

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

LINDA SATHER, *Applicant*

vs.

**COTTAGE HOSPITAL, permissibly self-insured;
adjusted by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ14274121
Oxnard District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate as quoted below, and for the reasons stated below, we will deny reconsideration.

We adopt and incorporate the following quote from the WCJ's report:

**REPORT AND RECOMMENDATION ON PETITION FOR
RECONSIDERATION**

The Workers' Compensation Administrative Law Judge ("WCJ") issued an Opinion on Decision and Findings and Award, on January 19, 2022. Defendant, hereinafter, "Petitioner," has filed a timely and verified Petition for Reconsideration on the following grounds pursuant to Labor Code § 5903 / Rule 10843:

1. The evidence does not justify the Findings of Fact and Order;
2. That the WCJ acted without or in excess of her powers, and
3. That the findings of fact do not support the order, decision, or award.

I. CONTENTIONS

That the WCJ failed to apply the conclusive presumption of apportionment of a prior permanent disability award to the current finding of permanent disability under Labor Code § 4664; that the applicant is not entitled to an un-apportioned

award; and that the Award of 9% PD is not supported by the DEU consultative rating.

II. FACTS

The matter involves an admitted specific injury occurring on September 29, 2020, to the applicant's right small finger, which proceeded to trial on December 10, 2021. The trial involved various issues, including PD and apportionment, with defendant arguing that "legal apportionment under Labor Code section § 4664 should be applied for the applicant's prior 3 percent PD Award to her right fifth finger, date of injury April 2, 2018, and approved on January 3, 2019." Minutes of Hearing and Summary of Evidence, December 10, 2021, page 2, lines 14-21.

For the claim herein, the parties proceeded to the Panel QME Dr. Bashner, who examined the applicant on August 24, 2021, and reported that the applicant had sustained an injury on September 29, 2020, to her right little finger, while "bagging a patient and was not able to clear herself before the shock was delivered to the patient." Joint Exhibit 1, page 1. The applicant reported to Dr. Bashner that she had previously injured her right little finger in 2018, and that her "finger had been feeling fine until this recent incident." Id. at page 2. The applicant treated with Dr. Kupperman as her PTP for both her April 2, 2018 date of injury and for the September 29, 2020 injury. However, Dr. Bashner was only provided with Dr. Kupperman's reports for the September 29, 2020 injury.

Pursuant to the records reviewed by the panel QME, the applicant initially treated with Dr. Kupperman, who in a report dated December 18, 2020 found that the applicant had a "nerve injury" to her right small finger, and that she be examined by a neurologist, and treated for bilateral carpal tunnel syndrome. Joint Exhibit 1, pages 3-4. The applicant then changed treating doctors to Dr. Scheinberg, who examined the applicant on March 3, 2021, and found that the applicant was "status post shock to the right upper extremity resulting in possible ulnar nerve damage." Id. at page 4. On May 12, 2021, Dr. Scheinberg issued a Permanent and Stationary report, finding that the applicant had 0% PD, and no apportionment. Id. at page 5.

Dr. Bashner addressed the applicant's prior injuries on page 7 of his report, which included the April 2, 2018 injury to her right little finger. However, Dr. Bashner indicated that he was not forwarded any records for the prior injury, and that "Dr. Scheinberg's note states it was a flexor tendon injury to the right fifth finger. The claimant described a strain or sprain injury to the 4th finger." Id. at page 7.

Under "Apportionment of Disability Due to Causation," Dr. Bashner found as follows:

“The applicant sustained a prior work related injury to the right 5th finger. Unfortunately, the records that I have been given the opportunity to review excluded treatment for that injury. Based upon the explanation she gave me today, she sustained a sprain or strain of the right 5th finger and she completely recovered with no residuals. The applicant sustained a very specific injury (Electrical Shock to the right 5th finger) which appears to be distinctly different from her prior injury. Based upon the information available to me at the present time I shall apportion 100% of the residual disability to the work related nerve injury of September 29, 2020.”

Joint Exhibit 1, page 14.

Dr. Bashner provided the applicant with 2% WPI pursuant to Table 16-15 and Table 16-10, and an additional 2% pain add on “for her ongoing pain symptoms that negatively influence her ADLs,” for a total WPI of 4%. Joint Exhibit 1, page 14.

The undersigned rated Dr. Bashner’s report as follows:

16.06.05.03-4-[1.4]6-311G-7-9%

Opinion on Decision, January 19, 2022, page 2.

No further reporting was issued by the Panel QME, and the parties did not cross-examine him or send him additional records, including the applicant’s prior Stipulation with Request for Award and Dr. Kupperman’s August 9, 2018 report. Defense, however, submitted Dr. Kupperman’s August 9, 2018 report, and the Stipulation with Request for Award approved on January 3, 2019 by Judge Hjelle, as Defense Exhibits A and B at trial.

The Stipulation with Request for Award itself reflects a 3% PD on page 6, and that the body part is the “right small finger” on page 5. Defense Exhibit B. On page 7 of the Award, under section 9 “Other Stipulations,” the parties noted that the case was being resolved pursuant to Dr. Kupperman’s August 9, 2018 report. However no rating string was included, or what table the 3% was based upon.

In Dr. Kupperman’s August 9, 2018 report, he found that the applicant had sustained injury to her right small finger while disconnecting a tube from an IV, and that it became stuck, and she “felt a pop in the tip of her finger, and since then has had swelling and pain with tingling/numbness at the DIP joint.” Defense Exhibit A, page 1. Under “Impairment Rating,” Dr. Kupperman provided the applicant with 1% WPI due to “mildly decreased DIP flexion.” Id. at page 3. It appears that the 1% then rated to 3% PD, pursuant to the Stipulation with Request for Award.

In the case herein, following the issuance of Dr. Bashner’s report of August 24, 2021, petitioner filed a Declaration of Readiness on October 29, 2021, requesting an MSC on several issues, including PD, TEMPORARY DISABILITY and future medical care. In addition, defendant noted the following in their declaration:

“The parties have received final QME reporting from Dr. Bashner and defendant communicated an offer based on the same. To date no response to the same has been received. Defendant requests WCAB assistance to facilitate settlement or set the matter for trial.”

Declaration of Readiness, October 29, 2021.

The matter was then scheduled for MSC on November 16, 2021, where the parties jointly requested that trial be set. The Minutes of Hearing for the MSC do not reflect any objections raised by defendant against setting the matter for trial.

The trial was scheduled before the undersigned judge on December 10, 2021, at which time the matter was submitted on the record, with no testimony. The undersigned then issued a Findings and Award and Opinion on Decision, on January 19, 2022, finding that the applicant was entitled to an un-apportioned award of 9% PD, pursuant to the findings of the Panel QME Dr. Bashner. Opinion on Decision, page 2, and Findings and Award, both dated January 19, 2022.

Petitioner then filed a timely and verified “Petition for Reconsideration,” dated February 9, 2022. Applicant’s attorney filed an Answer on February 18, 2022.

III. DISCUSSION

A. DEFENDANT DID [NOT] PROVE THERE WAS OVERLAP FOR APPORTIONMENT PURSUANT TO L.C. § 4664

Petitioner properly notes that L.C. § 4664 provides that “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.” Petition for Reconsideration, page 4, lines 23-27. It is clear that the applicant, pursuant to L.C. § 4664, has prior PD pursuant to the Stipulation with Request for Award approved for her prior April 2, 2018 injury, involving the same body part. However, pursuant to L.C. § 4664, defendant, who has the burden of proof, must then prove that there is overlap in order to establish apportionment. Here, petitioner did not establish same.

Petitioner acknowledges that they have the burden of proving overlap pursuant to the case of *Kopping v. Workers’ Comp. Appeals Bd.*, (2006)142 Cal. App. 4th

1099, 48 Cal. Rptr. 3d 618. Petition for Reconsideration, page 5, lines 13-22. However, petitioner believes that apportionment was established by submitting the prior Stipulation with Request for Award as an exhibit, because both injuries involve the same body part. Specifically, petitioner argues that “case law does not indicate that the same methods of rating must be used or that the same type of injury must occur in order to demonstrate overlap; just that the same body parts are involved.” Id. at page 6, lines 14-16. This is not correct pursuant to the *Kopping* case, despite petitioner referring to it as support for their argument.

Specifically, *Kopping* involved a traffic officer who had sustained two injuries to his back. The first back injury occurred in 1996, and was resolved via Stipulation with Request for Award for 29% PD, and the second back injury occurred in 2002, for which parties stipulated resulted in 27% PD. *Kopping*, Id at 620. Defendant SCIF argued to the trial judge that the 29% PD Award for the first injury had to be “treated as still existing because of the conclusive presumption of section 4664(b).” Id. at 621. The WCJ agreed and found that the applicant was not entitled to any PD, because the first award of 29% was greater than the current 27% PD. Id. at 621.

The applicant filed a Petition for Reconsideration, arguing in part that the WCJ erred in deducting the prior PD “to the extent the factors of disability did not overlap.” Id. at 621. The WCAB granted reconsideration, and remanded the matter back, for the claim to be addressed in light of two en banc decisions, which held that the burden of disproving overlap fell on the applicant. The applicant then filed a Writ of Review, which was granted, and the Court of Appeals found that the burden of overlap fell on defendant. Id. at 629. Thus, despite the fact that the applicant in *Kopping* had sustained two injuries to the same body part, his back, the burden of proving overlap fell onto defendant.

Thus, there is no automatic apportionment for a prior award based on the applicant having had injuries to the same body parts alone. As was noted by the WCAB in the case of *Laster v. City and County of San Francisco*, 2014 Cal. Wrk. Comp. PD LEXIS 201, where it was found that defendant had not established overlap:

“Turning to defendant's contention that the WCJ did not properly address apportionment of applicant's earlier awards in accordance with section 4664, we note that before apportionment under section 4664(b) will apply, the defendant must prove both the existence of a prior award and overlap of the permanent disability caused by the two injuries. (*Kopping v. WCAB* (2006) 71 Cal Comp Cases 1229 (3rd DCA); *Minvielle v. County of Contra Costa* (2010) 76 Cal Comp Cases 896 (writ denied). Overlap is not proven merely by showing that the second injury was to the same body part, because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body part injured. (... *Sanchez v. County of Los Angeles* (2005) 70

Cal Comp Cases 1440 (WCAB en banc) This requirement was not changed by the legislature's adoption of section 4664. (Kopping, supra.)”

Laster, 2014 Cal. Wrk. Comp. PD LEXIS 201, 25-26.

In the case herein, this judge did not find that there was overlap, because the basis, or “metrics” used to calculate the impairments were different, due to the mechanisms of the two injuries. Specifically, the April 2, 2018 date of injury was described as a “pop” in the tip of the applicant’s finger by Dr. Kupperman, who provided the applicant with 1% WPI due to “mildly decreased DIP flexion.” Defense Exhibit A, pages 1-3. Dr. Kupperman used Table 16-21 on page 461, titled “Finger Impairments Due to Abnormal Motion of the DIP Joint,” which is different from the tables used by Dr. Bashner.

In regards to the September 29, 2020 date of injury, Dr. Bashner described it as a “very specific injury (Electrical Shock to the right 5th finger) which appears to be distinctly different from her prior injury.” Joint Exhibit 1, page 14. In addition, both of the applicant’s treating doctors, Dr. Kupperman and Dr. Scheinberg, described the applicant’s injury as a nerve injury, which is different from her April 2, 2018 “pop” in her finger injury.

Dr. Bashner used Table 16-10, titled “Determining Impairment of the Upper Extremity Due to Sensory Deficits or Pain Resulting from Peripheral Nerve Disorders,” given that it was a nerve injury. Thus the applicant sustained two different injuries to the same body part, which resulted in different types of impairments. Accordingly, there was no overlap established by defendant.

....

IV. RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied in its entirety. (Report, at pp.

Consultative rating determinations are not admissible in judicial proceedings. (Cal. Code Regs., tit. 8, § 10166(b).) Therefore, defendant cannot rely on it. Moreover, the WCJ has the discretion to rely upon his own expertise in rating a case. (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc).) We see no error in the WCJ’s rating.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 11, 2022

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

**LINDA SATHER
THE LAW OFFICES OF PAUL F. KINSLER
THE OAKS LAW GROUP**

PAG/abs

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