# 73 Cal. Comp. Cases 1631; 2008 Cal. Wrk. Comp. LEXIS 399

Court of Appeal, Fifth Appellate District

December 12, 2008

Civil No. F055970—

**Reporter**

73 Cal. Comp. Cases 1631 \*; 2008 Cal. Wrk. Comp. LEXIS 399 \*\*

**Bonnie M. Allen, Petitioner v. Workers' Compensation Appeals Board, Doyle Ellis, Respondents**

**Status:**

 [\*\*1]  California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

**Prior History:**

W.C.A.B. Nos. BAK 0142207, BAK 0149113—WCJ Donald H. Johnson (BAK); WCAB Panel: Commissioners Brass, Cuneo, Moresi [*see* Allen v. Doyle Ellis, 2008 Cal. Wrk. Comp. P.D. LEXIS 529 (Appeals Board panel decision)]

**Disposition:** Original proceedings. Petition for writ of review from a decision of the Workers' Compensation Appeals Board. Petition *denied*.

**Core Terms**

pathology, disability, apportionment, percent, permanent disability, preexisting, speculation, contends, vocational rehabilitation, workers' compensation, industrial injury, reconsideration, arthritis, rating, x-ray, nonindustrial, earnings

**Headnotes**

CALIFORNIA COMPENSATION CASES HEADNOTES

  [\*1632]   **Permanent Disability—Apportionment—Substantial Evidence—Court of Appeal, denying applicant's petition for writ of review, held that substantial evidence supported agreed medical evaluator's opinion that 20 percent of applicant's disability was caused by pre-existing pathology in form of arthritis and stenosis, when Court of Appeal found that applicant suffered injury AOE/COE to her back on 5/19/2003, and that agreed medical evaluator's**  [\*\*2]   **opinion was based on review of applicant's medical history, examination of applicant, and comparison of x-rays taken before applicant's industrial injury with post-injury and post-surgery x-rays.** [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[3], 8.06[1]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 2–8.]

**Permanent Disability—Apportionment—Age-Based Discrimination—Court of Appeal held that WCAB's apportionment of applicant's permanent disability did not constitute age-based discrimination in violation of Government Code § 11135(a), when Court of Appeal found that agreed medical evaluator's opinion, on which WCAB relied, was based on applicant's medical health, not on her age.** [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.06[4].]

**Permanent Disability—Evidence—Vocational Rehabilitation Expert—Court of Appeal held that WCAB correctly rated applicant's permanent disability by using 2005 Permanent Disability Rating Schedule, rather than accepting applicant's vocational rehabilitation expert's opinion that applicant's permanent disability**   [\*\*3]  **was 100 percent, when Court of Appeal found that this opinion was expressed in terms of applicant's inability to compete in open labor market, which standard was repealed by SB 899 and replaced by requirement that WCAB and courts consider injured employee's diminished future earning capacity as set forth in 2005 Permanent Disability Rating Schedule, and that, in any event, vocational rehabilitation expert considered only applicant's previous job as bookkeeper and failed to consider other jobs that applicant might be able to perform.** [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 8.02[3], [4][a].]

**Counsel**

For petitioner—Law Offices of Leviton, Diaz & Ginocchio, by Keith B. Gilmetti

For respondent employer—Suzanne Ah-Tye, Charles W. Savage, Alan R. Canfield

**Opinion By:** Vartabedian, Acting P.J., Gomes, J., Kane, J.

**Opinion**

 Bonnie M. Allen petitions for a writ of review (Lab. Code, [[1]](#footnote-1)1§§ 5950, 5952; Cal. Rules [\*\*4]  of Court, rule 8.494) contending the Workers' Compensation Appeals Board (WCAB) erred by attributing 20 percent of her permanent disability to preexisting nonindustrial causes, by considering her age in violation of Government Code section 11135, and by not following the opinion of her vocational rehabilitation consultant. We will deny the petition.

 [\*1633]

 **BACKGROUND**

 Allen worked as a bookkeeper for Doyle Ellis LLC (Doyle Ellis) in Bakersfield when she sustained an admitted specific and continuous trauma injury to her back on May 19, 2003. [[2]](#footnote-2)2Allen received treatment from Michael O. McCabe, M.D., and the parties utilized the services of agreed medical examiner (AME) Thomas T. Haider, M.D. The physicians [\*\*5]  reported Allen sustained a compression fracture of the L4 vertebrae necessitating a surgical fusion. Dr. Haider opined that 20 percent of Allen's overall disability was attributable to her preexisting pathology.

 On September 12, 2007, based on the various medical reports and a May 21, 2007, deposition transcript from Dr. Haider, a workers' compensation administrative law judge (WCJ) concluded Allen was 40 percent permanently disabled, of which 20 percent was nonindustrial, amounting to $36,260 paid over 196 weeks, and that she required further medical treatment to cure or relieve the effects of the injury. Discussing credits for prior payments, the WCJ also noted that the 1997 permanent disability rating schedule (PDRS) applied to Allen.

 Doyle Ellis's workers' compensation carrier, the State Compensation Insurance Fund (SCIF), timely petitioned the WCAB for reconsideration contending the newer 2005 PDRS applied. The WCAB granted reconsideration and on December 5, 2007, agreed the 2005 PDRS must be utilized because the record did not contain any pre-January 1, 2005, medical reports indicating the existence of permanent disability. (See § 4660, subd. (d).) Accordingly, the [\*\*6]  WCAB remanded the matter back to the WCJ for further proceedings.

 A trial following remand occurred on February 27, 2008, where Allen presented vocational rehabilitation counselor Ken Ferra as an expert witness. Ferra testified that based on the work restrictions imposed by Dr. Haider, Allen's "loss of future earnings capacity in the future is 100 percent as she has completely lost her ability to work in the future."

 On April 25, 2008, the WCJ again concluded that 20 percent of Allen's permanent disability was attributable to her prior non-industrial pathology, but reduced her total permanent disability rating to 30 percent pursuant to the 2005 PDRS—amounting to $23,310 paid over 126 weeks. In response to issues raised at trial, the WCJ also ruled Dr. Haider's apportionment determination was not speculative and did not constitute age-based discrimination under Government Code section 11135. In an accompanying opinion, the WCJ explained Ferra's testimony did not overcome the 2005 PDRS in rating Allen's disability because he "did not consider any job but bookkeeper" in opining she was precluded from the job market.

 Both the SCIF [\*\*7]  and Allen petitioned the WCAB for reconsideration. The SCIF contended the WCJ erred by overruling its objection as to the admissibility of  [\*1634]  Ferra's report and testimony to rebut the 2005 PDRS. Allen contended the WCJ failed to consider Ferra's opinion in assessing permanent disability and that the WCJ's determination to apportion 20 percent of her disability to prior pathology was based on speculation and violated Government Code section 11135. In a report and recommendation to the WCAB, the WCJ explained his decision did not depend upon either Ferra's testimony or report and disagreed with Allen's contentions. On July 14, 2008, the WCAB summarily denied both petitions for reconsideration by adopting and incorporating the WCJ's reasoning.

 **DISCUSSION**

 **I. *Standard of Review***

 The WCAB's factual findings "are conclusive and final and are not subject to review." (§ 5953.) Those findings, however, must support the WCAB's order, decision, or award, which must be both reasonable and supported by substantial evidence. (§ 5952, subds. (c)-(e).) We therefore review whether substantial evidence, in view [\*\*8]  of the entire record, supports the WCAB's award and ensure the WCAB's findings are not unreasonable, illogical, improbable, or inequitable considering the overall statutory scheme. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 159, 164 [666 P.2d 14, 193 Cal. Rptr. 157, 48 Cal. Comp. Cases 566]; *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (1993) 16 Cal.App.4th 227, 233 [20 Cal. Rptr. 2d 26, 58 Cal. Comp. Cases 323].) "The term 'substantial evidence' means evidence 'which, if true, has probative force on the issues.' " (*Braewood Convalescent Hospital*, *supra*, 34 Cal.3d at p. 164.) So long as substantial evidence supports the decision, the WCAB "is empowered on reconsideration to resolve conflicts in the evidence, to make its own credibility determinations, and to reject the findings of the WCJ and enter its own findings on the basis of its review of the record." (*Rubalcava v. Workers' Comp. Appeals Bd.* (1990) 220 Cal.App.3d 901, 908 [269 Cal. Rptr. 656, 55 Cal. Comp. Cases 196].)

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 **II. *Speculation***

 Allen contends the WCJ and WCAB inappropriately relied upon insubstantial evidence to apportion 20 percent of her injury to nonindustrial factors by relying on Dr. Dr. Haider's medical opinion. According to Allen, Dr. Haider "speculated with regard to [her] underlying degenerative changes in her spine and arbitrarily assigned a number of 20%." It is well established that a medical opinion does not constitute substantial evidence and cannot support the WCAB's finding "if it is based on surmise, speculation, conjecture, or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [480 P.2d 967, 93 Cal. Rptr. 15, 36 Cal. Comp. Cases 93].)

 As agreed to by the parties, Dr. Haider reviewed dozens of Allen's medical records and conducted a 45-minute examination of her on November 2, 2005. In a report prepared that same day, Dr. Haider addressed the issue of apportionment as follows:

" [\*1635]

"This patient does have moderate disc collapse at L2–3 which is a preexisting pathology and with all medial probability does contribute to her overall [\*\*10]  disability. She has had x-rays of the lumbar spine in 2002 which was prior to the industrial injury but she does not recall why the x-ray was done at the time. She does have a preexisting pathology and I feel 20% apportionment is applicable due to this pathology. The other 80% is due to the industrial injury which caused compression fracture and discogenic disease for which she ended up having surgery.""

 Allen focuses on Dr. Haider's May 21, 2007, deposition testimony in contending his apportionment determination is pure speculation. At the deposition, Allen's counsel conducted the following inquiries of Dr. Haider:

"  "Q. . . . In the apportionment section [of the November 2, 2005, AME report] you had apportioned 20 percent of [Allen's] overall disability to preexisting pathology; is that correct?

 "A. That's correct.

 "Q. And with regard to that preexisting pathology, can you describe what that pathology was?

 "A. Well, this patient is 60 years old. And the patient had the industrial injury. They did a discogram which apparently came out positive at Level L3, 4, and L4, 5. But the surgery involved decompression L2 to S1, I believe. So the disc collapse [\*\*11]  at L2, 3 was automatically probably was [sic] causing stenosis at that level. *And that's why the decompression was done.*

 "And that's when the injury most likely caused discogenic disease which turned into a positive discogram. And for pathology like that, the only thing you do is fuse that level. *When you perform decompression, that's primarily because of arthritis in the facet joint and stenosis.* We know that there is collapse at L2, 3 so the decompression was done for that purpose. And the x-ray that I took shows even a compression fracture of L4 which was there before. So there's more than just an x-ray finding of disc collapse at L2, 3. *The surgery that was done involved going into 2, 3 and cleaning things out, which is not something that happened from one specific injury.*

 "Q. What would have caused that preexisting pathology?

 "A. *She's 60 years old and some people develop arthritis more than other people.* We get some 60-year-olds and don't really have much arthritis, but in general the majority of people have some degree. *And in this case I think it was more advanced than usual.*" (Emphasis added.)"

 Considering his written report and [\*\*12]  deposition testimony, Dr. Haider's medical opinion that 20 percent of Allen's disability was caused by nonindustrial factors  [\*1636]  was based on considerably more than mere speculation. Dr. Haider found objective medical evidence of underlying pathology, particularly arthritis and stenosis. Dr. Haider formed his opinion by reviewing both the 2002 x-rays, taken before Allen's industrial injury, as well as more recent x-rays which showed "a compression fracture of L4 which was there before."

 Allen believes that Dr. Haider's opinion was based on speculation because he admitted there was no mechanism for predicting when or if Allen's preexisting pathology would have been labor disabling had she not sustained the industrial injury. Allen provides no authority for the proposition that an underlying pathology must be labor disabling before it may constitute a valid basis for apportionment. To the contrary, Allen fails to acknowledge that since the enactment of Senate Bill No. 899 in 2004, apportionment of workers' compensation awards *must* be based on causation, not disability. (§ 4663, subd. (a); *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 912 [30 Cal. Rptr. 3d 598, 70 Cal. Comp. Cases 787].) [\*\*13]  An employer is now only "liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (§ 4664, subd. (a).) The Legislature enacted these provisions to "eliminate the bar against apportionment based on pathology and asymptomatic causes . . . ." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1327 [156 P.3d 1100, 57 Cal. Rptr. 3d 644, 72 Cal. Comp. Cases 565].) Allen's contention that Dr. Haider was unable to precisely assess her prior disability before the industrial injury was irrelevant as to his assessment of causation.

 **III. *Age-Based Discrimination***

 Allen contends the WCAB violated California's prohibition against classification based discrimination under Government Code section 11135 by adopting Dr. Haider's age-based apportionment findings. That section provides in relevant part:

"  "No person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color,  [\*\*14]  or disability, be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under, any program or activity that is conducted, operated, or administered by the state or by any state agency, is funded directly by the state, or receives any financial assistance from the state." (Gov. Code, § 11135, subd. (a).)"

 We need not determine the relationship between the Government Code provision and the workers' compensation laws here because we are not persuaded the WCAB's apportionment was based on Allen's age rather than her individual medical health. "[T]he Legislature intended that apportionment to causation under section 4663 may be based on age-related degenerative conditions." (*Kos v. Workers' Comp. Appeals Bd*. (2008) 73 Cal.Comp.Cases 529, 536 [writ den.].) Although Dr. Haider mentioned Allen was 60 years old and that it was a "factor" in her preexisting pathology, he explained that arthritis was common among individuals her age  [\*1637]  and added that "in this case I think it was more advanced than usual." As the WCJ found, "While the doctor did say age [\*\*15]  was a factor in the pathology, he meant that people develop arthritis as they age. His apportionment was to [Allen's] specific medical conditions, and not simply to her being sixty years old."

 **IV. *Vocational Rehabilitation Expert***

 Allen also contends the WCAB erred by refusing to rely upon Ferra's expert vocational rehabilitation opinion instead of the presumed level of permanent disability set forth in the applicable PDRS. Although the WCAB rated Allen's disability at 30 percent pursuant to the 2005 PDRS, Ferra expressed the opinion that Allen had a 100 percent loss of ability to generate future earnings and that she had no ability to work in the open labor market.

 Without analyzing or presenting any specific legal authority, Allen contends the Supreme Court's pre-Senate Bill No. 899 decision in *LeBoeuf v. Workers' Compensation Appeals Bd*. (1983) 34 Cal.3d 234 [666 P.2d 989, 193 Cal. Rptr. 547, 48 Cal. Comp. Cases 587] (*LeBoeuf*) compels a finding that she was 100 percent permanently disabled. *LeBeouf* notes that "A permanent disability rating should reflect as accurately [\*\*16]  as possible an injured employee's diminished ability to compete in the open labor market." (*Id.* at pp. 245–246.) Allen does not set forth any language in *LeBoeuf* that mandates the WCAB override the PDRS in favor of a vocational rehabilitation expert, let alone consider whether it applies after the adoption of Senate Bill No. 899. Senate Bill No. 899 repealed the requirement that the WCAB consider an injured employee's diminished ability "to compete in the open labor market" and replaced it with the obligation to consider "an employee's diminished future earning capacity," which is now statutorily defined as a schedule developed by the Division of Workers' compensation representing "a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees." (§ 4660, subds. (a) & (b)(2).)

 Regardless, even assuming *LeBeouf* permits the WCAB to adopt a vocational rehabilitation expert's opinion of an employee's future earnings capacity in lieu of the PDRS, the WCAB, in adopting  [\*\*17]  the WCJ's reasoning, was unconvinced Ferra adequately assessed Allen's potential earnings capacity. As the WCJ explained, Ferra only considered the job of bookkeeper as relevant to Allen. The WCJ concluded Ferra's opinion was therefore "not good and sufficient on its face." Ferra's failure to consider additional jobs left the WCJ skeptical that Allen was precluded from any future earnings.

 The WCJ also explained Allen had waived the *LeBeouf* issue. The WCAB remanded the matter to "to the trial level for further proceedings and decision in order for [Allen's] permanent disability to be rated under the new 2005 Schedule." According to the WCJ, when Allen "did not further appeal the Decision After Reconsideration mandating use of the 2005 PDRS, the door allowing the *LeBoeuf* claim was closed. It is too late to claim error in the Award on the basis that *LeBoeuf*  [\*1638]  was not considered." Allen makes no attempt to provide this court with a response to either of the WCJ's grounds for declining to adopt the vocational expert's opinion.

 **DISPOSITION**

 The Petition for Writ of Review is denied. This opinion is final forthwith as to this court.

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1. 1 Further statutory references are to the Labor Code unless otherwise stated. [↑](#footnote-ref-1)
2. 2 Although the parties stipulated to both specific and cumulative trauma injuries, the medical evidence suggests only a specific injury occurred on May 19, 2003, when she tripped over a rug and twisted her body by trying to avoid striking a water cooler. [↑](#footnote-ref-2)