WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

HYUN SOOK LEE, *Applicant*

vs.

MAKESHOPNCOMPANY, INC.; ACE PROPERTY & CASUALTY INSURANCE, administered by ESIS; SAMSUNG FIRE & MARINE INSURANCE, administered by BROADSPIRE, *Defendants*

Adjudication Number: ADJ9372475, ADJ10047707
Los Angeles District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in these cases. This is our Opinion and Decision After Reconsideration.

Defendant Ace Property & Casualty Insurance Company (hereinafter "Ace") seeks reconsideration of the Joint Findings and Award (Joint F&A) issued by the workers' compensation administrative law judge (WCJ) on June 17, 2021. By the Joint F&A, the WCJ found that applicant sustained 100% permanent disability and there is no basis for apportionment. The cumulative trauma injury (ADJ9372475) was found to be through March 5, 2013.

Ace contends that the evidence does not support the award of 100% permanent disability and there is a basis for apportionment of permanent disability. Ace also contends that the date of the cumulative trauma injury is April 8, 2013 and that Ace should have been permitted to obtain a qualified medical evaluator (QME) panel in orthopedics.

We did not receive an answer from applicant or co-defendant, Samsung Fire & Marine Insurance (hereinafter "Samsung"). The WCJ issued a Report and Recommendation of Workers' Compensation Judge on Defendant's Petition for Reconsideration and Petition for Removal (Report) recommending that Ace's Petition be denied.

We have considered the allegations of Ace's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will affirm the joint F&A.

FACTUAL BACKGROUND

Applicant claims two injuries while employed as a customer service manager by Makeshopncompany, Inc.: 1) to the cervical spine, lumbar spine, thoracic spine, right shoulder, right elbow, right hand, right wrist, bilateral knees, psyche, upper gastrointestinal system, lower gastrointestinal system, cardiovascular system, and sleep disorder from December 27, 2011 through April 8, 2013 (ADJ9372475), and 2) to the cervical spine, lumbar spine, thoracic spine, right shoulder, right elbow, right hand, right wrist, bilateral knees, psyche, upper gastrointestinal system, lower gastrointestinal system, cardiovascular system, high blood pressure and sleep disorder on April 18, 2012 (ADJ10047707). Ace provided coverage for the specific injury and during a portion of the cumulative trauma injury. (Minutes of Hearing and Summary of Evidence, April 27, 2021, pp. 2 and 4.) Coverage for the pled cumulative trauma injury period is shared between Ace and Samsung.

Lawrence Miller, M.D. provided treatment to applicant for the orthopedic parts. He reported regarding applicant's ability to perform activities of daily living in 2016 as follows:

> The patient needs assistance with all activities of daily living. She has difficulty getting in and out of chair and getting in and out of bed. She is unstable and requires cane to ambulate. She has severe weakness in the upper extremities with limited range of motion in the shoulders. She is unable to perform any repetitive gripping, grasping, or lifting with either of the upper extremity.
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> As a result of pain, she sleeps poorly, only intermittently.
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> (Applicant's Exhibit No. 4, Medical report of Dr. Lawrence Miller, November 11, 2016, p. 4.)

Dr. Miller diagnosed applicant with a lumbar post laminotomy pain syndrome. (*Id.* at p. 11.) The history of treatment for her lumbar spine was described:

> In 2013, she underwent L4-S1 lumbar laminectomy surgery. Following the surgery, she continued to do poorly. She had residual stenosis and developed findings of lumbar instability. She underwent an instrumented anterior-posterior fusion in 2014 and continued to do poorly. Surprisingly she has some palliative benefit from postop epidural steroid injections that were repeated frequently.
>
> She eventually completed spinal cord stimulator trial where after the placement of the permanent implantation she did poorly with probable hysterical complaint of dyspnea and throat tightness when the stimulator was turned on. She also had

> significant paresthesias in the abdomen, which was result likely of lateral displacement of laminotomy lead.
>
> The stimulator unit was eventually explanted including the laminotomy lead. She now has severe back pain and right leg radiating symptoms and weakness. She has near complete monoplegia of the right leg with right ankle/foot inversion. She has symptoms concerning for cauda equina where she has pelvic numbness and cannot feel voiding or evacuation of the bowel and has fecal soiling.
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> (*Id.* at pp. 11-12.)

Samsung and applicant initially agreed to utilize Dr. Phillip Kanter as an orthopedic agreed medical evaluator (AME). He found industrial causation for applicant's cervical spine, right shoulder, right elbow, right thumb and lumbar spine conditions. (Defendant Samsung's Exhibit F [marked as Appeals Board Exhibit Y], AME report of Dr. Phillip Kanter, July 13, 2016, p. 36.) These conditions were considered to have reached maximum medical improvement as of July 13, 2016. (*Id.* at p. 37.) Dr. Kanter provided whole person impairment (WPI) ratings for several body parts and included an alternate rating per *Almaraz/Guzman*[1] for her lumbar spine based on 50% loss of its function. (Defendant Samsung's Exhibit G, AME report of Dr. Phillip Kanter, July 12, 2017, p. 32.) Dr. Kanter concluded that applicant "would be eligible for supplemental job displacement benefits. In reality, however, this lady probably cannot participate in any type of retraining program." (*Id.* at p. 27.)

After Dr. Kanter retired, Samsung and applicant agreed to utilize Dr. Clive Segil as the orthopedic AME. Dr. Segil's diagnoses included in relevant part: "Severe disability as a result of multiple spinal surgeries as well as insertion with subsequent removal of spinal cord stimulator resulting in paralysis of the lower extremities." (Defendant Samsung's Exhibit A, AME report of Dr. Clive Segil, May 14, 2019, 12.) He provided WPI ratings as follows: 18% WPI to the cervical spine based on DRE Category III and an alternate rating of 80% WPI to the lumbar spine based on gait derangement. (*Id.* at p. 39.) Dr. Segil acknowledged that applicant's lumbar spine impairment "would normally fall into DRE Category IV," but explained the alternate rating for the lumbar spine as follows:

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[1] This is in reference to *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Almaraz/Guzman III*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837]. (See also *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist.* (*Almaraz/Guzman II*) (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc); Lab. Code, § 4660.1(h).)

> She has undergone a lumbar laminectomy followed by a lumbar fusion. She underwent spinal cord stimulator implantation and removal. These procedures have caused her to have chronic, severe low back pain and as a result of the chronic pain syndrome and failed back syndrome she is wheelchair bound. The accurate method of rating the lumbar spine impairment is to rate by analogy. She is rated utilizing p. 529, Table 17-5 – Lower Limb Impairment Due to Gait Derangement. She is wheelchair dependent which gives her a Whole Person Impairment of 80%.
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> (*Id.*)

He further opined that applicant "is totally disabled from a medical standpoint." (*Id.* at p. 40.) Dr. Segil initially provided the following opinion about apportionment:

> Apportionment based on labor code 4663 and pursuant to the Benson case, in the cervical spine 80% due to injury of 04/18/2012 and 20% due to cumulative trauma. In the lumbar spine 80% due to injury of 04/18/2012 and 20% due to continuous trauma 12/27/2011 to 04/08/2013. In the right shoulder, right elbow and right hand 50% due to continuous trauma 12/27/2011 to 04/08/2013 and 50% due to injury of 04/18/2012.
>
> As a result of the Hikida Case from the court of appeals decision, apportionment now is of the work related causation of cervical spine and lumbar spine, permanent disability to the continuous trauma claim to the exclusion of the specific injury claim. Specific injury produced trauma to two spinal regions that was sufficiently pronounced from the trauma caused by the examinee's regular job duties such that the specific injury caused any of the permanent disability. Even though, there would be a basis for any cervical and/or lumbar spine condition minus the post-surgical back syndrome to other non-industrial factors therefore again this is the use of Hikida case and as a result 80% of the whole person impairment is due to post-surgical back syndrome. The pain syndrome is a separate and distinct condition, which resulted directly from the surgical interventions performed as part of the treatment of the lumbar spine conditions on an industrial basis.
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> (*Id.* at pp. 38-39.)

Dr. Segil was deposed twice. During his second deposition on March 26, 2020, Dr. Segil was provided with additional medical records regarding applicant's back condition. The deposition included the following exchanges as relevant herein:

> Q. And we've also gone through the records. You've agreed that the reporting of Dr. Shin substantiates the fact that whatever happened in a specific injury, there was some contribution to continuous trauma once she returned to work

because she reported increased pain symptoms, and then, when she went off work, her pain symptoms improved.
Would you agree with that?

A. Yes.

Q. With that in mind, would it not be the case that the patient's lumbar spine condition is a product of both the specific injury that occurred on 4/18/2012 and the period of continuous trauma thereafter?

A. Yes.

Q. And is that based on medical probability and the records that you've looked at?

A. That's absolutely correct.
…
Q. Okay. But you didn't have at that time access to the records from her treating physician contemporaneous with her specific injury, this Dr. Sohn, correct?

A. Yes.

Q. Do those records in conjunction with my references to the specific records which you did have available to you previously, the two reports from Dr. Shin and the report from Dr. Bae, do those support your opinion that the applicant's lumbar spine condition is due to a combination of the specific injury and a continuous trauma thereafter?

A. Yes.

Q. Now, if we look at all of these records and specifically, for instance, the findings which you helped us interpret as described by Dr. Bae, whom you've indicated is a well respected doctor, spinal specialist, would you also agree that the applicant's need for the first surgery, the facetectomy that was done by Dr. Shin, as well as the fusion that was later done by Dr. Bae because of the result of the surgery done by Dr. Shin, those surgeries were necessitated by a combination of a specific injury of April 2012 as well as a period of continuous trauma thereafter?

A. Yes.
…
Q. Well, let me ask you the question. Okay?
Because we need -- you need to have -- whatever your opinion is, there has to be a clear record here.
So I'm asking you to consider – I'm asking you to consider all of the information I gave you, and can you state a percentage that due to one or the other, or would

it be speculative to indicate that the specific injury caused "X" percent of her disability to the exclusion of the CT?

A. Yes, I think that's correct because it's so inextricably intertwined.
…
Q. Okay. So based on the extensiveness and severity of the injury, there's no way you could apportion any percentage of the disability to the specific injury?

A. Very difficult. I think they are inextricably intertwined. I've mentioned this a few times.
…
Q. So you would apportion 100 percent of the disability to the specific injury?

A. I'm thinking. I mean, this is, as I said already, they're inextricably intertwined, and so it's very difficult to know.

Q. Okay. So, at this point, are you basically saying that you can't differentiate between apportionment for the specific versus the CT?

A. Yes.

Q. And you're finding inextricably intertwined accounting for the CT and the prior specific injury, correct?

A. Yes.

(Defendant Samsung's Exhibit D, Deposition transcript of Dr. Clive Segil, March 26, 2020, pp. 16:24 to 17:12, 17:24 to 18:23, 21:1-12, 24:22 to 25:2, 27:15 to 28:2.)

Samuel Miles, M.D., Ph.D. evaluated applicant as the psychiatric QME. He diagnosed applicant with a major depressive disorder, panic disorder and somatic symptom disorder with predominant pain. (Defendant Samsung's Exhibit H, PQME report of Dr. Samuel Miles, September 19, 2019, p. 19.) Dr. Miles opined that "it appears within reasonable medical probability, that the predominant cause for the applicant's psychiatric injury was her reaction to the orthopedic injuries she sustained as a result of her employment at Make Shop N. Company, including both the specific catastrophic injury of April 18, 2012 and the cumulative trauma for the period of December 27, 2011 through April 8, 2013." (*Id.* at p. 21.) He assigned a GAF score of 37, which translates to a 57% WPI rating. (*Id.* at p. 22.) He further opined regarding permanent disability:

> In light of the totality of the applicant's orthopedic, neurological, urological, and psychiatric impairments, she should be considered permanently totally disabled. She cannot perform substantial gainful employment activity.
>
> (*Id.*)

The matter proceeded to a mandatory settlement conference on November 9, 2020. The Minute Order from the hearing states:

> STRIKE PROCESS FOR PQME IN ORTHO WITH ESIS/ACE WAS COMPLETED IN MARCH 2020 BUT NO SCHEDULING TOOK PLACE OF EVAL UNTIL A WEEK BEFORE THE HEARING. WCJ DOES NOT FIND DUE DILIGENCE RE THIS NOTWITHSTANDING COVID AND THERE IS ALREADY A CODEF AME. OVER ESIS OBJECTION WCJ WILL SET FOR TRIAL ON ALL NORMAL CASE IN CHIEF ISSUES AND ORDER ANY ADDITIONAL PQME EVAL STAYED PENDING TRIAL. PARTIES ORDERED TO FILE PRETRIAL CONF STATEMENT AND ALL EXHS WITHIN 10 DAYS OF TRIAL. SET ON BOTH CASES
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> (Minutes of Hearing, November 9, 2020.)

Ace sought removal of the November 9, 2020 Minute Order. The Appeals Board issued an Opinion and Order Denying Petition for Removal on March 4, 2021.

Both cases proceeded to trial on April 27, 2021, at which time the cases were consolidated. (Minutes of Hearing and Summary of Evidence, April 27, 2021, p. 2.) For both cases, the parties stipulated to an occupational code of 211 and weekly earnings of $652.35 with a corresponding temporary disability indemnity rate of $434.90. (*Id.* at pp. 2-4.) The issues to be adjudicated for both cases included permanent disability and apportionment. (*Id.* at pp. 3-4.) For ADJ9372475, the issues at trial included whether the cumulative trauma injury period ends on March 5, 2013 or April 8, 2013. (*Id.* at p. 3.) In ADJ1004707, Ace objected to proceeding to trial without their own QME panel in orthopedic surgery. (*Id.* at p. 5.) Applicant testified at trial as follows in relevant part:

> Applicant testified she fell off a ladder on April 18, 2012. Applicant testified she was climbing up a ladder to take items off the top shelf, and while descending from the ladder, Applicant fell off and landed on the floor. Applicant testified she lost consciousness for a moment and when she regained consciousness she felt pain to her head, right fingers, right elbow, hips, and lower back.
> …

Applicant testified she underwent surgery to her lower back in March of 2013. Applicant testified she returned to work following her low back surgery and worked through April 8, 2013 or April 10, 2013. Applicant testified following her return to work the pain in her body increased through her last day of work.
…
Applicant testified she frequently has indigestion and stomach symptoms approximately 6 times per day. Applicant testified she often vomits after eating. Applicant testified her acid reflux medications were beneficial but her medications were stopped. Applicant testified she is always wearing an adult diaper because she wets her mattress and is unable to control her bowel movements. Applicant testified she soils herself several times per day and must wear an adult diaper. Applicant testified she has difficulty sleeping and cannot have deep sleep because of her orthopedic pain. Applicant testified she periodically has brief periods of sleep but never any deep sleep.
…
Applicant testified she is testifying while lying down on her floor and spends most of her day lying on the floor. Applicant testified she cannot get onto her bed by herself and because she sometimes wets or loses control of her bowels she doesn't want to be on the bed. Applicant testified she cannot walk by herself when she is alone. She uses a wheelchair to get around but needs assistance.
…
Applicant was asked what job duties caused her pain when she worked as a stock clerk. Applicant testified she was required to lift and transport items that weighed up to 90 pounds. Applicant testified she packed items and inspected items and lifted items regularly.

Applicant testified that prior to her surgery on March 5, 2013 she doesn't recall if she sought treatment for her lumbar spine or her low back. Applicant testified she was told she required low back surgery because of her job duties and elected to proceed with surgery.

Applicant testified that following her surgery her doctor placed her on temporary disability and gave her work restrictions. Applicant testified she was told to be off work by her doctor for approximately three months but does not recall how long she was actually off work. Applicant testified that following her surgery she was off work for 10 or more days before her employer told her she needed to return to work or risk being terminated.
…
Applicant testified every doctor that examined her told her the back pain is due to her work. Applicant testified the first time a doctor told her the back pain was related to work occurred after she fell off the ladder.

(*Id.* at pp. 8-10, 13.)

The WCJ issued the resulting Joint F&A as outlined above.

DISCUSSION

I.

While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, the employer holds the burden of proof to show apportionment of permanent disability. (Lab. Code, § 5705;[2] see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc), *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) To meet this burden, the employer "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 620.)

"Apportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Physicians are required to address apportionment when evaluating permanent impairment. (Lab. Code, § 4663(b)-(c).) Section 4663(c) provides in pertinent part as follows:

> In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
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> (Lab. Code, § 4663(c).)

Section 4664(a) separately states that the "employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).)

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[2] All further statutory references are to the Labor Code unless otherwise stated.

"Apportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay*, *supra*, 96 Cal.App.3d at p. 564.) Thus, the WCJ has the authority to determine the appropriate amount of apportionment, if any. It is also well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Therefore, the WCJ must determine if the medical opinions regarding apportionment constitute substantial evidence. (See *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

In determining apportionment, the evaluating physician must "look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72 Cal.Comp.Cases 565].) When two industrial injuries both cause permanent disability, the permanent disability caused by each must be separately awarded, unless the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113].) The Court in *Benson* recognized that a single permanent disability award may be appropriate if the physician cannot parcel out the percentage caused by each industrial injury to a reasonable medical probability. (*Id.* ["In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified."])

It is acknowledged that the orthopedic AME Dr. Segil's apportionment opinions changed over time.[3] Physicians may revise their opinions based on new evidence, particularly since their opinions must be based on an adequate history and examination. (See *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93] [medical reports and opinions must be based on an adequate medical history and examination in order to constitute

[3] Unless good cause exists to find an AME's opinion unpersuasive, the Appeals Board generally follows the opinions of the AME because an AME is presumably chosen by the parties based on their expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) However, the record does not reflect that Ace was a party to the AME agreement, which was entered into between applicant and Samsung.

substantial evidence].) During his March 26, 2020 deposition, Dr. Segil was provided with additional medical records regarding applicant's spinal condition and treatment. Following review of these records, he explained his conclusion that it would be speculative to parcel out causation for applicant's lumbar spine disability between the 2012 specific injury and the 2013 cumulative trauma injury. He repeated this multiple times and explained that due to the severity of applicant's back condition, which was caused by treatment necessitated by both injuries, he could not parcel out causation of disability between the two injuries without speculating. A medical opinion that is speculative is not substantial evidence. (*Id*.) Dr. Segil explained to a reasonable medical probability why applicant's injuries are inextricably intertwined and there can thus be no apportionment between the two injuries.

Additionally, Dr. Segil concluded that the surgical treatment necessitated by both injuries for applicant's lumbar spine resulted in failed back syndrome, which requires her use of a wheelchair. In *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], the Court of Appeal held that the employee was entitled to a permanent disability award without apportionment where her disability was due entirely to a new condition, chronic regional pain syndrome (CRPS), that she developed as a result of failed carpal tunnel surgery. In evaluating the *Hikida* decision, the Sixth District opined as follows in relevant part:

> Understood in context, the *Hikida* court's conclusion that there should be no apportionment makes sense only because the medical treatment in *Hikida* resulted in a new compensable consequential injury, namely CRPS, which was *entirely* the result of the industrial medical treatment. It was this new compensable consequential injury that, in turn, led *entirely* to the injured worker's permanent disability. The agreed medical examiner's findings underlined this point, as he determined that the injured worker's "permanent total disability was due *entirely* to the effects of the CRPS that she developed as a result of the failed carpal tunnel surgery." (*Hikida*, *supra*, 12 Cal.App.5th at p. 1253, italics added.) Although parts of the *Hikida* opinion can be read to announce a broader rule that there should be no apportionment when medical treatment increases or precedes permanent disability, it is clear that the rule is actually much narrower. Put differently, *Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability.
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> (*County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) (2020) 49 Cal.App.5th 605, 615 [85 Cal.Comp.Cases 467], emphasis in original.)

In this matter, applicant's failed back syndrome is a new condition that was solely caused by the surgical treatment she underwent for both injuries. Dr. Segil's 80% WPI rating was based on applicant being wheelchair dependent, which is necessary due to her failed back syndrome. Applicant is therefore entitled to a single permanent disability award for her injuries without apportionment both because her two injuries are inextricably intertwined and her treatment was the sole cause of her permanent disability (i.e., the treatment was the sole cause of the condition to which Dr. Segil attributes her permanent disability for the lumbar spine).

It is acknowledged that a 2012 injury must be rated pursuant to section 4660, applicable to injuries before January 1, 2013, but a 2013 injury must be rated pursuant to section 4660.1, applicable to injuries on or after January 1, 2013. (Lab. Code, §§ 4660, 4660.1; see also *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 618 [83 Cal.Comp.Cases 1680] [holding that section 4660 is mandatory for injuries before January 1, 2013].) However, as will be explained below, the issue of whether applicant's permanent disability rating is governed by section 4660 or 4660.1 is moot since her lumbar spine condition alone rates to 100% permanent disability[4] whichever statute is applied to determine her rating.

Applicant's lumbar spine has an 80% WPI rating using Table 17-5 of the AMA Guides per Dr. Segil.[5] (Defendant Samsung's Exhibit A, AME report of Dr. Clive Segil, May 14, 2019, p. 39.) The parties stipulated at trial to 211 as applicant's occupational code. (Minutes of Hearing and Summary of Evidence, April 27, 2021, pp. 2 and 4.) The age adjustment for the rating is the same using applicant's age at the time of either the 2012 or 2013 date of injury. (See 2005 Permanent Disability Rating Schedule (PDRS), p. 6-5.) Applicant's permanent disability rating strings for the lumbar spine are as follows under each statute:[6]

Rating per section 4660:

17.01.07.00 – 80[5] – 100 – 211E – 100 – 100%

Rating per section 4660.1:

17.01.07.00 – 80[1.4] – 100 – 211E – 100 – 100%

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[4] A permanent disability award may not exceed 100% per section 4664. (Lab. Code, § 4664.)

[5] Ace does not contest in its Petition the alternate WPI rating for the lumbar spine provided by Dr. Segil pursuant to *Almaraz/Guzman*. This alternate impairment rating is consequently considered undisputed.

[6] A rating of applicant's disability does not require the assistance of a DEU rater. (See *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 624-625 (Appeals Board en banc).)

A permanent total disability award is paid "based upon the average weekly earnings determined under Section 4453" for the remainder of applicant's life. (Lab. Code, § 4659(b).) For both cases, the parties stipulated that applicant's weekly earnings were $652.35, warranting a temporary disability indemnity rate of $434.90. (Minutes of Hearing and Summary of Evidence, April 27, 2021, pp. 2-3.) Applicant is consequently entitled to her temporary disability indemnity rate for life for her permanent total disability award and thus, the value of her award is the same regardless of which statute (4660 or 4660.1) governs calculation of her permanent disability rating.[7]

In any event, Dr. Kanter, Dr. Segil and Dr. Mills all concluded that applicant is permanently totally disabled as a result of her industrial injuries. Applicant is confined to a wheelchair. She requires assistance to perform essentially all activities of daily living. She must wear adult diapers, is in constant pain and has difficulty sleeping. There is therefore substantial evidence in the record to support the WCJ's finding that applicant is permanently totally disabled. (See e.g., *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587]; *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624]; see also Lab. Code, § 4662(b).)

Ace did not meet its burden of showing apportionment of permanent disability is warranted.

II.

The date of injury for cumulative trauma claims "is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.) Liability for a cumulative injury is determined under section 5500.5, which states in part:

> (a) . . . liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period . . . [one year] immediately preceding

[7] The WCJ made a finding that applicant is not entitled to an increase in impairment for her psychiatric disorder per section 4660.1. Section 4660.1(c) bars an increased impairment for a psychiatric condition for an injury on or after January 1, 2013 unless the condition was directly caused by the injury or one of the exceptions in section 4660.1(c) applies. (Lab. Code, § 4660.1(c); *Wilson v. State of CA Cal Fire* (2019) 84 Cal.Comp.Cases 393 (Appeals Board en banc).) However, since applicant is permanently totally disabled based on her lumbar spine condition alone, the issue of whether she may receive an increased impairment rating for her psychiatric condition is moot. (See Lab. Code, § 4664 [the permanent disability rating for each injury may not exceed 100%].)

> either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, **whichever occurs first.**
>
> (Lab. Code, § 5500.5(a), emphasis added.)

This has been true even prior to the enactment of sections 5412 and 5500.5:

> [W]e adopt a similar rule here which fixes what is by necessity a constructive date on which, for the purposes of subsequent injury statutes, a cumulative injury will be deemed to have been incurred. That date is the last day of the period in which the WCAB finds that cumulative injury was received by repetitive exposure to stress or other cause; or, if disability does not appear until yet a later date, the time when the employee becomes disabled.
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> (*Dow Chemical Co. v. Workers' Comp. Appeals Bd.* (1967) 67 Cal.2d. 483, 493 [32 Cal.Comp.Cases 431].)

Ace contends that the date of injury for the cumulative trauma claim must be April 8, 2013, the last date that applicant worked for the employer. Although the period of liability under section 5500.5 is limited to the last year of injurious exposure, the actual date of injury under section 5412 may be different than an employee's last date of work. "Pursuant to section 5412, the date of a cumulative injury is the date the employee *first* suffers a 'disability' and has reason to know the disability is work related." (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 238 [58 Cal.Comp.Cases 323], emphasis in original.) Disability has been defined as "an impairment of bodily functions which results in the impairment of earnings capacity." (*J.T. Thorp v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 327, 336 [49 Cal.Comp.Cases 224].) Disability can be either temporary or permanent. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 253 Cal.App.3d 463, 474 [56 Cal.Comp.Cases 631].) Whether there is temporary or permanent disability indicating the date for a cumulative trauma injury is a question of fact, which must be supported by substantial evidence. (*Austin*, *supra*, 16 Cal.App.4th at pp. 233-235.)

Applicant underwent lumbar spine surgery on March 5, 2013. She was placed on temporary disability by her doctor and was off work for approximately 10 days following the surgery. The record also demonstrates that the surgery caused permanent disability to her spine. Applicant testified at trial that she was told by her doctor that the surgery was necessary due to her

job duties. This constitutes knowledge that her disability was industrially related. Concurrence of disability and knowledge of its industrial relation therefore occurred on March 5, 2013, which was before applicant's last date of work. As stated above, the date of injury per section 5412 may be before the last date of injurious exposure and liability under section 5500.5 is determined by whichever occurs first: the section 5412 date of injury or the last date of injurious exposure. Since the record shows disability and knowledge of its industrial relation as of March 5, 2013, the WCJ properly found that this is the date of injury for applicant's cumulative trauma injury.

Ace contends that Dr. Kanter, Dr. Miles and Dr. Segil concluded that applicant's continuous trauma continued until her last day of work, April 8, 2013, and therefore, this must be the ending date of the cumulative trauma injury. Determining causation of a cumulative trauma injury generally requires an expert opinion. (See *Peter Kiewit Sons v. Industrial Acc. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188] [lay testimony alone generally cannot establish industrial causation in a cumulative trauma injury claim].) A physician may opine on whether and during which period an employee's job duties contributed to a cumulative trauma injury. However, the question of whether applicant suffered disability and had knowledge of the disability's industrial relation pursuant to section 5412 is a question of fact for the WCJ to determine. (*Austin*, *supra*.) As stated above, the record supports the WCJ's finding that the date of injury for the cumulative trauma injury is March 5, 2013.

III.

Section 5502(d)(3) provides as follows in relevant part:

> Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.
>
> (Lab. Code, § 5502(d)(3).)

Discovery accordingly typically closes at the mandatory settlement conference.

Ace contends that it must be given the opportunity to conduct additional discovery through a QME panel in orthopedics under section 4062.2. (Lab. Code, § 4062.2.) The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63

Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924].) However, the duty to develop the record must be balanced with the parties' obligation to exercise due diligence to complete necessary discovery prior to a mandatory settlement conference. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd.* (*McKernan*) (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].)

The record does not reflect that Ace exercised due diligence in pursuing medical-legal discovery under section 4062.2 as outlined in the WCJ's Report:

> Ace Property and Casualty Company argues it was prejudiced by not being allowed to proceed with its own Panel QME under Labor Code 4062.2. However, Defendant's Petition for Reconsideration acknowledges Ace Property and Casualty Company agreed with AME Dr. Clive Segil's reporting until he changed his findings regarding apportionment. (See Petition for Reconsideration dated 7/12/2021, page 9 line 20). Defendant Ace Property and Casualty Company also stipulated the applicant's condition with regards to the specific April 18, 2012 injury "reached MMI status as of July 13, 2016 per prior AME reporting of Dr. Philip S. Kanter, M.D." (See pre-trial conference statement dated 11/09/2020 setting case ADJ10047707 for Trial).
>
> Ace Property and Casualty Company was properly joined as a defendant to both cases and filed an Answer to the Application for Adjudication on November 5, 2015. Ace Property and Casualty Company participated in the pre-trial conference statement that set both cases for Trial before Judge Mays on March 16, 2016. Ace Property and Casualty Company reviewed the reports of Orthopedic AME Dr. Phillip Kanter dated February 9, 2015 and July 13, 2016. Ace Property and Casualty Company reviewed the reports of Orthopedic AME Dr. Clive Segil dated May 14, 2019 and August 16, 2019, and questioned Dr. Segil at the cross-examinations on December 19, 2019 and March 26, 2020.
>
> Ace Property and Casualty Company knew the medical reports of the Agreed Medical Examiners used by co-defendant Samsung Fire and Marine Insurance Company would be admissible in both claims, and at their own risk Ace Property and Casualty Company waited nearly five years after filing an Answer to the Application for Adjudication to request a Panel QME under Labor Code 4062.2. Ace Property and Casualty Company's request for Panel QME under Labor Code 4062.2 appears solely intended to cause unnecessary delay in the resolution of this matter. If Ace Property and Casualty Company wished to dispute Dr. Phillip Kanter and Dr. Clive Segil opinions, Ace Property and Casualty Company's solution was to timely request a panel under Labor Code sections 4060 and 4062.2(b) and not sit idly by as it did here. (Lorenz v. Encino Hosp. Med. Ctr., Hartford Ins. Co., 2014 Cal. Wrk. Comp. P.D. LEXIS 410).
>
> (Report, July 17, 2021, pp. 7-8.)

In conclusion, we will affirm the Joint F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Award issued by the WCJ on June 17, 2021 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 14, 2022

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

HYUN SOOK LEE
LAW OFFICES OF SOLOV & TEITELL
QUINTAROS PRIETO WOOD & BOYER
TESTAN LAW

AI/*pc*

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