

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

ALBERT CONTRERAS, *Applicant*

vs.

**STATE OF CALIFORNIA DEPARTMENT OF MOTOR VEHICLES, legally uninsured,
administered by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ3925432 (RIV 0019858); ADJ10116368;
ADJ4645800 (RIV 0019859); ADJ4602694 (RIV 0019856); ADJ1080115 (RIV 0019855);
ADJ3961337 (RIV 0019857); ADJ414165 (RIV 0007997)
Riverside District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant Alberto Contreras filed a Petition for Reconsideration¹ from the April 17, 2019 Findings and Awards and Findings and Orders, issued in seven open cases, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a license and registration examiner by the California Department of Motor Vehicles, sustained industrial injuries to his bilateral knees, lumbar spine, neck, and bilateral shoulders, on January 26, 1995, October 16, 1995, August 22, 1996, August 25, 1997, January 7, 1998, and cumulatively over the period 1987 through January 7, 1998. The WCJ found applicant sustained 30% permanent disability, after apportionment, from his cumulative trauma injury to his bilateral knees and lumbar spine in ADJ3925432, 23% permanent disability, after apportionment, for his January 7, 1998 left knee injury in ADJ1080115, and 19% permanent disability for his October 16, 1995 injury to his

¹ We note that applicant has attached a non-citable consultative rating to the Petition for Reconsideration in violation of WCAB Rule 10945(c), which prohibits the attachment of any documents that have been received in evidence or are part of the adjudication file. Parenthetically, the consultative rating of Dr. Akmakjian's reports specifically omits his apportionment. Further, applicant's attorney has not included his State Bar number on the Petition for Reconsideration, as required by WCAB Rule 10520.

neck, shoulders and low back in ADJ4645800. The WCJ found applicant sustained no permanent disability arising from the injuries found in ADJ4602694, ADJ414165, and ADJ10116368. The WCJ made no finding in ADJ3961337, for a claimed August 1, 1997 injury to applicant's bilateral knees, and ordered the matter off calendar pending further development of the medical record.

Applicant contests the WCJ's separate awards of permanent disability, contending that he is entitled to a single award of 100% permanent disability for all of his industrial injuries. Applicant argues that because the medical evaluators found him to be permanently totally disabled as a consequence of his several injuries, the disability ratings for his injuries should be added together using the Multiple Disabilities Table (MDT)², as provided in *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213, due to the synergistic effects of his injuries. Applicant further argues, per *Dileva v. Northrop Grumman Systems Corp.* 2015 Cal. Work. Comp. PD Lexis, his is entitled to a single joint award, without regard to apportionment, because his injuries are "inextricably intertwined."

We have not received an answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations and arguments of the Petition for Reconsideration, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of May 22, 2019, which considers, and responds to, each of the applicant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's final determinations in each of these matters.

Applicant has failed to present cogent arguments for the relief he seeks. Applicant seeks a joint award of permanent total disability despite the substantial medical evidence in the record that supports the separate awards of permanent disability, apportioned both to non-industrial factors and between his several industrial injuries.

In order to prevail on his theory that the medical evidence justifies a single award of permanent total disability, applicant must present evidence that the apportionment of disability

² The MDT, rather than the Combined Values Chart, is applicable here based on the dates of injury.

between the several dates of injury was in error because his separate injuries are “inextricably intertwined.”³

In *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535 [74 Cal. Comp. Cases 113, the court held that under Labor Code section 4663 and 4664, separate awards are required for each distinct injury that causes permanent disability. The court recognized that there may be limited circumstances where a combined award of permanent disability is appropriate.

We also agree that there may be limited circumstances, not present here, when 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. 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. (See § 4663, subd. (c); *Kopping v. Workers' Comp. Appeals Bd.*, *supra*, 142 Cal.App.4th at p. 1115 [“the burden of proving apportionment falls on the employer because it is the employer that benefits from apportionment”].) (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560.)

The *Dileva* case upon which applicant relies is not applicable here. In that case, a single joint award was found appropriate where one of the medical examiners was unable to apportion disability between the injured worker's three dates of injury, finding the combined psychiatric effects of the separate injuries were “inextricably intertwined.” This is the argument applicant asserts, but applicant fails to cite to any medical evidence that a physician was unable to parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to his overall permanent disability. In fact, the Agreed Medical Examiner, Dr. Akmakjian, set out apportionment findings in detail in his May 18, 2012 report. (Jt. Ex. 1, pages 2-4.) Nowhere in his petition does applicant contend the AME's apportionment determination is not substantial medical evidence, or cite to any medical opinion that applicant's separate injuries were “inextricably intertwined,” to support a single joint award.

Additionally, applicant asserts that the rating of the disability to his separate body parts should be added together to reach 100%, rather than use the MDT to combine them, as provided in *Kite*. This approach is unavailing due to the absence of any citation to a medical finding stating this method would capture more accurately the extent of applicant's permanent disability.

³ Applicant does not raise any contention under *LeBoeuf* that he has rebutted the scheduled permanent disability rating, and there is no vocational evidence in the record addressing applicant's amenability to vocational rehabilitation.

Accordingly, we will affirm the WCJ's determinations.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Orders issued in Case Numbers ADJ3925432; ADJ10116368; ADJ4645800; ADJ4602694; ADJ1080115; ADJ3961337; and ADJ414165 on April 17, 2019 are **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 18, 2021

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

**ALBERT CONTRERAS
LAW OFFICES OF D. MICHAEL CARUTHERS
STATE COMPENSATION INSURANCE FUND**

SV/pc

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

**REPORT & RECOMMENDATION OF JUDGE ON PETITION FOR
RECONSIDERATION**

INTRODUCTION

Petitioner Alberto Contreras filed a timely, verified Petition for Reconsideration ("Petition") asserting that by the 4 / 1 7 / 19 Findings, Awards and Orders, the appeals board violated LC 5903 (a) by acting without or in excess of its powers; (c) in that the evidence does not justify the findings of fact; and (e) in that the findings of fact do not support the order, decision, or award.

CONTENTIONS

THAT the medical record supports finding a single award of total, permanent disability.

THAT in the alternative, in the event of finding less than total disability, the ratings should be added, not calculated using the Multiple Disability Table.

FACTS

Alberto Contreras worked for the California Department of Motor Vehicles (DMV) as a licensing and registration examiner from January, 1987 to January, 1998. During that time, he sustained seven injuries:

1/26/95 right knee twisting injury getting in/out of a car (ADJ10116368).

10/16/95 neck/shoulders/low back injury grabbing a falling customer (ADJ4645800).

8/22/96 right knee injury while kneeling (ADJ414565).

8/1/97 right and left knee injury against a dashboard (ADJ3961337).

8/25/97 right and left knee injury climbing on a crane (ADJ4602694).

1/7/98 left knee injury climbing up and down from a food truck (ADJ1080115).

1/26/87-1/7/98 knees and low back from cumulative trauma (ADJ3961337).

Before working for the DMV, applicant had surgery on his left knee once and his right knee twice.

His right knee was replaced on 11/ 11/96. His left knee was replaced on 1/25/99 and revision was performed on 8/29/09.

Jacob Rabinovich, MD, performed an orthopedic evaluation 4/ 19/05, finding him permanently totally disabled due to his neck, shoulders, back and knees. He had no medical records. He apportioned 10% of the knees to the pre-DMV injuries. He did not explain what percentage of the total disability the knees represent. He did not state how much disability was allotted to each injury, or that he could not parcel that out. Joint Exhibit 11.

The parties selected Jack Akmakjian, MD, as agreed medical evaluator in orthopedics. His first exam was in 2007, and Mr. Contreras was still permanent and stationary in 2011. Joint Exhibits 4, 2. In a supplemental report dated 4 / 18/ 12, the AME allocated disability among four injuries, and gave detailed apportionment. Joint Exhibit 1. In a deposition in 2013, he agreed that the applicant could not be gainfully employed. He did not discuss causation of the total disability. Joint Exhibit 26. In his deposition in 2015, the AME described work restrictions for the neck, shoulders and low back. He gave 40% non-industrial apportionment to the right knee and 33% to the left. Joint Exhibit 25.

The issues were framed at trial on 10/ 10/ 18. For all dates of injury, permanent disability, apportionment and attorney's fee were framed. In addition, injury to the neck, shoulders, thoracic and lumbar spine were framed for the cumulative injury case (ADJ3925432). "As to all of the cases set for trial herein, issues relating to SIBTF are deferred." Minutes of Hearing 10/ 10/ 18, page 5, lines 20-21.

Findings, Awards and Orders issued in accordance with the AME.

DISCUSSION

A. Medical evidence does not support an exception to Benson.

Petitioner argues that both Dr. Akmakjian and Dr. Rabinovich find applicant is unable to work and is totally disabled. He further argues that because of the "constellation of the injuries and the numerous aggravating injuries at work", "the adverse effect of one body part injury upon the other" make it appropriate to find the injuries are "inextricably intertwined" and the whole disability should be assigned to cumulative trauma. The petition does not cite a medical opinion for this assignment.

What is missing in the Petition's argument is a medical opinion that the injuries are inextricably intertwined. A medical opinion to that effect is required for a judge to combine the disability from multiple injuries into a single award. Without a credible, substantial medical opinion, the Petition impermissibly asks the WCJ to substitute her own judgment for that of medical experts.

In *Benson v. WCAB* (2009) 170 Cal. App. 4th 1535, 74 Cal. Comp. Cases 113, 133, the Court of Appeal upheld an en banc decision of the WCAB. "We agree with the Board that a system of apportionment based on causation requires that each distinct industrial injury be separately compensated based on its individual contribution to a permanent disability. We also agree that there may be limited circumstances, not present here, when 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."

Petitioner's reliance on *Northrup Grumman Systems Corp. v WCAB (Dileva)* (2015) 80 Cal. Comp. Cases 749, 2015 Cal. Wrk. Comp. P.D. LEXIS 78 is misplaced. In that case, the orthopedist apportioned disability among the injuries, and the psychiatrist could not, saying instead that the effects were "inexplicably intertwined." Based on the latter, the WCJ gave a single combined disability, which was upheld. The finding and award had a medical basis.

In the cases herein, AME Akmakjian was able to apportion causation of disability to successive injuries, as stated in his 4/ 18/ 12 report and his 2015 deposition. His agreement that applicant cannot work does not change his other opinions. It did not involve any discussion of apportion such as us required for an opinion on permanent disability.

No physician has said that the injuries are inextricably intertwined, compelling a single award. Even if a doctor had found the injuries were inextricably intertwined, no doctor has discussed apportionment of a 100% award. Even if a doctor were unable to parcel out injuries, he could-and must-discuss the non-industrial apportionment of a combined rating. For example, in this case, the greatest disability comes from the knees, and 1/3 to 2/5 of the knee disability is apportioned to pre-existing non-industrial occurrences. This assures that there should be apportionment to non-industrial factors for an award combining the knees and lesser factors of disability. Petitioner acknowledges this at page xi, lines 22-23. There is no medical opinion or discussion of apportionment of a combined 100% rating.

B. No medical opinion supports the accuracy of addition over using the Multiple Disability Table.

Petitioner seeks to use a method other than the Multiple Disability Table for combining various disabilities. In *Athens Administrators v. WCAB (Kite)* (2013) 78 Cal. Comp. Cases 213, 2013 Cal. Wrk. Comp. P.D. LEXIS 34, a more recent date of injury, it was found that the scheduled impairment rating is rebuttable, and that the PQME's opinion that the impairment from injuries to both hips was most accurately achieved by simple addition instead of using the Combined Values Chart.

If a doctor had given such an opinion herein, the rating instructions could have so noted. The medical support to rebut the CVC was not found in this case.

RECOMMENDATION

That the Petition for Reconsideration be denied.

DATED 5/22/19 AT RIVERSIDE, CA
CHRIS ELLEN WILLMON
WORKERS' COMPENSATION ADMINISTRATIVE LAW JUDGE