WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CHRISTINE SPERRY, *Applicant*

vs.

SAN DIEGO UNIFIED PORT DISTRICT;
AMERICAN HOME ASSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ11046834
San Diego District Office

OPINION AND ORDER ON RECONSIDERATION

We previously granted applicant's Petition for Reconsideration (Petition) to provide an opportunity to further study the legal and factual issues raised by the Petition. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings, Award and Order (F&A), dated February 7, 2020, served February 10, 2020, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a police officer from November 3, 2004 to September 11, 2017, sustained industrial injury to her low back, with the need for further medical care to cure or relive from the effects of the industrial injury. (F&A, p.4, Award No.1.) The WCJ made no specific findings regarding permanent disability or apportionment.

Applicant contends that the WCJ made implied findings of apportionment that are inconsistent with the anti-attribution provisions of Labor Code section 4663(e).[1]

We have reviewed defendant's Answer. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

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

FACTS

Applicant has a prior Award for injury to the back and right lower extremity from November 3, 2003 through November 3, 2004 (Case No. ADJ4121352 (SDO 0349771)).[2] Applicant received an Award of 30% permanent disability, approved May 19, 2008, based on the 13% impairment described by primary treating physician Larry Dodge, M.D. (Petition, at 2:14; Answer, at 2:4.) Dr. Dodge described his rating methodology as follows:

> Under the AMA Guides of permanent impairment, Fifth Edition, this problem is not addressed in any kind of reasonable fashion. We really did not discuss impairment-related to piriformis syndrome. I reviewed the AMA Guides in detail and therefore it is my clinical judgment that based upon the impingement of the sciatic nerve, based upon the fact this patient did not require operative procedure to reduce pressure against the sciatic nerve it is equivalent to an individual who undergoes a decompression of nerve root in the lumbar spine. The level of impairment in my medical opinion would be similar. This would therefore place the patient into lumbar DRE category 3. This would reasonably correspond to 13% impairment of whole person. (Ex. C, report of Larry Dodge, M.D., dated March 8, 2007, p.2.)

Applicant continued to work for the San Diego Unified Port District, and alleged a new continuous trauma to the low back sustained from November 3, 2004 through September 11, 2017 (Case No. ADJ11046834). Beth Bathgate, M.D., acted as the Qualified Medical Examiner (QME), and evaluated applicant on November 9, 2018. Applicant provided a history of continued periodic flare-ups, noting ongoing requirements that she wear her duty belt. (*Ibid.*) Applicant's duties included driving in a vehicle with narrow seats, causing changes in her posture while wearing the duty belt, and physically restraining individuals as necessary. (*Ibid.*) Dr. Bathgate also noted a 2016 MRI study, which revealed degenerative changes in applicant's low back. (Ex. A, report of Beth Bathgate, M.D., dated November 9, 2018, p.3.)

The QME concluded that applicant had sustained a new cumulative trauma injury through 2017, noting that applicant's "work duties are such that additional cumulative trauma was sustained." (Ex. A, report of Beth Bathgate, M.D., dated November 9, 2018, p.32.) The QME placed applicant's injury in Category III of the Diagnosis Related Estimate (DRE), and assigned low back impairment of 13% Whole Person Impairment (WPI), noting applicant to be post-surgery

[2] Although two additional case numbers were listed on the May 19, 2008 Award, the applicant stipulated she did not sustain the specific injury claimed in Case No. ADJ2491991 (SDO 0330001), and further stipulated to "no liability" under Labor Code § 5500.5 in Case No. ADJ3869224 (SDO 0349770).

for radiculopathy. (*Id.,* at p.34.) Dr. Bathgate apportioned 60% of the injury to applicant's prior cumulative trauma ending November 3, 2004, 20% to degenerative changes, and 20% to the cumulative trauma ending September 11, 2017. (*Id*., at p.35.)

The parties proceeded to trial on January 6, 2020, on the issues of permanent disability, attorney fees, "apportionment pursuant to Labor Code section 4664," and "Labor Code section 3213.2 and 4663(e) duty belt presumption and non-attribution clause." (Minutes of Hearing and Summary of Evidence (MOH), dated January 6, 2020, at 3:3.) Applicant testified that following her injury in 2004, her low back condition worsened. (*Id*., at 4:10.)

The WCJ issued the F&A on February 27, 2020, awarding future medical care. The F&A did not make specific findings regarding apportionment under Labor Code sections 4663 or 4664, or their interaction with the anti-attribution provisions of section 3213.2. The WCJ stated in the Opinion on Decision, however, that the presumption of section 3213.2 defined the covered injury as *impairment* to the low back. (F&A, Opinion on Decision, p.3.) Because applicant's prior injury rated at 13% impairment, and the current injury also rated at 13% impairment, the defendant had met its burden of rebutting the presumption of impairment arising out of the 2017 injury.

Applicant contends the WCJ made an "inchoate" finding in which he disregarded the apportionment opinion of QME Dr. Bathgate, who opined that 60% of applicant's present impairment arose out of the 2004 injury, 20% from degenerative changes, and 20% from the 2017 injury. (Petition, at 4:9.) Applicant contends this was an impermissible attribution of causation in contravention of section 4663(e).

Defendant's Answer reframes the inquiry as one of statutory interpretation: "whether section 4664 apportionment to a prior Award of permanent disability is precluded by section 4663(e)." (Answer, at 3:19.) The Answer responds in the affirmative, asserting that apportionment to prior awards of disability is permissible, notwithstanding the anti-attribution provisions of section 3213.2 and section 4663(e). The Answer further asserts defendant has met its burden of establishing overlap between the past and current injuries under *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 (71 Cal.Comp.Cases 1229).

The WCJ's Report states that based on credible evidence of current impairment per QME Dr. Bathgate and prior impairment from treating physician Dr. Dodge, "the reasonable conclusion is that applicant's current level of impairment results from the prior industrial injury, and that the

current injury in this case has not resulted in any increase of applicant's impairment to the low back." (Report, at p.3.)

DISCUSSION

Labor Code section 5313 provides that:

> The appeals board or the workers' compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made." (Lab. Code, § 5313.)

In our en banc decision in *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473 (Appeals Bd. en banc), we stated that:

> [A] proper record enables any reviewing tribunal, … to understand the basis for the decision. As discussed below, the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.
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> When a decision is reached, the WCJ must make and file findings upon all facts involved in the controversy and issue an award, order, or decision stating the determination as to the rights of the parties. The findings and the decision must be served upon all the parties together with a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made. (Lab. Code, § 5313.)
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> The WCJ is also required to prepare an opinion on decision, setting forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on. (Lab. Code, § 5313.) The opinion enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful. (See *Evans v. Worker's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755, 68 Cal.Rptr. 825, 826, 333 Cal.Comp.Cases 350, 351 [441 P.2d 633].) For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record. (*Hamilton v. Lockheed Corporation*, supra, 66 Cal.Comp.Cases at pp. 475-476.)

Here, the parties framed issues for decision including permanent disability, attorney fees, "apportionment pursuant to Labor Code section 4664," and "Labor Code section 3213.2 and

4663(e) duty belt presumption and non-attribution clause." (January 6, 2020 MOH, at 3:3.) The F&A does not enter corresponding findings on any of these issues. We acknowledge that the WCJ's Opinion on Decision discusses the evidence with respect to applicant's prior and current impairment levels. However, no corresponding Findings of Fact are entered, and there is no discussion of the legal issues raised by the parties, namely the interaction of the anti-attribution provisions of section 4663(e) and apportionment under 4664(b). Moreover, the Findings of Fact must address with specificity whether the defendant has met its burden of establishing overlap between past and current injuries necessary to sustain apportionment under section 4664(b). In the absence of a discussion of the legal requirements underpinning apportionment to prior awards, the WCJ has not made the findings required under section 5313 or *Hamilton, supra*, 66 Cal.Comp. Cases at 475-476. We thus rescind the F&A and return the matter to the trial level for further proceedings in accordance with this opinion.

In deciding the issues presented, the WCJ should first consider whether apportionment under section 4664(b) is applicable, given the anti-attribution provisions of section 4663(e).[3] If apportionment to applicant's prior award is permissible under section 4664(b), the WCJ should then consider whether defendant has met its burden of establishing overlap, as set forth in *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 (71 Cal.Comp.Cases 1229).[4] Corresponding Findings of Fact should be entered, and the rationale therefor explained in the Opinion on Decision, as required under section 5313. These findings will allow the Board "to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful." (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

Accordingly, we rescind the February 7, 2020 F&A and return the matter to the trial level for further proceedings. When the WCJ issues a new decision, any aggrieved party may timely seek reconsideration.

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[3] We note that both the applicant and defendant cite to the recent panel decision in *Bates v. County of San Mateo*, 84 Cal.Comp.Cases 648 [2019 Cal. Work. Comp. P.D. LEXIS 72]. (Petition at 5:5; Answer at 5:27.) However, the decision in *Bates* addressed apportionment under section 4664(a), not section 4664(b).

[4] "First, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability. Under these circumstances, the employer is entitled to avoid liability for the claimant's current permanent disability only to the extent the employer carries its burden of proving that some or all of that disability overlaps with the prior disability and is therefore attributable to the prior industrial injury, for which the employer is not liable." (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 (71 Cal.Comp.Cases 1229).

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration Of the Workers' Compensation Appeals Board, that the February 7, 2020 Findings, Award and Order is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 12, 2022

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

CHRISTINE SPERRY
LAW OFFICE OF O'MARA & HAMPTON
BRADFORD AND BARTHEL
CHERNOW & LIEB

SAR/abs

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