WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SUSAN SHROLL, *Applicant*

vs.

SAN LUIS COASTAL UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by ATHENS ADMINISTRATORS, *Defendants*

Adjudication Numbers: ADJ12182226; ADJ12329585

San Luis Obispo District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact, Award, and Order (F&A) issued by the workers' compensation administrative law judge (WCJ) on September 27, 2022, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her cervical spine, lumbar spine, and left hip, during the period ending on May 2, 2019 (ADJ12182226); that the injury caused 12% permanent disability after apportionment of the 23% permanent disability previously awarded for applicant's March 9, 2007 injury to her lumbar spine in case number ADJ6646185; and that applicant did not sustain injury AOE/COE on May 18, 2018 (ADJ12329585).

Applicant contends that she is entitled to an award of 35% permanent disability indemnity ($48,140.00) minus the permanent disability indemnity she received for the March 10, 2009 23% permanent disability award.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will deny reconsideration.

BACKGROUND

Applicant claimed injury to her lumbar spine while employed by defendant as a custodian during the period ending on May 2, 2019 (ADJ12182226). She also claimed injury to her back, hips, and legs/lower extremities, while employed by defendant as a custodian on May 18, 2018 (ADJ12329585). Applicant had previously sustained a specific industrial injury to her lumbar spine while working for defendant on March 9, 2007 (ADJ6646185) and on March 10, 2009, she was awarded 23% permanent partial disability indemnity as a result of the injury.

Orthopedic agreed medical examiner (AME) Peter M. Newton, M.D., evaluated applicant on October 28, 2019. Dr. Newton examined applicant, took a history, and stated that:

> Because of her ongoing symptoms and findings on exam, I will refer her for electrodiagnostic studies of the lower extremities, an MRI of the lumbar spine, and x-rays of the pelvis and left hip. ¶ … After these studies have been completed within four weeks, I will see the applicant for an Agreed Medical Re-evaluation, at which time I will issue a supplemental report discussing apportionment, impairment, and future medical treatment.
> (Joint Exh. 1, Dr. Newton, October 28, 2019, p. 20.)

On July 27, 2020, Dr. Newton re-evaluated applicant.[1] He re-examined applicant and reviewed "extensive medical records." (Joint Exh. 2, Dr. Newton, July 27, 2020, p. 26.) Dr. Newton determined that applicant had reached maximum medical improvement/permanent and stationary status, and that, "There is no current disability or impairment. … The impairment rating is not indicated. On examination today, the applicant has no pain and no abnormal findings. There is no reported loss of function." (Joint Exh. 2, p. 27.)

Dr. Newton was provided additional medical records and, in his August 26, 2020, supplemental report he stated: "The additional records reviewed above do not cause me to change my opinion as noted in the 07/27/20 report." (Joint Exh. 3, Dr. Newton, August 26, 2020, p. 4.)

On October 20, 2020, Dr, Newton submitted another report wherein he stated:

> On page 10 of my report, I documented antalgic gait. This is a typographical error and should state that there is no antalgic gait. The patient had no complaints of pain and it is medically improbable that [she] had antalgic gait on 07/27/2020.
> (Joint Exh. 4, Dr. Newton, October 20, 2020, p. 2.)

Applicant was again evaluated by Dr. Newton on March 22, 2021. After re-examining applicant and taking an interim history Dr. Newton explained:

[1] Dr. Newton's deposition was taken on March 25, 2020. His testimony was consistent with his opinions as previously stated in his October 28, 2019 report. (Joint Exh. 7, Dr. Newton, March 25, 2020, deposition transcript.)

> At the time I last evaluated this applicant in 2020, she had no complaints of pain and the exam demonstrated no abnormality. At the time of today's evaluation, she has tenderness to palpation over the lumbar spine. She has decreased painful motion of the lumbar spine.
> (Joint Exh. 5, Dr. Newton, April 13, 2021, p. 18.)

He then assigned 19% whole person impairment (WPI) "with respect to the lumbar spine injuries" and stated that, "Apportionment for this injury should be based on Labor Code Section 4664 using the subtraction method to assigning apportionment." (Joint Exh. 5, p. 19.)

Dr. Newton was provided additional medical records to review, and in his April 28, 2021, supplemental report he reiterated his prior opinions that applicant had 19% WPI and that apportionment of her disability should be based on Labor Code section 4664. (Joint Exh. 6, Dr. Newton, April 28, 2021, p. 15.)

The parties proceeded to trial on September 12, 2022. They stipulated that based on the reports from Dr. Newton, applicant's permanent disability was rated at 35% prior to applying apportionment as assigned by Dr. Newton.

DISCUSSION

Pursuant to Labor Code section 4664:

> (a) 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.
> (b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.
> (Lab. Code, § 4664.)

Permanent disability is based on causation, and a defendant is liable for "the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, §§ 4663(a), 4664(a); *Ashley v. Workers' Comp. Appeals Bd.* (1995) 37 Cal.App.4th 320 [60 Cal.Comp.Cases 683].) Employers are required to compensate injured workers only for the portion of permanent disability attributable to the current industrial injury, not for the portion attributable to previous injuries or nonindustrial factors.(*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565] (*Brodie*).) Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors,

in order to fairly allocate legal responsibility. (*Ibid,* at p. 1321.) Later in the *Brodie* decision, the Supreme Court explained:

> The tables in section 4658 are for compensating the current injury only, not the totality of an injured worker's disabilities; a 30 percent disability is a 30 percent disability, not a 90 minus 60 percent disability or a 60 minus 30 percent disability. The changes wrought by Senate Bill No. 899 (2003–2004 Reg. Sess.) affect how one goes about identifying the percentage of permanent disability an employer is responsible for, but not how one calculates the compensation due for that disability once a percentage is determined.
> (*Ibid,* at p. 1332.)

Thus, we agree with the WCJ that the relief applicant seeks by her Petition "is inconsistent with Labor Code §4664 apportionment as interpreted in *Brodie.*" (Report, p. 3.)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact, Award, and Order issued by the WCJ on September 27, 2022, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 23, 2022

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

SUSAN SHROLL
LAW OFFICES OFJOSEPH E. LOUNSBURY
GOLDMAN, MAGDALIN & KRIKES, LLP

TLH/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Applicant by and through their attorney of record, filed a timely and verified Petition for Reconsideration challenging the decision issued by WCJ John Durr on September 27, 2022 alleging that the method of application in that decision of Labor Code §4664 is inequitable. This is based on the result where the applicant is not receiving the full monetary value for her current level of disability, less payments previously received for a prior award to the same body part, while working for the same employer. As the decision correctly applied Labor Code §4664 as interpreted by the holding in *Brodie v. Workers' Comp* (2007) 40 Cal.4th 1313, 57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 CCC 565, it is recommended that the petition be denied.

II
FACTS

The applicant had a prior specific industrial injury to her lumbar spine while working for the same employer on March 9, 2007 (ADJ6646185) which resulted in an Award being made on March 10, 2009 finding a level of permanent disability for the lumbar spine of 23%. This matter came on for trial in the above two captioned cases on September 12, 2022.

At the time of trial it was stipulated that in ADJ12182226; Susan Shroll, sustained injury AOE/COE to her lumbar spine as a result of a cumulative trauma ending on May 2, 2019.

The decision contained a Finding of Fact that the applicant did not suffer an industrial injury in ADJ12329585 and this was not raised as an issue in the Petition for Reconsideration. The parties further stipulated that the rating of the AME Dr. Peter Newton prior to apportionment was as follows: 15.03.02.00 - 19 - [1.4] - 27 - 340G - 30 - 35%.

III
DISCUSSION

The applicant is attempting to distinguish this case from the holding in *Brodie v. Workers' Comp* (2007) 40 Cal.4th 1313, 57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 CCC 565. In that decision, the California Supreme Court analyzed three (3) methods of applying Labor Code§4664 apportionment and held that the intent of the legislature was to allow for the subtraction of prior awards using the levels of **permanent disability** not using the subtraction of dollars.

The basis for the claimed distinction in this case is the applicant was an employee of the same employer during the entire period of the cumulative trauma including the period when the prior specific injury in ADJ6646185 occurred.

The argument being raised by the applicant is analogous to the "Method C" in the *Brodie* decision. Insofar as the apportionment of permanent disability be based on a credit for the monetary value of said prior disability. Here, due to the change in the rates, the disability was paid at a lower weekly rate for the earlier specific injury and additionally due to the logarithmic nature of the rating tables, the overall monetary value is less. The legislature enacted Labor Code §4664 which states that if an applicant has received a prior award permanent disability, it shall be conclusively presumed that the prior permanent disability exists the time of any subsequent industrial injury. The applicant's attorney pled a cumulative trauma from May 2, 1993 through May 2, 2019 but the legal date of that cumulative trauma was for a period ending on May 2, 2019 per Labor Code §5412. The prior award had issued on March 10, 2009 and is presumed that the 23% permanent disability was in existence on the legal date of the cumulative trauma, albeit, having occurred during the pendency of pled cumulative trauma.

It appears that the applicant, for all intent and purposes is arguing that any prior award that occurred during a pled cumulative trauma period should be treated merely as an advance of permanent disability despite there having entered into a prior Stipulation and receiving a 23% Award. In the conclusion in *Brodie* the Supreme Court states unequivocally:

> *In the end, the relevant portions of Senate Bill No. 899 (2003-2004 Reg. Sess.) and the history behind them reflect a clear intent to charge employers only with that percentage of permanent disability* ***directly caused*** *by the* ***current industrial injury****. The tables in section 4658 are for compensating the current injury only, not the totality of an injured worker's*

> *disabilities; a 30 percent disability is a 30 percent disability, not a 90 minus 60 percent disability or a 60 minus 30 percent disability. Brodie[581] emphasis added*

There was no petition to reopen the prior Award and the issue of the value of the permanent disability relating to that specific injury is res judicata. Failing to find any legal basis to distinguish the instant case from the holding in *Brodie,* "Method A" from that case was applied.

IV

RECOMMENDATION

It is recommended that the applicants Petition for Reconsideration be denied as the relief requested is inconsistent with Labor Code §4664 apportionment as interpreted in *Brodie v. Workers' Comp* (2007) 40 Cal.4th 1313, 57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 CCC 565.

Respectfully submitted,

DATE October 11, 2022

_____
JOHN E. DURR
Worker's Compensation Judge

Served by mail on all parties listed on the Official Address record on the above date.
BY: *NORA MARTINEZ*