WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GREGORY FRAMPTON, *Applicant*

vs.

CITY OF LOS ANGELES,
permissibly self-insured, *Defendants*

Adjudication Numbers: ADJ15351318, ADJ7106301, ADJ7106302
Marina del Rey District Office

OPINION AND ORDER DENYING PETITIONS FOR RECONSIDERATION

Applicant's current attorney, on his own behalf, and applicant's former attorney have each filed a Petition for Reconsideration of the Arbitrator's September 21, 2021 Amended Findings and Award of Division of Attorney Fees. Applicant's former attorney's petition was filed on September 29, 2021 and applicant's current attorney's petition was filed on October 12, 2021. The Appeals Board did not issue a decision within 60 days of these filings.

Preliminarily, we note that a petition is generally considered denied by operation of law if the Appeals Board does not grant the petition within 60 days after it is filed. (Lab. Code, § 5909.) However, we believe that "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice …." (*Shipley v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied the applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Shipley, supra*, 7 Cal.App.4th at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley, supra*, 7 Cal.App.4th at p. 1108.)

In this case, the Appeals Board failed to act on petitioners' timely petitions within 60 days of their filing. Therefore, considering that the Appeals Board's failure to act on the petitions was in error, we find that our time to act on the petitions was tolled.

We have considered the allegations of the Petitions for Reconsideration and the contents of the report of the arbitrator with respect thereto. Based on our review of the record, and for the reasons stated in the arbitrator's report, which we adopt and incorporate, we will deny reconsideration of both petitions.

For the foregoing reasons,

IT IS ORDERED that the Petitions for Reconsideration are **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

DECEMBER 27, 2021

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

GOLDFARB & ZEIDNER
OFFICE OF THE CITY ATTORNEY-LOS ANGELES
ALTMAN & BLITSTEIN, ATTN: MARK L. KAHN, ARBITRATOR

PAG/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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ARBITRATOR'S REPORT AND RECOMMENDATION ON RECONSIDERATION

I.
INTRODUCTION

The above-captioned matter was set for Arbitration on August 17, 2021 before Mark L. Kahn, Arbitrator on [] the issue of division of attorney fees.

At the Arbitration on August 17, 2021, the parties reached Stipulations, Issues and admitted Exhibits into evidence, testimony was taken and the parties agreed to submit the matter on the present record.

On September 21, 2021, the Arbitrator issued a Findings and Award on the issue of division of attorney fees as follows:

FINDINGS

It is found by the Arbitrator, taking into the account the final result of the case, the fact the case was brought to a successful end, the amount of work done by each attorney and the conduct of the prior attorney, who made every attempt to make sure the applicant went to the attorney who he had a prior agreement with, finds that a reasonable division of attorney fees is $128,715 to the present attorney and $20,000 to the prior attorney.

AWARD

Award is made in favor of Gregory Frampton against the City of Los Angeles of:

The City of Los Angeles is to pay the $148,715 attorney fee, which is now being held by the City of Los Angeles, $128,715 to the present attorney, Bentley & More LLP, and $20,000 to the prior attorney, Goldfarb & Zeidner.

It is from that decision that both the prior attorney (lien claimant) and the present attorney now filed Petitions for Reconsideration.

Lien claimant, Goldfarb & Zeidner, Petitions for Reconsideration on the grounds that before representation was instituted by current attorney, applicant was a quadriplegic as a result of the injury and, therefore, was presumptively totally disabled. Because of the presumption of total disability because the applicant was quadriplegic, there was no basis for apportionment. They, therefore, argue the division of attorney fees is not accurate because of the amount of work done by the prior attorney compared to the present attorney and the fact that the case was a conclusive presumption with no apportionment when claimant undertook representation. They further argue the actions of the lien claimant were not unethical and the claimant did not withdraw as attorney of record.

Current attorney, Bentley & More LLP, Petitions for Reconsideration on the grounds that lien claimant is not entitled to any attorney fee because of the unethical actions of prior attorney

(lien claimant) abandonment of his client which was willful and egregious because the prior attorney (lien claimant) violated California Rules of Professional Conduct, breached his duty of loyalty and, therefore, no attorney fee should be awarded to the prior attorney (lien claimant).

II.
FACTS

The applicant, Gregory Frampton, was employed by the City of Los Angeles as a traffic officer.

Gregory Frampton sustained an admitted specific injury on July 23, 2015, while employed as a traffic officer for the City of Los Angeles.

The applicant was placed on temporary total disability on August 18, 2015 and was off work until October 9, 2015. On October 9, 2015, the applicant returned to work through September 9, 2016.

Gregory Frampton sustained an admitted continuous trauma injury from January 28, 2002 through August 17, 2015, while employed as a traffic officer for the City of Los Angeles.

Gregory Frampton filed a claim for an additional continuous trauma from October 9, 2015 through September 9, 2016, which was denied by the City of Los Angeles.

On February 25, 2019, the applicant had neck surgery performed at Olympia Hospital, which was approved by utilization review and authorized by the City of Los Angeles.

The surgery resulted in complications that rendered the applicant a quadriplegic with additional disabilities.

After the applicant sustained a specific injury to his neck on July 23, 2015, the applicant retained Goldfarb & Zeidner to represent him in his workers' compensation cases.

Goldfarb & Zeidner filed an Application for Adjudication of Claim for a specific injury to applicant's neck on July 23, 2015 and a cumulative trauma injury from January 28, 2002 through August 17, 2015 to applicant's neck and back.

Goldfarb & Zeidner later filed a third Application for Adjudication of Claim for a second continuous trauma injury from October 9, 2015 through September 9, 2016.

On September 23, 2019, the applicant was advised by Goldfarb & Zeidner that their partnership was dissolving, they were retiring and their representation would soon terminate in the upcoming months.

Following issuance of that letter, Goldfarb & Zeidner encouraged the applicant by correspondence and by phone to select Field Law group to take over his representation in the case.

Goldfarb & Zeidner indicated in correspondence that they had selected Field Law Group to undertake the applicant's representation. They indicated the firm was the most worthy firm to

take over for their representation and referred cases to them and the firm is the best of the best. They indicated they did not take the responsibility lightly putting the case in the most competent hands.

Goldfarb & Zeidner noted in the termination letter that they had a pre-arranged fee split agreement and attached a Substitution of Attorneys Form in the letter requesting the applicant undertake his representation with the Field Law Group. The fee split agreement was not sent to the applicant.

After Goldfarb & Zeidner sent their letter of September 23, 2019 indicating there a dissolution of their firm and retirement, they attempted to settle the case with the City of Los Angeles at 100% permanent disability Stipulation which was rejected by the City of Los Angeles.

The applicant testified he felt the conduct of the attorney made him uncomfortable in pushing him to be represented by the attorney chosen by Goldfarb & [Zeidner].

Following receiving the termination letter, the applicant chose to be represented by Bentley & More.

Because Goldfarb & Zeidner was of the opinion that the case was presumptively 100% permanent disability because the applicant was a quadriplegic and the presumption precluded apportionment, they had not begun medical legal discovery when they retired.

Following undertaking representation, Bentley & More proceeded to obtain five different medical-legal specialists, who found the applicant permanently totally disabled and commented on the issues of apportionment.

The matter was referred to medical-legal specialists because the defendants were disputing apportionment.

The defendant was claiming the applicant was not entitled to a 100% permanent disability and the conclusive presumption did not bar apportionment, pursuant to Labor Code §§4663, 4664 and the *Benson* case.

Bentley & More cross-examined the Agreed Medical Evaluator on the issue of apportionment.

The City of Los Angeles was arguing *Benson* apportionment applied to the case.

Following the completion of discovery, the matter proceeded to Arbitration on April 29, 2021, before the undersigned Arbitrator.

The parties stipulated as follows at the Arbitration on April 29, 2021.

In case 4011779, it was stipulated that Gregory Frampton, born August 17, 1957, while employed during the period January 28, 2002 through August 17, 2015 as a traffic officer, Occupational Group 250, at Los Angeles, California, sustained an injury arising out of and incurring in the course of his employment to his neck and claims to have sustained an injury arising

out of and incurring in the course of his employment to his spine, upper extremity, lower extremities, psyche, bladder, bowel, eyes, heart, sleep, urological, sexual dysfunction, skin, lungs, high blood pressure, lower digestive, respiratory, internal and quadriplegia.

At the time of the injury, the employer was permissibly self-insured. Applicant's earnings are in dispute. At the time of the injury, the employer was permissibly self-insured.

Applicant's earnings at the time of injury were $2,138.28 per week. The applicant was paid to temporary disability rate of $1,128.43 and permanent disability pursuant to California law.

The employer has furnished some medical treatment.

In case 4040559, it was stipulated that Gregory Frampton, born [], while employed during the period October 9, 2015 through September 9, 2016 as a traffic officer, Occupational Group 250, at Los Angeles, California, claims to have sustained an injury arising out of and incurring in the course of his employment to his neck, upper extremity, lower extremities, body systems, head, brain, bilateral upper extremities, psyche, chest, internal, respiratory system, nervous system, neurological system, neurogenic bowel, neurogenic bladder, cardiovascular, eyes, sleep, sexual dysfunction, spine, gastrointestinal, eyes, high blood pressure and quadriplegia.

At the time of the injury, the employer was permissibly self-insured. Applicant's earnings at the time of injury were $2,138.28 per week. The applicant was paid to temporary disability at the rate of $1,128.43 and permanent disability, pursuant to California law.

The employer has furnished some medical treatment. No attorney's fees paid and no attorney fees arrangement has been paid.

In case ADJ7106301, Stipulations with Request for Award were entered into between the applicant and the City of Los Angeles for a continuous trauma injury from January 28, 2002 through March 18, 2010 with an injury to applicant's right and left knee resulting in permanent disability of 15%. The settlement was based on the June 2, 2011 report of Jeffrey Berman, M.D., the Agreed Medical Evaluator, with a Whole Person Impairment of 15% and work restrictions contained in that report. The Award was approved by the Appeals Board on April 11, 2012.

In case ADJ7106302, Stipulations with Request for Award were entered into between the applicant and the City of Los Angeles for a specific injury on January 30, 2006 to applicant's right knee resulting in permanent disability of 4%. The settlement was based on the June 2, 2011 report of Jeffrey Berman, M.D., the Agreed Medical Evaluator, utilizing the AMA Guides that applicant had a 4% Whole Person Impairment and work restrictions as mentioned in the report. The settlement was approved on April 11, 2012.

The issues were framed as follows for each of the cases:

In case 4008812 and 4011779 issues as follows:

1. Parts of the body injured.
2. Earnings. The applicant claiming $1,823.24 and the employer claiming $1,378.73.

3. There is a dispute as to IOD rate, jurisdiction is left to be adjusted between the parties.

4. Claim of additional temporary disability from August 17, 2015 through April 3, 2020.

5. Permanent and stationary date. The applicant claims April 3, 2020, based on the medical report of Dr. Patterson. The employer claims August 31, 2020, based on the medical report of Dr. Grodan.

6. Permanent disability.

7. Apportionment.

8. Need for further medical treatment.

9. Attorney fees per Tito Torres.

10. Is applicant permanently totally disabled, pursuant to Labor Code §4662(a)(2)?

11. Is applicant permanently totally disabled, pursuant to Labor Code §4662(a)(3)?

12. Is applicant 100% disabled via AMA Guides rating?

13. Is applicant permanently totally disabled, pursuant to *Kite v. Athens*?

14. Temporary disability start date.

15. Defendants assert Labor Code §4664 and overpayment of permanent total disability pending P&S determination.

16. Subtraction of permanent disability awards, pursuant to Labor Code §4664.

17. Overpayment of temporary disability depending on permanent and stationary date.

18. Penalties and attorney fees, pursuant to Labor Code §§5813 and 5814.

In case 4011779 issues were framed as follows:

1. Injury arising out of and occurring in the course of employment.

2. Parts of the body injured

3. Earnings. The applicant is claiming $1,823.24 and the employer claiming $1,378.73.

4. There is a dispute as to IOD rate, jurisdiction and it is left to be adjusted between the parties.

5. Claim of temporary disability, September 9, 2016 through April 2, 2020.

6. Permanent and stationary date. The applicant claims April 3, 2020, based on the medical report of Dr. Patterson. The employer claims August 31, 2020, based on the medical report of Dr. Grodan.

7. Permanent disability.

8. Apportionment.

9. Need for further medical treatment.

10. Attorney fees per Tito Torres.

11. Is applicant permanently totally disabled, pursuant to Labor Code §4662(a)(2)?

12. Is applicant permanently totally disabled, pursuant to Labor Code § (a)(3)(sic)?

13. Is applicant 100% disabled via AMA Guides rating?

14. Is applicant permanently totally disabled, pursuant to *Kite v. Athens*?

15. Temporary disability start date.

16. Defendant assert Labor Code §4664 and overpayment of permanent total disability pending P&S determination

17. Subtraction of permanent disability awards, pursuant to Labor Code §4664.

18. Overpayment of temporary disability depending on permanent and stationary date.

19. Penalties and attorney fees, pursuant to Labor Code §§5813 and 5814.

20. Hofmeister.

21. Date of injury, pursuant to Labor Code §§5412 and 5500.5.

22. Is there one continuous trauma or two separate continuous traumas?

The following medical evidence was submitted at the Arbitration.

Fred S. Kuyt, M.D., the Agreed Medical Evaluator in neurology, found due to the absence of pre-existing or non-industrial factors that contribute to the quadriplegia, bladder and bowel dysfunction and their associated symptoms, it is appropriate to apportion 100% of applicant's urological impairment to the industrial environment. Absent the industrial environment, it is with reasonable medical probability the applicant would not suffer any of the above impairments. In this case, the impairments that arose out of the specific date of injury and impairments that arose out of the period of the continuous trauma are truly inextricably intertwined. The applicant was given a 55% Whole Person Impairment.

Paul S. Grodan, M.D., the Agreed Medical Evaluator in internal medicine, found the applicant is a quadriplegic and cannot move either his left or right arm, hands or his legs. The applicant is wheelchair-bound and dependent on total bodily care. The applicant sustained an injury to the cervical spinal cord, which basically knocked out all of his body functions except for his brain, vision and hearing. The physician finds the applicant is totally disabled. He finds that it is clear the applicant meets the criteria for 100% disability under Labor Code §4662(a)(3) and Labor Code §4662(a)(2). The applicant has loss of function of all four limbs and clearly has loss of bowel and bladder action. Essentially his entire body below the neck is nonfunctional except for the anatomic nervous system, which empties his bladder and bowel. The physician finds there is no question the applicant meets the criteria for 100% total permanent disability based on the disastrous outcome of his injury to the cervical spinal cord. The physician's diagnosis of quadriplegia secondary to the cervical spine surgical procedures. The physician found the applicant totally and permanently disabled and requires 24 hours/7 days a week attending care. The physician noted no matter how one parcels out the individual impairments, the applicant is 100% disabled. He is unable to move his body, unable to move his extremities, the only activity that is remaining is that he can see and talk. The physician finds that the *Hikida* case applies as the

disability was all caused by complications of the surgery and is not subject to apportionment. His total disability is the direct consequence of the surgical procedure for the industrial injury. In this case, the total disability was caused by the catastrophic injury to the cervical spine resulting from the surgery. The injury specifically was industrial. The injury itself is not apportioned as it was a specific injury and that specific injury precipitated the need for surgery. Therefore, if surgery caused incremental increases in the level of disability, that would be apportioned entirely to the surgery. Clearly this is the issue in the *Hikida* case. The clear documentation was after his industrial injury. The applicant was mobile. He did not have any evidence of quadriplegia or any limitation in his movements. The surgery was selective based on industrial impact resulting in findings on clinical exam and imaging. It was really a catastrophe that he sustained injury of the cervical spine, which led to paralysis of the body from the neck down. Therefore, the specific cause of the total disability was the surgery. It is not subject to apportionment to the orthopedic disability apportionment, not apportionment to the different dates of injury as those become inextricably intertwined resulting from surgical intervention. Apportionment of disability is a different issue versus apportionment of surgical outcome.

The applicant was evaluated by Robert J Shorr, M.D. as Agreed Medical Evaluator in neurology. The physician's assessment was quadriplegia with bowel, bladder and sexual dysfunction. The applicant has lost total use of both hands and upper extremities. The applicant, based on his clinical findings in his examination, is a quadriplegic. The applicant should be considered to have met the criteria of Labor Code §4662(a)(2) as he has total loss of use of both hands and upper extremities. He had surgery for the industrial neck injury and the outcome of the surgery was quadriplegia, which would be considered consequential and not subject to apportionment according to *Hikida*. The applicant suffers from quadriplegia, neurogenic bowel and bladder with vertigo, spasticity, chronic pain, insomnia and consequential anxiety and depression. The physician found the applicant 100% permanently disabled.

Steven N. Brourman, M.D. evaluated the applicant has Agreed Medical Evaluator in orthopedic surgery. The history was the applicant began work for the City of Los Angeles as a traffic officer in January 28, 2002. The applicant developed pain in the neck, bilateral upper extremities, hands wrists, back, bilateral lower extremities, which he attributed to performing the physical demands of his job duties. He stated that on July 23, 2015, he was getting out of the city car when he struck his head against the car jolting his upper body causing injuries to his neck, shoulders and back. He described that after the injury of July 23, 2015, he commenced treatment for the specific and cumulative trauma injuries. He does not recall receiving treatment for the cumulative injuries prior to July 23, 2015. The applicant had performed surgery for his cervical spine on February 25, 2019. The applicant stated that after the surgery, he was no longer able to move his arms or legs. He described that from that point, he remained a quadriplegic. The applicant indicated that after the surgery, he was transferred to UCLA where he was evaluated by a neurosurgeon who performed the cervical fusion, however, he remained a quadriplegic. Since that time, he has been staying at Casa Colina where he receives care and rehabilitation. The diagnosis was status post failed cervical spine surgery resulting in complete motor paralysis and quadriplegic. There was a subsequent spinal disc replacement infusion. The physician found the primary cause of the applicant's disability was the cervical spine surgery performed on February 25, 2019. Prior to that procedure, the applicant was not only ambulatory, he was intact neurologically. The applicant had no bowel or bladder symptoms. The end result of the two surgical procedures performed on February 25, 2019 were that the applicant is now quadriplegic with complete loss of function of the upper and lower extremities and loss of bowel and bladder

function. The applicant had pain in his shoulders, elbows wrist, knees and ankles associated with work activities. However, it does not appear there was any significant level of disability associated with these body parts in light of the reported ability to play competitive tennis only two months before his cervical spine surgery in February 2019. Any disability resulting from injuries to the shoulders, elbows, wrists and knees and ankles would be subsumed by the disability associated with quadriplegia. The medical records indicated describing modified duties, regular duties and temporary total disability between July 23, 2015 and February 2019. The applicant last worked February 2019 when he was taken off work for cervical spine surgery. The physician found the applicant was 100% permanently disabled. The major factor in the applicant's disability was the cervical spine surgery on February 25, 2019, which was apparently approved and performed on an industrial basis. It appears there was a continuous trauma injury from January 28, 2002 through August 17, 2015, a cumulative injury from September 9, 2015 through September 9, 2016 and a specific injury of July 23, 2015. In his opinion, 2.5% of the impairment should be apportioned to the continuous trauma from January 20, 2002 through August 17, 2015, 2.5% to the continuous trauma from September 9, 2015 through September 9, 2016, 2.5% to the specific injury of July 23, 2015 and 2.5% to the degenerative aging process of the cervical spine that developed over his lifetime and the remaining 90% to the cervical spine surgery performed on February 25, 2019. The applicant's total paralysis impairment is considered, pursuant to Labor Code §4662(a)(4), 100% disabled. Using the AMA Guides, the final evaluation of impairment is 99%.

Steven Brourman, M.D., in his deposition taken on November 17, 2020, noted the applicant was in a wheelchair and he had complete paralysis below the neck with complete absence of motor function of his extremity and loss of sensory function as well. The applicant cannot move anything below the neck and has zero function. The applicant is a quadriplegic. He has an absence of motor function. There is zero range of motion. In his opinion, the applicant is 100% permanently totally disabled. He is totally disabled due to his being a quadriplegic. The applicant has no control of his bowel function. He has no control his bladder function. The applicant cannot control when he urinates or defecates. The applicant is at Casa Colina. This is a facility designated for taking care of this kind of patient. The applicant qualifies under the conclusive presumption of Labor Code §4662 for loss of both hands and practical total paralysis. The applicant is conclusively presumed to be 100% disabled in two different ways. Prior to the surgery on February 25, 2019, the applicant was an active person. He played tennis. The applicant was working prior to the neck surgery. He was intact from a neurological perspective prior to the surgery on February 25, 2019. The applicant was not in a wheelchair prior to February 25, 2019. The applicant was able to control his bowel movements prior to that surgery. The applicant was intact neurologically. There was no bowel or bladder disorders prior to surgery. He was ambulatory. In had full use of his hands and legs prior to the surgery. He had neck surgery in February 25, 2019. The neck surgery was not needed, he did say that it was authorized and performed as a result of the industrial injury. The neck surgery was authorized. He does not understand why this procedure was attempted. The procedure was performed through the workers' compensation case with the City of Los Angeles. The neck surgery on February 25, 2019 was a complete and sad disaster. The medical treatment rendered failed. The quadriplegia was the result of the neck surgery. The neurogenic bladder was the result of the neck surgery. There neurogenic bowel was the result of the neck surgery. The total sensory loss was the result of the neck surgery. The total motor loss was the result of the neck surgery.

The disability is either a 100% or at least greater than 90% due to the surgery. Had the applicant not had the surgery, he would probably have had some disability. He probably would have had a 13% Whole Person Impairment. He would say 87% is from the surgery, 10% from the

prior injury and 3% to the aging process. When asked if it is his testimony there is no apportionment because this is a clearly new disability under *Hikida*, the physician testified that all the disability quadriplegia, neurogenic bowel, neurogenic bladder, sensory loss, motor loss, gait impairment are the result of the surgery. Based on reasonable medical probability, the sole cause of the quadriplegia is the surgery. He found there were no awards for prior loss of use of both legs. As far as he is concerned there is no prior award for loss of use of both arm . As far as he is concerned, there is no awards prior for having a neurogenic bladder. As far as he is concerned there is no prior records for total sensory loss.

Following the Arbitration on April 29, 2021, the undersigned Arbitrator issue the following and Award:

FINDINGS

In case 4008812, it is found that Gregory Frampton, born August 17, 1957, while employed on July 23, 2015 as a traffic officer, Occupational Group 250, at Los Angeles, California, sustained an injury arising out of and incurring in the course of his employment to his neck, spine, upper extremity, lower extremities, psyche, bladder, bowel, eyes, heart, sleep, urological, sexual dysfunction, skin, lungs, high blood pressure, lower digestive, respiratory, internal and quadriplegia.

At the time of the injury, the employer was permissibly self-insured.

The applicant has been paid compensation as follows: the applicant has been paid IOD according to proof and temporary disability from February 25, 2020 through April 11, 2020 at the rate of $940.64 and permanent disability advances from April 12, 2020 through April 24, 2021 at the rate of 940.64.

In case 4011779, it is found that Gregory Frampton, born August 17, 1957, while employed during the period January 28, 2002 through August 17, 2015 as a traffic officer, Occupational Group 250, at Los Angeles, California, sustained an injury arising out of and incurring in the course of his employment to his neck, spine, upper extremity, lower extremities, psyche, bladder, bowel, eyes, heart, sleep urological sexual dysfunction, skin lungs high blood pressure lower digestive, respiratory, internal and quadriplegia.

At the time of the injury, the employer was permissibly self-insured. Applicant's earnings are in dispute.

The applicant has been paid compensation as follows: IOD, TD and PD per proof as reflected in the benefit printout.

In case 4040559,_it is found that Gregory Frampton, born August 17, 1957, while employed during the period October 9, 2015 through September 9, 2016 as a traffic officer, Occupational Group 250, at Los Angeles, California, sustained an injury arising out of and incurring in the course of his employment to his neck, upper extremity, lower extremities, body systems, head, brain, bilateral upper extremities, psyche, chest, internal, respiratory system, nervous system, neurological system, neurogenic bowel, neurogenic bladder, cardiovascular, eyes, sleep, sexual dysfunction, spine, gastrointestinal, eyes, high blood pressure and quadriplegia.

At the time of the injury, the employer was permissibly self-insured.

As to all three injuries, it is found as follows:

Applicant became permanent and stationary and reached MMI status on April 3, 2020, based on the medical report of Dr. Patterson.

The applicant is found to be 100% permanently totally disabled as a result of all three injuries.

It is found there is no basis for apportionment, pursuant to Labor Code §§4663 or 4664, or pursuant to the *Benson* case.

It is found the applicant is entitled to a combined disability award for both the specific injury and the continuous trauma injuries because all three injuries are inextricably intertwined and it is found by the medical evidence that both the specific injury and the continuous trauma injuries caused applicant's need for surgery that resulted in a catastrophic event, therefore, no apportionment is found between the industrial injuries.

1t is found the applicant is 100% permanently totally disabled without a basis for apportionment.

It is found the applicant permanently totally disabled, pursuant to Labor Code §4662(a)(2).

It is found the applicant is permanently totally disabled, pursuant to Labor Code §4662(a)(3).

It is found the applicant is 100% disabled via AMA Guides rating.

It is found the applicant is permanently totally disabled, pursuant to *Kite v. Athens*.

It is found applicant is entitled to further medical treatment to cure or relieve from the effects of the injury.

The following issues are taken off calendar.

The issues are to be adjusted between the parties with the Arbitrator retaining jurisdiction in case of a dispute.

Period of temporary disability and rate.

Industrial disability leave rate and period.

Penalties and attorney fees, pursuant to Labor Code §§5813 and 5814.

AWARD

Award is made in favor of Gregory Frampton against the City of Los Angeles of:

Temporary disability to be adjusted between the parties.

Permanent disability indemnity of 100% payable at 1,128.43 per week for life, plus cost of living adjustment, pursuant to Labor Code §4649(c), less the sum of $148,715 payable to Bentley & More, LLP as the reasonable value of services rendered payable beginning April 3, 2020.

Attorney fees to be commuted over the life of the A ward.

Further medical treatment is needed to cure or relieve from the effects of the injury.

No Petition for Reconsideration was filed by either party from the Findings and Award.

The present attorney and the prior attorney were to adjust the attorney fees between them with the Arbitrator retaining jurisdiction in case of a dispute.

The attorneys were unable to agree on a division of attorney fees and the matter was set for Arbitration on August 17, 2021.

Following the original Arbitration, the matter proceeded to Arbitration on the division of attorney fees issue between the present attorney and lien claimant on August 17, 2021.

At the Arbitration on August 1 7, 2021, Stipulations and Issues were framed, Exhibits were admitted into evidence and testimony was taken of applicant, Gregory Frampton, Mark Wilson, a certified specialist in California Legal Malpractice, and the prior attorney, Goldfarb.

The Stipulations, Issues, Exhibits are contained and listed in the transcript of the Arbitration and the Opinion on Decision which also services as minutes of the Arbitration as well as the transcript. The testimony of all witnesses is contained in the transcript of the Arbitration Minutes.

As stated in the introduction, the Arbitrator then issued the Decision on the issue of division of attorney fees which is now subject to the two Petitions for Reconsideration on the grounds set forth above by both the prior attorney and the present attorney.

III.

DISCUSSION

The law on the issue if division of attorney fees issue is that between two attorneys who represented the applicant, the Appeals Board needs to consider: (1) the responsibility assumed by the attorney; (2) the care exercised in representing the applicant; (3) the time involved; and (4) the results obtained (*Whitley v. Bell Plastics,* 2015 Cal. Wrk. Comp. P.O. LEXIS 427).

In this case, the Arbitrator awarded a fee of$128,715 to the present attorney and $20,000 to the prior attorney (lien claimant).

Both the present attorney and prior attorney (lien claimant) filed Petitions for Reconsideration on the division of attorney fee fi und by the Arbitrator.

The present attorney requests the Appeals Board Award a fee of $0.00 to the prior attorney 1ien claimant and prior attorney lien claimant requests and the fee be increased from the $20,000 Awarded by the Arbitrator.

Goldfarb & Zeidner requested 79% of the fee based on percentage of time they had the case and work performed at the Arbitration. They argue the case was a presumptive 100% permanent disability from the start and they did most of the work to obtain the Award.

Bentley & More argue they are entitled to 100% of the attorney fee based on various arguments including the result obtained, breach of duty of loyalty by the prior attorney, the method of withdrawal of the previous attorney and the amount of work they performed.

The Arbitrator, after reviewing the evidence, found this case was not as set forth by the prior attorney of 100% presumptive case with little or no work having to be done to achieve the 100% Award by the second attorney.

The City of Los Angeles hotly disputed the applicant was entitled to 100%. They argued the Award should be reduced by apportionment based on the Benson case, a prior Award, pursuant to Labor Code §4664, apportionment, pursuant to Labor Code §4663 and the legal argument that apportionment is not precluded by the [] conclusive presumption of Labor Code §4662(a)(2).

The case involved three different dates of injury and dispute over earnings on some of the cases. Other issues were disputed as outlined above.

The case could not be settled by a Stipulated Award to 100% permanent disability and proceed to an Arbitration on all the above issues.

The present applicant's attorney had to obtain medical-legal reports, cross-examine evaluators, present and prepare Arbitration briefs and litigate the case by way of an Arbitration to a final result.

After the prior attorney's request for a Stipulated Award was rejected, the present attorney proceeded to conduct the discovery process and was able to finalize the case with a result of total disability with no apportionment, an excellent and favorable result.

The present attorney argues there should be no fee awarded because the prior attorney retired and left practice and violated his duty of loyalty by attempting to make sure the applicant went to the attorney he chooses and with whom he had a guaranteed fee agreement.

The present attorney argued that no fee should be awarded to the prior attorney because of this misconduct based on violation of State Bar rules, case law and the testimony of their expert, Mark Wilson.

The Arbitrator, after reviewing the testimony and exhibits, found that the prior attorney did go too far in attempting to make sure the applicant went to the attorney he had a guaranteed fee agreement.

In addition, the prior attorney went too far in arguing he could not guarantee the abilities of other attorneys and the applicant needed to stay with his recommendation.

In the opinion of the Arbitrator, the prior attorney attempted to force the applicant to his attorney of choice, who he had a fee agreement with based on length of time each firm had the case and not based on the criteria for a division of attorney fees as set forth by the Appeals Board.

In the opinion of the Arbitrator, the prior attorney did violate his duty of loyalty to his client and put himself first.

However, the prior attorney going too far in attempting to make sure the applicant went to an attorney he chose which would guarantee his fee, according to the case law and the testimony of Mark Wilson, any such misconduct can be taken into account in awarding the fee including reducing or denying the fee. Mr. Wilson and the case law also allow for the fee to be reduced based on misconduct. The law provides that any conduct by a lawyer that is considered unethical behavior, breaching the duty of loyalty, anything that falls below the standard of care goes into the mix when the trier-of-fact determines the value of services performed services.

Mr. Wilson testified that it is up to the Judge to determine based on the facts whether the fee should be disallowed or allowed in part. He indicated it was not an automatic denial of the entire fee for these violations.

When determining the division of attorney fees between multiple attorneys who represented the applicant, multiple factors must be taken into account including work done by each attorney, the result obtained and being able to finalize the case.

In this case, the present attorney did substantial work, conducted all discovery and achieved the favorable result of a 100% Award, represented the applicant in the Arbitration hearing and was able to bring the case to a successful conclusion.

The prior attorney also provided a service to the applicant and is entitled to retire and obtain a fee for work done.

Based on the above factors, the Arbitrator finds the majority of the fee should go to the present attorney, who did substantial work on the case prior to the Arbitration, took the case to Arbitration, presented evidence, argued, and briefed the case and was able to finalize the case with an excellent result of a 100% permanent disability.

The Arbitrator was bothered by the prior attorney's attempt to make sure the applicant went to the attorney he chose and with whom he and a prior agreement on division of attorney fees. The attorneys did his best to make sure that the applicant went to the attorney who he had a fee agreement with following his retirement.

In addition, the Arbitrator was bothered by the attorney's attempts to discredit any firm other that the firm he wanted the applicant to go with, whom he had he guaranteed fee agreement.

After reviewing the case law and expert testimony, the Arbitrator is of the opinion the WCAB does have jurisdiction to consider the conduct of the attorney in determining the Award of a fee or the division of the fee.

Therefore, based on the amount of work done by each attorney, taking into account the case had to be litigated to a result by the present attorney and the success of the result obtained by the present attorney and his ability to take the case to completion, the Arbitrator finds majority of the fee should be awarded to the present attorney.

The Arbitrator, weighing the amount of work done by each attorney, the results achieved by the present attorney of total disability with no apportionment, the present attorney being the one who was able to bring case to a final and successful conclusion and the conduct of the prior attorney regarding attempting to steer the case to the attorney with whom he had an pre-arranged fee agreement, the Arbitrator concludes a fair division of attorney fees would be $128,715 to the present attorney and $20,000 to the prior attorney.

In addition, the Arbitrator is of the opinion the fee division is fair and reasonable on the work performed by the present attorney alone, the result achieved and the fact the present attorney conducted all discovery, cross-examined evaluators and obtained a favorable result irrespective of the attorney conduct.

The Arbitrator is of the opinion the conduct of the prior attorney does not result in his receiving no fee whatsoever.

The prior attorney argues that he is entitled to a greater fee because the applicant became a quadriplegic at the time he represented the applicant and this case was presumptively 100%. However, the facts show that right before the prior attorney was substituted out, the City of Los Angeles rejected his request for a Stipulation at 100% permanent disability because they plan on

litigating the case regarding Labor Code §4663 and Labor Code §4664 and other issues such as earnings and temporary disability period.

It was at this point litigation really began and continued up through the Arbitration decision and during this time the present attorney represented the applicant and obtained the desired result.

The present attorney argues the prior attorney is not entitled to any attorney fee because his withdrawal was not mandatory or permissive for any of the 10 reasons outlined in the rules. In the opinion of the Arbitrator, an attorney is allowed to retire and obtain a fee after retirement for the work he performed prior to his retirement. The Arbitrator rejected this argument.

The Arbitrator disagrees with the argument of the present attorney that the withdrawal was not mandatory or due to ethical reasons and no fee can be awarded. In the opinion of the Arbitrator, the applicant's attorney had a right to retire and is entitled to a fee for the work he did prior to his retirement.

The Arbitrator disagrees with the prior attorney's stating this case was a slam dunk 100% because the applicant became a quadriplegic while he represented the applicant and he should be entitled to a larger fee.

The case was hotly contested by the City of Los Angeles regarding the issue of apportionment, *Benson* apportionment and additional issue necessitating the parties proceeding with substantial medical-legal evaluations, cross-examination of evaluators and discovery before the case was ready to proceed to Arbitration. Most of the discovery, all medical-legal and the Arbitration hearing with briefing was performed by the present attorney. The case became hotly contested following the surgery in February 2019 which resulted in the applicant becoming a quadriplegic and the rejection of a settlement at 100% permanent disability with no apportionment by the City of LA just before the present attorney undertook representation of the applicant.

The Arbitrator would disagree with the prior attorney's characterization that the case was a slam duck 100% with no apportionment when the prior attorney represented the applicant and remained that way when the applicant was represented by the present attorney and that is why he is entitled to greater fee.

The Arbitrator would disagree with the prior attorney's characterization that the case was a slam duck 100% with no apportionment when the prior attorney represented the applicant and remained that way when the applicant was represented by the present attorney and that why he is entitled to greater fee.

Taking into account the criteria of: (1) the responsibility assumed by the attorney; (2) the care exercised in representing the applicant; (3) the time involved; and (4) the results obtained (*Whitley v. Bell Plastics*, 2015 Cal. Wrk. Comp. P.D. LEXIS 427), in the opinion of the Arbitrator, present attorney after the City of LA rejected the Stipulation at l 00%, the present attorney proceeded to assume the responsibility for litigating these issues and other issues, obtaining medical-legal and cross-examining physicians and taking the case to Trial and obtaining the result of a total disability without apportionment.

Therefore, taking into account the *Whitley* case, the fee division of the Arbitrator not taking into account the misconduct of the attorney was fair and reasonable based on the facts of this case. When you add in the misconduct of the attorney attempting to make sure the client went to the attorney where he got the best fee result, that even further justifies, in the opinion of the Arbitrator, the fee division awarded.

The Arbitrator would disagree with the present attorney that 0 dollar fee should be awarded to the prior attorney for the reasons set forth above.

IV.

RECOMMENDATION

For the foregoing reasons, it is recommended that both Petitions for Reconsideration be denied.

DATED: October 20, 2021

Respectfully submitted,

ALTMAN & BLITSTEIN

By:

MARK KAHN,
ARBITRATOR