is most accurately combined using simple addition than by use of the combined-values formula.

In *Taina v. County of Santa Clara/Valley Medical Center* (2018) 2018 Cal. Wrk. Comp. P.D. LEXIS 344, the panel of the Appeals Board further explained, "disability values of multiple impairments may be added instead of combined using the CVC if that provides an accurate rating, particularly when there is no overlap, and when the synergistic effect of the multiple disabilities support that method of combination." (Slip opinion, at pp. 10-11.) Of course, the opinion of an evaluating physician who finds a synergistic effect between injuries or disabilities, so as to justify addition rather than combination to most accurately rate permanent disability, must comply with the usual requirements of substantial evidence. (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 620-621 [Appeals Board en banc].)

Further, as stated by the Appeals Board panel in *De La Cerda v. Martin Selko & Co.* (2017) 83 Cal.Comp.Cases 567 (writ den.), the fact that an AME (for instance) does "not use the term

³ The Combined Values Chart is found at pages 8-1 through 8-4 of the 2005 Schedule for Rating Permanent Disabilities ("PDRS").

‘synergistic’ to advocate for the use of the additive rating method is not determinative of the validity of using that method. The impairments may be added *if substantial medical evidence supports the physician’s opinion that adding them will result in a more accurate rating of the applicant’s level of disability than the rating resulting from the use of the CVC.*” (Italics added.)

In the instant case, applicant’s answer relies on the statement in Dr. Chodakiewitz’s report of August 27, 2019 that applicant’s impairments should be “added rather than combined.” (Exhibit S1, p. 40.) As defendant’s petition for reconsideration points out, however, Dr. Chodakiewitz (neurologist) does not specifically explain why the addition rather than combination of applicant’s impairments results in the most accurate permanent disability rating. The same is true of applicant’s reliance upon the August 28, 2019 medical report of Dr. Nobandegani (psychiatrist), who evaluated applicant’s cognitive complaints. (Exhibit V, p. 16.) It appears that Dr. Nobandegani simply did not address the issue of adding rather than combining permanent impairments. Based on the conflicting allegations of the parties upon reconsideration, we conclude that the WCJ must revisit the issue of adding versus combining permanent impairments upon further proceedings at the trial level, in conjunction with the other outstanding issues discussed in this opinion.

Finally, defendant contends that if applicant’s impairments are combined rather than added, his overall permanent disability in ADJ10530072 rates to 97 percent. We will not address this contention in any detail because defendant does not specify the medical evidence that supports the suggested rating. On this issue, defendant fails to comply with WCAB Rule 10945(b), which provides, in relevant part: “[e]very petition for reconsideration ... *shall support its evidentiary statements by specific references to the record.*” (Cal. Code Regs., tit. 8, § 10945(b), emphasis added.) On the other hand, the WCJ’s Opinion on Decision (pp. 10-12) seems to confuse the issue of adding versus combining permanent impairments with the issue of presumptive total disability under Labor Code section 4664(a)(4). Therefore, we conclude that the WCJ should revisit the overall permanent disability rating in ADJ10530072 as necessary or appropriate, in conjunction with the other outstanding issues discussed herein.

Finally, we note that in ADJ10530072, the WCJ relied in part upon the November 19, 2019 medical report of Dr. Grodan (PQME in internal medicine) to find applicant permanently and totally disabled. (Exhibit R1.) It appears that Dr. Grodan found applicant permanently and totally disabled primarily due to his cognitive dysfunction. (Exhibit R1, p. 18.) However, Dr. Grodan

also diagnosed other medical conditions causing disability, including applicant's hypertension and coronary disease. In ADJ10530086, the formal recommended rating dated February 11, 2021 included permanent disability ratings for applicant's heart and hypertension injuries. Though this matter apparently involves two distinct injuries, the specific injury occurred within the last day of the cumulative trauma period. Therefore, it appears appropriate for the WCJ to consider whether or not there are any overlapping disabilities, given the medical evidence and formal rating described above. (*State Compensation Ins. Fund v. Workers' Comp. Appeals Bd. (Hurley)* (1977) 70 Cal.App.3d 599 [42 Cal. Comp. Cases 481].) As with the other outstanding issues discussed before, this is another issue that should be addressed and resolved by the WCJ in further proceedings at the trial level. It bears repeating, however, that we express no final opinion on the disputed issues discussed in this opinion. This is true in both case numbers. When the WCJ makes new findings on the outstanding issues, 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 May 5, 2021 Findings and Award (and Order of Commutation) in ADJ10530086 is **RESCINDED**, and ADJ10530086 is **RETURNED** to the trial level for further proceedings and new decision by the WCJ, consistent with this opinion.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the May 5, 2021 Findings and Award in ADJ10530072 is **AFFIRMED**, except that Findings of Fact 2 and 5, paragraphs (a.), (b.) and (d.) of the Award, and the Order of Commutation are **RESCINDED**, and the following Findings of Fact 2 and 5, and paragraphs (a.), (b.) and (d.) of the Award are **SUBSTITUTED** in their place:

FINDINGS OF FACT

2. The issue of permanent disability is deferred pending further proceedings and new finding by the WCJ, jurisdiction reserved.
5. The issue of attorney's fees is deferred pending further proceedings and new finding by the WCJ, jurisdiction reserved.

AWARD

...

- a. Industrial injury as set forth in Finding 1.
- b. The award of permanent disability is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.
- d. The allowance of a reasonable attorney's fee is deferred pending further proceedings and determination by the WCJ, jurisdiction reserved.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that ADJ10530072 is **RETURNED** to the trial level for further proceedings and new findings on the outstanding issues by the WCJ, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 31, 2022

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

**JAIME SANCHEZ
ROWAN, GURVEY & WIN
STATE COMPENSATION INSURANCE FUND**

JTL/ara

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