

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

JAMES BROWN, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, legally
uninsured, adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ10753764
Sacramento 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, and the reasons discussed below, we will deny reconsideration.

Defendant contends that Labor Code¹ section 4660.1(c)(1) bars applicant's entitlement to psychiatric permanent disability that arose as a compensable consequence of an orthopedic injury. We agree with the WCJ that defendant's reliance on section 4660.1 is misplaced.

As relevant to this discussion, the May 21, 2018 Minutes of Hearing and Summary of Evidence (MOH/SOE) reflect the following stipulations: in Case No. ADJ8992405, "during a cumulative period to June 15, 2013 [applicant] sustained injury arising out of and in the course of employment to his lumbar spine, hearing, teeth, knees, ***and as a compensable consequence to his psyche;***" and, in Case No. ADJ10753764, "during a cumulative period to June 15, 2013" applicant "claims to have sustained injury to his teeth ***and psyche as a result of job stress.***" (MOH/SOE, 5/21/18, at p. 2:12-17, emphasis added.) On August 13, 2018, the parties added to the relevant stipulations: in Case No. ADJ8992405, "the agreed rating for the admitted body parts of lumbar spine, bilateral knees, hearing loss, psyche and teeth is 32% after adjustment for age and

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

occupation. That rating includes all of those body parts *except the psyche;*” and in Case No. ADJ10753764 that “dispute of injury AOE/COE arising out of and in the course of employment to the psyche and teeth.” (MOH/SOE, 8/13/18, at p. 2:10-13 & 2:18-19, emphasis added.) The parties did not raise either the issue of injury as a compensable consequence in Case No. ADJ10753764 nor the applicability of section 4660.1(c). Section 4660.1 was enacted as part of Senate Bill (SB) 863, and became effective January 1, 2013. (Stats. 2012, ch. 363, § 60.) Therefore, defendant should have raised its applicability as an issue at the time of the 2018 trial. The failure to raise an issue at the first hearing in which it may properly be raised may result in waiver of that issue. (See *U.S. Auto Stores v. Workers’ Comp. Appeals Bd. (Brenner)* (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases] 173; *Los Angeles Unified Sch. Dist. v. Workers’ Comp. Appeals Bd. (Henry)* (2001) 66 Cal.Comp.Cases 1220 (writ den.); *Hollingsworth v Workers’ Comp. Appeals Bd.* (1996) 61 Cal.Comp.Cases 715 (writ den.).)

On August 29, 2018, the former WCJ issued separate decisions. In Case No. ADJ8992405, he found industrial injury to the lumbar spine, hearing, teeth, knees and, as a compensable consequence, to applicant’s psyche causing 32% permanent disability. (Findings, Award and Order, 8/29/18.) In Case No. ADJ10753764, the former WCJ found that “[a]pplicant sustained injury arising out of and in the course of employment to his psyche and teeth, as alleged.” (Findings, Award and Order, 8/29/18.) The WCJ clearly made the distinction of finding psychiatric injury “as a compensable consequence” in Case No. ADJ8992405 and psychiatric injury “arising out of and in the course of employment” Case No. ADJ10753764. Both August 29, 2018 decisions became final when neither party sought reconsideration within the statutory time frame. (Lab. Code, §§ 5803, 5804.)

Defendant asserts that “[a]n Award issued on [August 29, 2018] made a finding of fact of industrial injury to the Applicant’s psyche via a compensable consequence in ADJ8992405.” (Petition for Reconsideration, at p. 3:1-3.) However, the finding of a compensable consequence psychiatric injury in Case No. ADJ8992405 does not affect or negate the finding of psychiatric injury AOE/COE in Case No. ADJ10753764. Defendant did not challenge the finding of psychiatric injury AOE/COE in Case No. ADJ10753764 when it was made on August 29, 2018 and cannot challenge it now.

Moreover, any reliance on statements made in the August 29, 2018 Opinion on Decision is also misplaced. Pursuant to section 5313, “the workers’ compensation judge shall, within 30

days after the case is submitted, make and file *findings* upon all facts involved in the controversy ...” (Lab. Code, § 5313, emphasis added.) Those *findings* must subsequently support any an order, decision, or award that is issued. (Lab. Code, § 5903(e).) In this case, the August 29, 2018 Findings, Award and Order found psychiatric AOE/COE and that finding is final.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 7, 2021

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

**JAMES BROWN
METZINGER & ASSOCIATES
STATE COMPENSATION INSURANCE FUND**

PAG/pc

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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REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

In the above referenced matter, the Department of Corrections (defendant) filed a timely, verified, petition for reconsideration, taken from the Findings and Award (F &A) that issued on March 23, 2021.

James Brown (applicant) worked as a correctional officer for defendant for 27 years, retiring on November 2, 2013. While so employed he sustained an injury to his teeth and psyche due to cumulative job activities through June 15, 2013.

On February 22, 2021, the parties tried this case before this Workers' Compensation Administrative Law Judge (WCALJ). The issues disputed included permanent disability and apportionment. Thereafter this WCALJ issued the F&A now disputed, finding applicant 60% permanently disabled. Defendant disputes that finding and asserts:

1. By the order, decision or award made and filed by the WCALJ, the Division of Workers; Compensation acted without or in excess of its powers;
2. The evidence does not justify the findings of fact, and;
3. The findings of fact do not support the order, decision or award.

STATEMENT OF FACTS

Previously this case was tried and decided by (retired) WCALJ Joseph Samuel and he issued a F&A on August 29, 2018. In that F&A he found that "Applicant sustained injury arising out of and occurring in the course of employment to his psyche and teeth as alleged." He also determined that applicant had not reached maximal medical improvement so he deferred a finding on permanent disability.

In a companion case (ADJ8992405) WCALJ Samuel also found that applicant "sustained injury arising out of and in the course of employment to his lumbar spine, hearing, teeth, knees, and as a compensable consequence, to his psyche." He then went on to award applicant 32% permanent disability based on a stipulation that applicant's injury caused such disability not including the psyche (Minutes of Hearing 8/13/18, p. 2, lines 10-13).

When this case was tried before this WCALJ the parties stipulated that applicant sustained an injury to his teeth and psyche (based on WCALJ Samuel's earlier finding) (Minutes of Hearing 2/22/21 [hereafter MOH], p. 2, lines 2-5). The evidence on extent of injury came from the reports of Joseph Schames, D.M.D., Jeffrey Light, D.D.S. and Michael Meade, M.D.

Dr. Meade authored multiple reports but the pertinent one is that of March 18, 2019 (exh. E) in which he discussed applicant's psychiatric disability, noting applicant was permanent and stationary with 29% permanent disability based on global assessment functioning level of 51. Notably Dr. Meade stated the psychiatric disability did not overlap with disability from his teeth or hearing (the teeth injury did not result in any permanent disability, as noted in the Opinion on Decision, 3rd paragraph). He also noted applicant had no significant overlap between psychiatric disability and previously adjudicated orthopedic disability even though he added a comment that the psychiatric injury was a compensable consequence of those orthopedic injuries.

Regarding apportionment of the psychiatric disability Dr. Meade created a chart listing all the causes of disability (e.g. threats from inmates, 15%; dependent disabled sons, 2%) with all of those causes listed so as to add up to 100%.

In a supplemental reports (exhs. C and F) Dr. Meade held to his analysis of apportionment.

At trial applicant testified that some of the causes of psychiatric disability were merely answers to questions posed by Dr. Meade but not really actually psychiatrically disabling (MOH, p. 4, lines 1-13).

DISCUSSION AND LEGAL AUTHORITIES

Defendant's first contention is that applicant is not entitled to permanent disability for his psychiatric injury because that injury is a compensable consequence of earlier adjudicated orthopedic injuries. Defendant's contention is based on California Labor Code section 4660.1, subdivision (c) which provides as follows:

"(c) (1) Except as provided in paragraph (2), the impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury shall not increase. This section does not limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

(2) An increased impairment rating for psychiatric disorder is not subject to paragraph (1) if the compensable psychiatric injury resulted from either of the following:

(A) Being a victim of a violent act or direct exposure to a significant violent act within the meaning of Section 3208.3

(B) A catastrophic injury, including, but not limited to, loss of a limb, paralysis, severe burn, or severe head injury."

Defendant asserts that applicant's psychiatric claim is the result of three different causes including compensable consequences of an orthopedic injury. The problem with that assertion is that it is not born out by findings of fact in this specific cases, which are final and can't be re-visited. As noted above WCALJ Samuel found that applicant sustained a cumulative injury to his teeth and psyche on August 29, 2018. No party sought reconsideration of that finding and so it became final and binding on the parties 25 days later. It is improper to presently look behind that finding and say that the psyche injury is due to a consequence of other injuries.

The controlling legal principle was set out in *State Farm General Insurance v WCAB* (2013) 218 Cal.App.4th 258, 78 Cal.Comp.Cases 758. In that case the parties entered into stipulations in 2002. After two of the involved carriers went bankrupt and were taken over by the California Insurance Guaranty Associates (CIGA), CIGA sought to be relieved from the stipulations but a WCALJ ruled in 2008 that CIGA was bound by the earlier stipulations. CIGA did not seek review of the 2008 holding and it became a final decision. In 2009, 2010, and twice in 2011 CIGA again sought to be relieved from the effects of the stipulations and finally in 2011 he WCAB ruled that CIGA was relieved from the effects of the earlier stipulations. The district court in reversing the WCAB held that CIGA had lost its opportunity to seek relief by not appealing the 2008-2011 decisions: "Right or wrong, the WCJ's decision in 2008, and the WCAB's 2009 and 2011 decisions are final, and CIGA may not invoke the jurisdiction of the WCAB or this court to review the lawfulness of those decisions." (id. at p. 270, in accord *Fireman's Fund v WCAB* (2010) 181 Cal.App.4th 752,771, 75 Cal.Comp.Cases 1: "[H]ence it is the long established policy of the law to, so far as possible, prohibit the further contest of an issue once judicially decided[.]") The same principle applies herein, that applicant sustained a cumulative trauma injury to the psyche (and teeth) due to work duties through June 15, 2013, and defendant cannot presently attack that finding as incomplete.

Given the finality of the prior finding this case is one of "psychic trauma producing psychological injury [mental-mental]" (see *Lockheed Martin v WCAB* (2002) 96 Cal.App.4th 1237, 67 Cal.Comp.Cases 245, fn. 6). As such, the limitation on permanent disability noted in section 4660, subdivision (c) does not apply.

Defendant further contends that an award of psychiatric disability provides applicant with two awards for the same disability because of the award in ADJ8892405. That argument ignores the stipulations in that case. As noted above the MOH of August 13, 2018, stated "the agreed rating for the admitted body parts of lumbar spine, bilateral knees, hearing loss, psyche and teeth is 32% after adjustment for age and occupation, That rating includes all of those body parts **except the psyche.**"(emphasis added). Clearly therefore, applicant

received the 32% permanent disability for non-psychiatric injuries, leaving this case for the proper full award of psychiatric disability.

Defendant next contends that this WCALJ erred in not finding apportionment of psychiatric disability. This was addressed in the Opinion on Decision:

"The only real dispute is over apportionment. While Dr. Meade apportioned some of applicant's disability to various factors other than his industrial injury (e.g. an errant belief that applicant's father was in hospice, and stress from dealing with special needs sons) that apportionment does not meet the legal thresholds set out *Escobedo v Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (WCAB en banc):

"Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms [sic] of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.

For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability."

In this matter Dr. Meade gave numbers for apportionment to factors other than the industrial injury but did not explain why or how those factors contributed to applicant's disability. Therefore an unapportioned disability award is due."

To expound on the above analysis, Dr. Meade provided numbers on apportionment. He noted on March 18, 2019 as follows:

"Based on the report of Mr. Brown today, as well as information in the provided records, it is medically probable that psychiatric residuals may be apportioned as follows. The two major factors

major the stress associated with verbal abuse and threats from inmates, and the stress in dealing with his Supervisors and coworkers over policy and application....

It's probable that residuals are apportionable 30% to the stress from dealing with inmates [sic]; 30% to the problems from dealing with supervisors and coworkers; 15% to the stress associated with the father's impending death; 12% to the stress of negotiating the workers' compensation; 6% to the stress of dealing with chronic Erectile Dysfunction following resection of prostate cancer; and 2% to the stress of having dependent disabled sons."

The mere use of percentages by Dr. Meade did not include any explanation at all how chronic erectile dysfunction caused a reduction in global assessment function nor how the stress of having disabled sons did so. One must keep in mind that apportionment [sic] of disability due to non-industrial causes is defendant's burden (*Escobedo*, supra at p. 613) and that burden is met by medical evidence that sets forth the reasoning behind the physician's opinions not just mere conclusions (id. at p. 621), Accordingly, Dr. Meade's apportionment conclusions, which lacked underlying rationale, failed to meet defendant's burden of proof.

Defendant's reference to *Wilson v Cal Fire* (2019) 84 Cal.Comp.Cases 393 (WCAB en bane) is misplaced, That case did not deal with an employee that sustained a psychiatric injury directly caused by events of employment (id. at pp. 404-405) which is what we have in the present matter. Similarly defendant's reliance on *Allen v CarMax* 2017 Cal. Wrk. Comp. P.D. LEXIS 303 is also unavailing because again, that was a case involving psychiatric consequences from a physical injury (deemed a "violent act") rather than (again like in this case) a psychiatric claim directly caused by events of employment.

In summary, applicant sustained a psychiatric claim predominantly caused by events of employment and that finding was binding on defendant since 2018. It could not be altered or changed to become a compensable consequence of an orthopedic claim because of the rules of finality. Additionally, the apportionment of disability due to non-industrial factors did not meet the correct legal standard for apportionment in a purely psychiatric claim. That reasoning formed the bases for the findings in this case.

CONCLUSION

Based on the above analysis, it is respectfully submitted that the WCAB should deny defendant's petition for reconsideration.

DATE: April 19, 2021

Gregory P. Cleveland
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE