WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

BRENDA RICHARD, *Applicant*

vs.

CITY OF LOS ANGELES permissibly self-insured, and self-administered, *Defendant*

Adjudication Number: ADJ10247229
Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on April 30, 2019, wherein the WCJ found in pertinent part that applicant's cumulative injury to her left ankle caused 3% permanent disability.

Applicant contends that she is entitled to an unapportioned award of permanent disability for her left ankle.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her left ankle while employed by defendant as a clerk typist during the period from January 8, 2008, through December 22, 2015. Applicant had previously claimed injury to her left wrist on January 28, 1997 (LAO0738179), and to her left knee and ankle on October 3, 2000 (LAO0786653). Both of those injury claims (including a Petition to Reopen

for New and Further Disability [Petition to Reopen] in case number LAO0738179) were settled by the March 27, 2003 Stipulations with Request for Award. The Award included 29% permanent disability. The permanent disability rating was based on the August 22, 2002 report from orthopedic agreed medical examiner (AME) Alexander Angerman, M.D. (See March 27, 2003 Stipulations, p. 2, paragraph 8.) Applicant filed a Petition to Reopen regarding case number LAO0786653. That Petition to Reopen was settled by Stipulations with Request for Award, and the December 14, 2005 Award included 37% permanent disability, with defendant taking credit for the prior 29% permanent disability award. The 37% permanent disability rating was based on the work restrictions set forth in Dr. Angerman's May 4, 2005 report. (See December 14, 2005 Stipulations, p. 2, paragraph 9.)

On October 19, 2017, orthopedic AME Dr. Angerman, evaluated applicant regarding the January 8, 2008, through December 22, 2015 cumulative injury claim. Dr. Angerman examined applicant, took a history, and reviewed the limited medical record he was provided. He explained that, "After I have received the entirety of the records requested, I will issue a report outlining my opinions and recommendations from an orthopaedic standpoint." (Joint Exh. CC, Dr. Angerman, October 19, 2017, p. 17.)

In his February 7, 2018 report, Dr. Angerman stated:

> Additional records are now submitted for my review which I have summarized above. However, they remain incomplete. … ¶ … At this time, I will defer further orthopaedic opinions until the entirety of records have been received as requested above. After I have received all the records requested, I will issue a report outlining my opinions and recommendations from an orthopaedic standpoint.
> (Joint Exh. BB, Dr. Angerman, February 7, 2018, pp. 10 – 11.)

Dr. Angerman was provided additional medical records and in his supplemental report he concluded that applicant had 12% whole person impairment (WPI) as a result of her left ankle ankylosis [stiffness or fixation of the joint]. (Joint Exh. AA, Dr. Angerman, April 11, 2018, pp. 43 – 44.) Regarding apportionment, Dr. Angerman stated:

> As discussed previously, the patient has already received stipulated awards with regard to her left ankle, however, how those awards were predicated is unknown to me. Therefore, I am basing my opinions solely on the information available to me at the present time. I do reserve the right to amend my opinions pending receipt of new information. ¶ If the subtraction method is determined to be applicable, it is then felt appropriate to state that, in all medical probability, 20%

> of the patient's current level of left ankle disability/impairment would be attributable to the injuries already stipulated to with the remaining portion attributable to industrial causation on a continuous trauma basis as a result of the most recently pled period. ¶ If the subtraction method is not determined to be applicable, it is then felt appropriate to state that, in all medical probability, 80% of the patient's left ankle disability/impairment would be attributable to her prior stipulated injuries with the remaining portion attributable to industrial causation on a continuous trauma basis as a result of the most recently pled period.
> (Joint Exh. AA, pp. 41 – 42.)

The parties proceeded to trial on February 4, 2019. The issues submitted for decision included permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 4, 2019, p. 2.)

DISCUSSION

Labor Code section 4664 states in part:

> (a) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.
> (b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.
> (Lab. Code, § 4664.)[1]

Regarding the section 4664 presumption, the Third District Court of Appeals explained:

> The conclusive presumption of section 4664(b) is a presumption affecting the burden of proof because it affects the employer's burden of proving apportionment by conclusively establishing that the permanent disability resulting from a previous industrial injury still existed at the time of the subsequent injury. Of course, under this reading of the statute, the employer would still have to prove that the previous disability, which was conclusively presumed to still exist, overlapped with the current disability.
> (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1107 [71 Cal.Comp.Cases 1229].)
>
> First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under

[1]All further statutory references are to the Labor Code unless otherwise noted.

> these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable.
> (*Id.* at 1115.)

Here, each of applicant's previous permanent disability awards were based on ratings from the 1997 permanent disability rating schedule (PDRS). Any permanent disability caused by the cumulative injury at issue herein (for the period from January 8, 2008, through December 22, 2015) would be rated based on the 2005 PDRS. The Appeals Board has held that if the prior injury was rated under the 1997 PDRS and the current injury is subject to the 2005 PDRS, there cannot be overlap per section 4664. (See e.g. *Contra Costa County Fire Protection Dist. v. Workers' Comp. Appeals Bd. (Minvielle)* (2010) 75 Cal.Comp.Cases 896, 901-902 (writ den.); *County of Los Angeles v. Workers' Comp. Appeals Bd. (Seafus)* (2014) 79 Cal.Comp.Cases 580 (writ den.); *City of Torrance v. Workers' Comp. Appeals Bd. (Carreras)* 76 Cal.Comp.Cases 498 (writ den.).)

Also, applicant's prior awards of permanent disability indemnity included disability caused by injury to various body parts, in addition to injury to applicant's left ankle. Thus, the section 4664(b) presumption is not applicable to the rating of applicant's disability in this matter.

Pursuant to section 4663:

> (a) Apportionment of permanent disability shall be based on causation.
> (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.
> (Lab. Code, § 4663.)

To be substantial evidence on the issue of apportionment a medical opinion must set forth reasoning in support of its conclusions. For example, if a physician states that a percentage of an injured worker's disability is caused by a pre-existing condition, the physician must explain the nature of the pre-existing condition, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for the percentage of the disability identified by the doctor. (*Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

As noted above, in his reports. Dr. Angerman discussed apportionment in the context of "the subtraction method." He concluded that if the subtraction method (i.e. the section 4664(b) presumption) was not applicable, then, "… [I]n all medical probability, 80% of the patient's left ankle disability/impairment would be attributable to her prior stipulated injuries." (Joint Exh. AA, p. 42.) Dr. Angerman did not describe the nature of the pre-existing condition. Nor did he explain how and why the prior injuries were causing permanent disability at the time of the evaluation, or how and why the prior injuries were responsible for 80% of applicant's left ankle disability. Therefore, his opinions do not comply with the requirements of the applicable case law and they do not constitute substantial evidence as to the issue of apportionment. (*Acme Steel v. Workers' Comp. Appeals Bd. (Borman), supra*; *Escobedo v. Marshalls, supra*.)

Although Dr. Angerman's reports are not substantial evidence regarding apportionment, based on our review of the record, it appears likely that a certain amount of applicant's left ankle permanent disability is the result of her prior left ankle injuries. However, the trial record does not contain substantial evidence upon which a final determination addressing the issues of permanent disability and apportionment can be made. The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

Normally, when the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) As an AME, Dr. Angerman was presumably chosen by the parties because of his expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) As such, upon return of this matter, we recommend that the parties request Dr. Angerman submit a supplemental report addressing the permanent disability/ apportionment issue. It must be noted that Dr. Angerman needs to be made aware of the proper method to be used for determining apportionment of disability caused by injuries which were previously rated using different factors of disability. 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.

Accordingly, we rescind the F&A and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 30, 2019 Findings and Award is **RESCINDED** and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2022

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

BRENDA RICHARD
LAW OFFICES OF FORD & WALLACH
OFFICE OF THE CITY ATTORNEY

TLH/*pc*

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