# 2012 Cal. Wrk. Comp. P.D. LEXIS 327

Workers' Compensation Appeals Board (Panel Decision)

Opinion Filed July 24, 2012

W.C.A.B. No. ADJ7166686—WCJ Craig A. Glass (OXN); WCAB Panel: Deputy Commissioner Dietrich, Commissioner Sweeney, Deputy Commissioner Sullivan

**Reporter**

2012 Cal. Wrk. Comp. P.D. LEXIS 327 \*

**Richard Anderson, Applicant v. Jaguar/Landrover of Ventura, Compwest Insurance Company, Defendants**

**Status:**

 **CAUTION:** This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see Griffith v. WCAB (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see Gee v. Workers' Comp. Appeals Bd. (2002) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see Guitron v. Santa Fe Extruders (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc Opinion)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

**Disposition:**  [\*1]

Defendant's Petition for Reconsideration of the May 2, 2012 Findings and Award is *granted*, the Findings and Award is *affirmed*, except that Findings of Fact number 5 is *rescinded* and a new Findings of Fact number 5 is *substituted*, and the case is *returned* to the trial level for such further proceedings and decisions as are appropriate.

**Core Terms**

permanent disability, pre-existing, surgery, disability, stroke, apportionment, attorney's fees, shoulder, commuted, risk factor, neurological, impairment, diabetes, industrial injury, causation, factors, calculating, permanent, right shoulder, labor market, hypertension, Reduction, petition for reconsideration, total disability, claimant's, increases, workers' compensation, present value, conditions, apportion

**Headnotes**

CALIFORNIA COMPENSATION CASES HEADNOTES

**Permanent Disability—Apportionment—Non-Industrial Factors—WCAB affirmed WCJ's finding that applicant/automobile mechanic incurred**  **100 percent permanent disability as a result of industrial injuries to his brain, neurological system, vision, urological system, right shoulder, and psyche on 9/2/2008, and that there was no basis for Labor Code § 4663 apportionment of his permanent disability based upon panel Qualified Medical Evaluator's opinion that applicant, who suffered a stroke shortly after he underwent surgery for admitted industrial right shoulder injury, was predisposed to stroke by pre-existing risk factors, when WCAB found that panel Qualified Medical Evaluator's opinion did not constitute substantial evidence to justify apportionment because panel Qualified Medical Evaluator applied an incorrect legal**  [\*2] **theory by apportioning to causation of injury instead of causation of disability, that applicant's permanent total disability was caused entirely by stroke suffered as a result of medical treatment for his industrially injured right shoulder and that, although applicant's pre-existing conditions may have contributed to causation of his stroke, there was no evidence that any portion of permanent total disability caused by stroke was reasonably medically attributable to**  **those pre-existing conditions.**  [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[4]; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Chs. 7, 9.]

**Attorney's Fees—Commutation—WCAB rescinded WCJ's finding that applicant/auto mechanic's attorney was entitled to fee of $ 200,000.00 based on 4.6 percent cost of living adjustment (COLA) to be commuted from far side of applicant's permanent total disability award, and awarded attorney's fees calculated and commuted from side of award using uniform increasing reduction method with assumption of a 3 percent COLA, when WCAB found that uniform increasing reduction method of commutation was in best interests of applicant,**  [\*3] **that 4.6 percent COLA assumed by Disability Evaluation Unit in this case was speculative given current economic conditions and foreseeable state average weekly wage (SAWW) pursuant to Labor Code § 4659(c), and that, while allowing for reasonable increase over time in order to assure that attorney is fairly compensated, a 3 percent factor places more of the economic risk of hyperinflation upon attorney instead of on**  **injured worker which is appropriate since attorney obtains substantial benefit from commutation by being assured that fee that has already been earned is timely paid in full.**  [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.08[2], 20.02[1][a], 20.03, 32.04[3][b].]

**Counsel**

For applicant—Finestone, Schumaker, Cocquyt & Ongania

For defendants—Morse, Giesler, Callister & Karlin

**Opinion By:** Deputy Commissioner Rick Dietrich

**Opinion**

**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

Defendant seeks reconsideration of the May 2, 2012 Findings and Award of the workers' compensation administrative law judge (WCJ) who found that applicant incurred industrial injury to his brain, neurological system, vision, urological system, psyche and right shoulder  [\*4] while working for defendant as an automobile mechanic on September 2, 2008, causing 100% total permanent disability and need for future medical treatment. The WCJ further found that defendant was liable for the $ 1,200.00 cost of applicant's medical-legal vocational expert John Meyers, and that applicant's attorney is entitled to a reasonable fee of $ 200,000, "to be commuted from the far side of the award to the extent necessary to pay as one lump sum."

Defendant contends that applicant's permanent disability should have been apportioned to non-industrial factors, that it should not have been found liable for Mr. Meyer's fee and that the award of applicant's attorney's fees is in error because there is no "far side of the award" in a 100% permanent disability case and the 4.6% cost of living adjustment (COLA) assumed by the Disability Evaluation Unit (DEU) in calculating the present value of the permanent disability award is speculative, too high and not in applicant's best interest because it could result in reduced permanent disability payments if the assumed COLA of 4.6% exceeds the "SAWW" adjustment to applicant's life pension. [[1]](#footnote-1)1 An answer was received and the WCJ provided a Report  [\*5] and Recommendation on Petition for Reconsideration (Report) in which he acknowledges that the reference to the "far side of the award" in the decision is a clerical error that should be corrected and that his intended finding was to commute the attorney's fee from the "side of the award," but that his decision should otherwise be affirmed.

We have carefully reviewed the record and considered the  [\*6] allegations of defendant's petition for reconsideration and the WCJ's Report with respect thereto. For the reasons stated by the WCJ in his Report, which is incorporated by this reference, and for the reasons below, we affirm the WCJ's finding of total permanent disability and his award of the expert witness fee, but amend the finding and award of attorney's fees to provide for their calculation and commutation from the side of the award using the Uniform Increasing Reduction Method with the assumption of a 3% COLA.

**BACKGROUND**

Applicant admittedly incurred industrial injury to his right shoulder while working for defendant as an automobile mechanic on September 2, 2008. On December 19, 2008, applicant underwent shoulder surgery as part of the medical treatment of his injured shoulder. Shortly after the surgery he suffered a stroke. Defendant does not dispute that applicant has a "100% loss of future earnings capacity" as a result of his current permanent disability, but argues that there is a basis for apportionment because applicant had diabetes and other "pre-existing risk factors" before he incurred the industrial injury. [[2]](#footnote-2)2Defendant's argument for apportionment relies primarily upon  [\*7] the opinions expressed by the parties' Panel Qualified Medical Examiner (PQME) Martin Krell, M.D. In his permanent and stationary report dated June 10, 2010, Dr. Krell described the results of his examination that date and offered the following opinion on page 9 regarding applicant's disability: "This claimant cannot be expected to perform gainful employment and is unable to compete in the open labor market." With regard to causation of applicant's permanent disability, the physician affirmed his earlier opinion on page 10 of the June 10, 2010 report as follows:

"As stated in my Qualified Medical Review of Medical Records and Neurosurgical Report of 06/01/2009, *the operative procedure of 12/19/2009 is considered a probable causal factor for this claimant's residual neurological injury*. Many events that occur within 24 hours of the pen-operative period following surgery are considered to have a causal relationship to the surgery. *Since the right shoulder arthroscopic procedure was an indicated operation to treat an accepted industrial injury, the complication of this claimant's right cerebral infarction with left hemiparesis and 50% loss of vision is considered to be the responsible  [\*8] result of his claimed industrial*  *injury."* (Emphasis added.)

Although Dr. Krell recognized in his June 10, 2010 report that applicant's total permanent disability resulted from the stroke he suffered because of the surgery on his industrially injured shoulder, he wrote that there was a basis for apportionment, as follows:

"In view of this claimant having rather severe diabetes that has required bilateral panretinal photocoagulation for diabetic retinopathy and requiring an insulin pump, having developed a sudden right central visual loss while skiing in Big Bear on 03/08/2004, experiencing recurrent headaches treated with medication including Imitrex as reported on 08/26/2004 in neurological  [\*9] consultation and having two episodes of loss of memory related to his diabetic and insulin-dependent condition as reported on 07/26/1996, **apportionment is indicated and appropriate.** In addition, this claimant has a 25-year smoking history with hypertension and hyperlipidemia. These factors would render him significantly vulnerable to sustain a cerebrovascular infarction. (Life insurance actural [*sic*] analysis would most likely support this conclusion.)

"I therefore apportion **40%** of this claimant's residual neurological disability to this claimant's pre-existing comorbidity medical factors as described. I apportion the remaining **60%** of this man's residual neurological disability to the claimed industrial injury and subsequent shoulder arthroscopic surgery." (Emphasis in original.)

Dr. Krell continued to opine in his subsequent reporting that applicant's total permanent disability was caused by the stroke he suffered as a result of the shoulder surgery, but also continued to state that there is a basis for apportionment of the permanent disability to non-industrial factors because of applicant's pre-existing diabetes, hypertension, hyperlipidemia and history of smoking. Dr. Krell was asked  [\*10] about applicant's pre-existing conditions and the causation of his permanent disability during his November 22, 2010 deposition. After affirming his June 10, 2010 opinion that a portion of applicant's permanent disability should be attributed to pre-existing "comorbidity medical factors," the following exchange occurred:

"Q Now, I'd like to go over with you what are the preexisting comorbidity medical factors described. Are those under 'Diagnoses' on page 8 of your report?

Specifically, the 'insulin-dependent diabetes mellitus, preexisting history of hypertension, 25 years smoking history, and hyperlipidemia'"?

A Yes.

Q Now, those factors that preexisted the industrial injury, the insulin-dependent diabetes, the hypertension, the smoking history, and the hyperlipidemia, are those risk factors for development of a cerebral infarction?

A Yes. He was also symptomatic as described on page 10 under 'Apportionment,' prior to his surgical procedure….

*Q Prior to the industrial injury of September 2, 2008, to the shoulder and the resulting surgery for the shoulder, did Mr. Anderson have any rateable disability in regard to his diabetes, hypertension, or hyperlipidemia?*

*A I don't believe so*.

Q *Did  [\*11] the neurological disability—* *was the neurological disability that he has now, the episodic loss of consciousness and awareness, the mental status impairment requiring assistance, and supervision for most activities of daily living, did those factors of disability exist prior to the surgery for the shoulder?*

*A I don't believe so*, except for a report in the medical records that he had two episodes of loss of memory related to his diabetic and insulin-dependent condition as reported on 7–26–1996.

Q What is the likely memory loss back—it was transient back In 1976 related—

A '96.

*Q '96, related to diabetes? Is that some type of a neurological permanent impairment at that time or is that some type of a transient symptom related to blood sugar level?*

*A The latter…*

Q Wouldn't it be correct to say that Mr. Anderson's permanent disability neurologically has been precipitated to occur sooner than otherwise would have occurred by the industrial injury?

Or stated another way: *Isn't it speculative as to whether Mr. Anderson would have the rateable neurological impairment at this time had he not had the injury to his shoulder and resulting surgery?*

*A I think you could say that*. But on the other hand, he  [\*12] was a set-up to have this event.

Q He had preexisting risk factors, several, didn't he?

A Yes. And I think I -even though I'm not an actuary expert, I did make a statement that a life insurance actuary analysis would most likely support this conclusion, that this man had significant risk factors and that there was a 'there was an increased likelihood that he would not have a normal life span.

*Q It's speculative as to when the preexisting risk factors by themselves without the stress of the surgery for the shoulder would ever have* - *would have become symptomatic and labor disabling by the time of your examination, had he not had the surgery?*

*A Correct..*.

*Q Okay. His preexisting diabetes didn't impair his ability to compete in the labor market, did it, Doctor?*

*A I don't* *believe so. And I think he would not have an impairment to compete in the labor market*.

*Q And his hypertension that he had prior to the industrial injury didn't impair his ability to compete in the open labor market, did it, Doctor?*

*A No. There's people that compete in the labor market including lawyers and neurosurgeon that have hypertension*.

*Q So to answer the question, hypertension didn't limit his ability to compete in the  [\*13] open labor market, did it, Doctor?*

*A No. "* (Emphasis added.)

During his subsequent September 7, 2011 deposition Dr. Krell reiterated his opinion that, "this is *not a case where a stroke was imminent and could have very easily occurred or would have occurred* *without him undergoing a surgical procedure* with a high probability," and in his supplemental report dated January 19, 2012, Dr. Krell confirmed, "that it is medically probable that *in* *the absence of this industrial cerebrovascular accident, Mr. Anderson would not have had a neurological impairment* of his ability to work and of his earning capacity." (Emphasis added.)

In sum, Dr. Krell opined that applicant's stroke was caused by the shoulder surgery, but that pre-existing risk factors predisposed him to have the stroke. Indeed, Dr. Krell opined that applicant should not have undergone outpatient surgery on his shoulder because of his pre-existing conditions, writing on page 8 of his June 1, 2009 report as follows:

"1. This patient should not have undergone elective arthroscopic shoulder surgery in an outpatient facility because he is a brittle diabetic and should have been under the constant supervision by a qualified internist who  [\*14] understands and can monitor a diabetic condition during surgery.

2. When this patient was noted by anesthesiology to have a blood sugar of 400, his elective arthroscopic procedure should have been canceled. His shoulder operation should have been performed in a hospital setting where the patient could have been monitored closely during and following the procedure in terms of blood sugar and blood pressure control…

4. In addition, the post operative injection that this man received into the right side of his neck at the level of the cricoid cartilage is very close or adjacent to the carotid artery. There is a potential possibility that the wall of the carotid artery could have been punctured causing dislodgment of a plaque resulting in a thrombus and embolus migrating and occluding the middle cerebral artery causing an infarction. During his hospitalization the patient apparently did not have an MRA scan or carotid angiogram that may have visualized the artery on the right." [[3]](#footnote-3)3

**DISCUSSION**

Dr. Krell's reporting does not support apportionment of applicant's permanent disability to non-industrial factors. When the Legislature in SB 899 repealed former Labor Code sections 4663, 4750, and 4750.5  [\*15] without a savings clause, and substituted in their places a new Labor Code section 4663 and Labor Code section 4664, it made clear that apportionment is to be based upon causation of disability and not causation of injury. [[4]](#footnote-4)4

"[T]he new approach to apportionment is to look at the current disability  [\*16] 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, 1321 [72 Cal.Comp.Cases 565].)

It is apparent from his reporting in this case that Dr. Krell confuses causation of injury with causation of disability in offering an apportionment opinion. While it may be that applicant had pre-existing risk factors that predisposed him to suffer a stroke, Dr. Krell repeatedly confirmed in his reporting and during his deposition that applicant had no pre-existing permanent disability because of those risk factors. He further confirmed that applicant's total permanent disability was caused entirely by the effects of the stroke he suffered as a result of the surgical medical treatment of his admitted industrial injury, but he *never* opined with reasonable medical probability that the permanent disability caused by the stroke was in any way increased because of those pre-existing nonindustrial risk factors. (See, *United Airlines v*. *Workers' Comp. Appeals Bd*. (*Milivojevich*) (2007) 72 Cal.Comp.Cases 1415 (writ den.) [improper to apportion  [\*17] part of permanent disability caused by industrial stroke injury to applicant's pre-existing high cholesterol stroke risk factor].)

In short, applicant's pre-existing conditions may have contributed to the causation of his stroke injury, but there is no evidence that any portion of the total permanent disability caused by the stroke is reasonably medically attributable to those pre-existing conditions.

Applicant's total permanent disability was caused entirely by the stroke he suffered as a result of the medical treatment of his industrially injured right shoulder, and no portion is attributable to his pre-existing conditions. Thus, there is no basis for apportionment as opined by Dr. Krell who followed an incorrect legal theory by apportioning to causation of injury instead of causation of disability. To be substantial evidence on the issue of apportionment, a medical opinion "must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion." (*E.L. Yeager Constr. v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 992 [71 Cal.Comp.Cases 1687.) Here, Dr. Krell based his  [\*18] opinions on apportionment upon an incorrect legal theory. A medical opinion based upon an incorrect legal theory is not substantial medical evidence. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525].)

Turning to the issue of applicant's attorney's fees, we conclude that the award of fees needs to be recalculated. We agree that an attorney's fee of 15% of the total permanent disability indemnity award is reasonable in this case of above-average complexity that involves significant disputed issues and a seriously injured client. [[5]](#footnote-5)5

(See e.g., *Robert G. Beloud. Inc. v* *Workers' Comp. Appeals Bd*. (*Leinweber*) (1975) 50 Cal.App.3d 729, 737 [40 Cal.Comp.Cases 505]; *Bentley v*. *Industrial Acc. Com*. (*Martin*) (1946) 75 Cal.App.2d 547 [11 Cal.Comp.Cases 204].)

However, we reach a different conclusion as to the method of commutation and the COLA that should apply. As to the method of commutation, we find that the Uniformly Increasing Reduction method is appropriate in this  [\*19] case. This method allows for increases in the amount taken weekly from the side of the award over applicant's lifetime. This approach lessens the impact of the initial reductions and allows for increasing deductions as applicant's bi-weekly benefit increases over time because of annual SAWW adjustments pursuant to section 4659(c).

With regard to the calculation of the present value of the total permanent disability indemnity award for purposes of determining the attorney fee, we recognize that the actual amount of future SAWW increases is unknown. This presents a problem if the predicted average future SAWW is less than the actual SAWW in any given year because the employee's commuted bi-weekly benefits for that year will have been disproportionately reduced to accommodate the commuted attorney's fee. Moreover, the disproportionate reduction may be exaggerated in following years because the assumed average future COLA compounds. Of course, there may be years where the actual annual SAWW will be greater than the COLA that is assumed in calculating the amount of the commuted attorney's fee. Thus, it is important to carefully consider the factor used to calculate future COLA increases  [\*20] in determining the present value of the permanent disability award for purposes of commuting the attorney's fee.

The 4.6% COLA the DEU applied in this case appears to be based upon the average annual SAWW increase over the prior 50 years. In the absence of a request by the WCJ or the parties to use a different percentage, the DEU uses that figure as an annual COLA in calculating the present value of an award of permanent disability indemnity for the purpose of determining the amount of a commuted attorney's fee. Prior decisions of the Appeals Board have endorsed use of this average to determine present value. (See e.g. *Bacha v. State of California* (2009) 2009 Cal.Wrk.Comp. P.D. LEXIS 613 (Appeals Board panel); *Pan v*. *State of California* (2007) 2007 Cal.Wrk.Comp. P.D. LEXIS 227 (Appeals Board panel) *(Pan); Munoz v*. *Barrocas Construction* (2007) 2007 Cal.Wrk.Comp. P.D. LEXIS 197 (Appeals Board panel).) As the panel wrote in *Pan:*

"Where life expectancies are used for purposes of establishing the present value of an award, and in order to comply with Labor Code section 4659(c), some type of formula or approach is necessary to establish a percentage figure for purposes of the statewide weekly  [\*21] wages factor, because the statute in fact requires that an injured worker's 100% permanent disability indemnity rate will be continually adjusted in the future." *(Pan, supra*, 2007 Cal.Wrk.Comp. P.D. LEXIS 227, at pp. 6–7.)

Although the panel in *Pan* concluded that the 4.7% SAWW average used by the DEU in that case was a "rational and reasonable" rate, it is important to note that use of this figure for the purpose of calculating the amount of a commuted attorney's fee has not been established by regulation or statute and it came into existence only as a result of an effort by the DEU to informally establish a reasonable estimated average future COLA that can be used state-wide in permanent total disability and life pension cases without delaying resolution of those cases, and without flooding the WCAB with litigation over the issue. While these goals are laudable, they are not the only factors we consider in addressing this issue.

The 4.6% average future COLA used in this case is predicated on the assumption that the average annual increase in the SAWW over the preceding 50 years fairly reflects the rate of future increases. However, the percentage increase in the SAWW has almost uniformly  [\*22] been less than 4.6% during the seven years from 2004 through 2011. The only year during that span in which the SAWW increased by more than 4.6% was 2007, which saw a 4.96% increase. However, the percentage increases of the SAWW for the years 2005, 2006, 2008, 2009 and 2010 were, respectively, 1.97%, 4.01%, 3.93%, 4.55% and 2.99%. Moreover, the years 2004 and 2011 had no increase in the SAWW. Thus, the average increase over that span of time is less than 4.6%. We also believe it is reasonable in light of current economic conditions to anticipate that the average SAWW increase over the foreseeable future will also be less than 4.6%. For these reasons, we decline to adopt the DEU figure of 4.6% as a COLA factor in this case.

In considering the factor that should be used in this case, we conclude that a COLA of 3% is rational and reasonable in light of the above-described concerns. While allowing for reasonable increases over time in order to assure that the attorney is fairly compensated, a 3% factor places more of the economic risk of hyperinflation upon the attorney, instead of upon the injured worker. This is both appropriate and reasonable because the attorney obtains substantial benefit  [\*23] from the commutation by being assured that the fee that has already been earned is timely paid in full.

The May 2, 2012 Findings and Award of the WCJ is affirmed, except that applicant's attorney's fee is to be commuted using the Uniformly Increasing Reduction Method and a 3% COLA, to be adjusted by the parties with jurisdiction reserved.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the May 2, 2012 Findings and Award of the workers' compensation administrative law judge is **GRANTED.**

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Appeals Board that the May 2, 2012 Findings and Award of the workers' compensation administrative law judge is **AFFIRMED,** except that Findings of Fact number 5 is **RESCINDED,** and the following is **SUBSTITUTED** in its place:

**FINDINGS OF FACT**

\*\*\*\*

5. The reasonable value of the services and disbursements of applicant's attorney is 15% of the permanent disability indemnity awarded, to be commuted using the Uniformly Increasing Reduction Method with a 3% annual cost of living adjustment through the award, all in an amount to be adjusted by the parties with jurisdiction reserved at the trial level.

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**IT IS FURTHER**  [\*24] **ORDERED** as the Decision After Reconsideration of the Appeals Board that the case is **RETURNED** to the trial level for such further proceedings and decisions by the workers' compensation administrative law judge in accordance with this decision as appropriate.

WORKERS' COMPENSATION APPEALS BOARD

Deputy Commissioner Rick Dietrich

I concur,

Commissioner Marguerite Sweeney

Deputy Commissioner Neil P. Sullivan

**\* \* \* \* \***

***REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION***

***I***

***INTRODUCTION***

1. Date of Injury: 9/2/08

2. Occupation: Automobile mechanic

3. Date of birth: 7/15/62

4. Parts of Body Allegedly Injured: Brain, neurological system, vision, urological system, psyche, and right shoulder

5. Manner in which injuries occurred: Shoulder injury; stroke resulting from surgical repair

6. Identity of Petitioner: **Defendant** filed the Petition

7. Timeliness: The petition was **timely** filed.

8. Verification: A verification is attached to the Petition

9. Date of issuance of Order: 5/2/12

***II***

***PETITIONERS' CONTENTIONS:***

Petitioner contends that: (1) the Court should have apportioned permanent Disability (impairment) to "risk factors"; (2) the Court cannot find that a catastrophic injury cause, in, in and of itself, a total  [\*25] and permanent disability (impairment); (3) defendant should not have to reimburse applicant for his Vocational Expert's reporting and testimony; and, (4) the Court incorrectly calculated and awarded attorney fees.

***III***

***FACTS***

Applicant, Richard A. Anderson, born 7/15/62, while employed as an automobile mechanic on 9/2/08 by Jaguar/Landrover of Ventura, insured by Comp West Insurance Company, sustained injury arising out of and in the course of his employment to his brain, neurological system, vision, urological system, psyche, and right shoulder.

At the time of the injury, applicant's earnings were $ 1,060.65 per week, warranting a temporary disability indemnity rate of $ 707.10 per week.

Applicant suffered an injury at work on 9/2/08, requiring surgery to his right shoulder. Applicant had surgery to his right shoulder on 12/19/08. Within hours of the surgery, applicant suffered a catastrophic severe cerebral infarction (stroke).

Applicant currently resides in an assisted living facility and is totally and permanently disabled.

The parties stipulated that applicant's condition became permanent and stationary (MMI) on 11/19/10.

Applicant testified on his own behalf.

His testimony was not deemed  [\*26] useful as he could not remember questions sufficiently to answer properly nor could he recall events sufficiently to render useful information.

John Meyers, a Vocational Rehabilitation expert, testified on behalf of the applicant. His testimony was substantially that applicant is totally and permanently disabled and unable to earn any monies in the labor market.

All of the medical exhibits offered by the parties were "joint exhibits" (to the extent they were actually offered).

The doctors agree, in total, that the applicant is permanently and totally disabled and is unable to earn monies in the labor market.

The principal issue presented to the Court is whether apportionment applies as to applicant's impairment/diminished earning capacity.

A Findings and Award favorable to applicant issued on 5/2/12.

It is from these Findings and Award that defendant Jaguar/Landrover of Ventura, insured by Comp West Insurance Company, files its Petition for Reconsideration.

***IV***

***DISCUSSION***

Petitioner's primary premise appears to be that apportionment to "risk factors" should be made.

There is no basis for this in law or fact for this position. This "test" might lead the WCAB to consider such "risk factors" as  [\*27] crossing a road or walking in "high heels" in determining permanent disability. This should not be allowed.

Petitioner next points to the apportionment as determined by Dr. Krell in his reporting and, more directly in his deposition testimony (See Exhibit "O").

Dr. Krell finds 20% whole person impairment to applicant's pre-existing "paroxysmal disorders". This rare disorder which apparently begins in childhood was diagnosed by Dr. Krell in applicant as an adult. There is no evidence in the file that applicant had such a lifelong disease. In any event, he appears to identify it (them) as more a "risk factor" than pre-existing impairment.

The Court is of the opinion that the catastrophic stroke was, in and of itself, a totally disabling injury. Citing a case tried by the former firm of the undersigned (***Baias v. WCAB*** (1990) 266 Cal.Comp.Cases 103), this Court noted that the Court of Appeal determined an otherwise totally disabled person could suffer a total disability arising out of employment. Here, Petitioner's infers that applicant was, previous to the catastrophic stroke, not totally disabled, just a little disabled (impaired) "here and there".

The current Labor Code refers to "causation".  [\*28] There is no dispute as to "causation" here. The stroke was caused by the surgery. The surgery was necessary because of the admitted industrial injury. It would be pure speculation to find that applicant would have suffered this catastrophic stroke without the surgery having been performed.

Petitioner actually appears to reference "overlap". With no evidence offered as to this issue, it was not considered by the Court. Petitioner failed to meet its burden as to the issue of "overlap".

It should also be noted that the AME in psychiatry, John Stalberg, M.D., finds the applicant to be permanently and totally disabled and unable to work in any capacity. The Court agrees with Dr. Stalberg.

Applicant called as a witness a vocational expert, John Meyers.

The Court found the experts testimony useful as to applicant's current condition and his (diminished) earning capacity. Clearly, based on applicant's need to live in an assisted living facility, the Court's observation of the applicant, and the expert testimony of Mr. Meyers, there is no doubt that applicant is completely and totally disabled.

The Court also notes that Mr. Meyers set forth testimony as to applicant's prior work capacity and employment,  [\*29] testimony that applicant can no longer give, in a cogent and well organized fashion. His billing of $ 1,200.00 appeared reasonable for the work done and information provided. The Court gave great consideration as to the applicant's attorney fee. This matter involves a much litigated case with substantial risks and a great amount of money involved.

While the Court does not find the issues presented to be complex, Petitioner chose to present and defend the case as complex. The applicant was fortunate to have a skilled attorney represent him as to the issues presented and the fee awarded has been well earned.

The Court did not award 15% of all monies that *may* become due to applicant, but instead had the numbers calculated by the Disability Evaluation Unit to determine a maximum value in making a determination, based on this information.

Petitioner is correct in that the fee should have been awarded from the "side" of the Award and using a "uniform reduction" of benefits to pay the fee. This clerical error should be corrected.

***V***

***RECOMMENDATION***

For the reasons stated above, the award of attorney fees should be corrected due to clerical error to read that applicant's attorney is to be paid an  [\*30] attorney fee of $ 200,000.00, in one lump sum, from the "side" of applicant's award, using the "uniform reduction of benefits" to pay these monies. As to the remaining issues, it is respectfully recommended that the Petition for Reconsideration filed by defendant the Boeing Company, permissibly self-insured, and adjusted by Sedgwick CMS, be **denied.**

Craig A. Glass

Workers' Compensation Administrative Law Judge

Dated: June 5, 2012

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1. 1"SAWW" refers to "state average weekly wage" as described in section 4659(c), which provides in pertinent part as follows: "For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension.. *.shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the 'state average weekly wage' as compared to the prior year*. For purposes of this subdivision, 'state average weekly wage' means the average weekly wage paid by employers to employees covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred." (Emphasis added.) [↑](#footnote-ref-1)
2. 2Quotations are from defendant's Petition For Reconsideration. In the petition defendant argues that it offered before trial to stipulate that applicant incurred "100% loss of future earnings capacity" and for that reason Mr. Meyers testimony was unnecessary and defendant should not be obligated to pay his fee. Regardless of any stipulation defendant may have offered before trial, we agree with the WCJ that Mr. Meyer's services were reasonably required and that the award of his fee is appropriate. [↑](#footnote-ref-2)
3. 3Even if applicant's stroke was said to be caused by medical malpractice, our conclusion that there is not a basis for apportionment would be the same bacause the stroke that caused applicant's total permanently disability was incurred in connection with the medical treatment of applicant's admitted industrial injury. (See e.g, *Laines v. Workers' Comp. Appeals Bd.* (1975) 48 Cal. App. 3d 872 [40 Cal. Comp. Cases 365] [injuries sustained in vehicle collision while traveling to treatment for industrial injury is compensable]; *Ballard v. Workers' Comp. Appeals Bd.* (1971) 3 Cal.3d 832 [36 Cal. Comp. Cases 34] [drug addiction caused by medication prescribed for industrial injury is compensable injury].) [↑](#footnote-ref-3)
4. 4Further statutory references are to the Labor Code. Section 4663(a) provides in full as follows: "Apportionment of permanent disability shall be based on causation." Section 4664(a) provides in full as follows: "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."

"Section 4663(a)'s statement that the apportionment of permanent disability shall be based on 'causation' refers to the causation of the permanent disability, not causation of the injury, and the analysis of the causal factors of permanent disability for purposes of apportionment may be different from the analysis of the causal factors of the injury itself…" (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc); cf. *Reyes v*. *Hart Plastering* (2005) 70 Cal.Comp.Cases 223 (significant panel decision).) [↑](#footnote-ref-4)
5. 5The WCJ indicates in his Report that 15% of the permanent disability indemnity due is a reasonable fee, and we agree. [↑](#footnote-ref-5)