WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

INDALECIO CRUZ, *Applicant*

vs.

D'ARRIGO BROS. CO., OF CALIFORNIA; NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA, administered by AIG CLAIMS SERVICES, INC.; JOSE HERNANDEZ, LLC; ALASKA NATIONAL INSURANCE, *Defendants*

Adjudication Numbers: ADJ7814539, ADJ8102820, ADJ9099054, ADJ11057424 (MF)
Salinas District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Applicant and defendant both seek reconsideration of the Joint Findings & Award (F&A) issued on April 26, 2022, by the workers' compensation administrative law judge (WCJ).

The WCJ found in pertinent part that, while employed as a broccoli cutter for defendant D'Arrigo Bros. Co., of California, insured by National Union Fire Insurance Company (AIG): in ADJ7814539, applicant sustained injury arising out of and in the course of his employment (AOE/COE) to his thoracic and lumbar spine during the period from October 20, 2009 to October 20, 2010, and that permanent disability indemnity benefits of $16,217.50 were paid "per the Stipulations and Award"; in ADJ8102820, applicant sustained injury AOE/COE to his cervical spine, right shoulder, right wrist, gastrointestinal system (in the form of gastroesophageal reflux disease) and in the form of headaches during the period from June 20, 2010 to June 20, 2011, and that permanent disability indemnity benefits of $36,011.43 were paid from 2017 to 2020[1]; in ADJ9099054, applicant sustained injury AOE/COE to his low back and hips on July 22, 2013; and in ADJ11057424, applicant sustained injury AOE/COE to his cervical, thoracic and lumbar spine, right shoulder, right wrist, gastrointestinal system, psyche and in the form of

[1] In ADJ8102820, applicant was employed by Jose Hernandez, LLC, who was insured by Alaska National Insurance. Defendant AIG filed a petition for contribution on September 3, 2014; applicant has elected against AIG.

headaches during the period from September 6, 2015 to September 6, 2016. The WCJ further found that applicant's four separate injuries were one single cumulative injury ending on July 6, 2016. He issued an Award in ADJ11057424 only for temporary disability benefits from July 7, 2016 to July 17, 2017 and 59% permanent disability, less credit for permanent disability paid, commencing July 18, 2017.[2]

Applicant contends that the WCJ erred when he found a single cumulative injury instead of four separate injuries based on the different periods of exposure, improperly applied the Combined Values Chart (CVC) in the Permanent Disability Rating Schedule (PDRS) rather than adding the impairments, and improperly excluded impairment for the injury to psyche from the calculation of permanent disability for the injuries before 2013.

Defendant contends that the WCJ erred by issuing a joint award of permanent disability and by only awarding a credit for the amounts of permanent disability indemnity previously paid, thereby failing to properly apply apportionment of applicant's disability from the prior award in ADJ7814539 under Labor Code section 4664[3].

We have received an Answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending we deny reconsideration of both Petitions.

We have considered the allegations in applicant's and defendant's Petitions and defendant's Answer, and the contents of the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the decision and substitute a new decision that finds only that the March 29, 2022 Findings and Award is rescinded and defers all other issues. We will return the matter to the trial level for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

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[2] We note internal inconsistencies in the Joint F&A wherein the WCJ, in Finding of Fact 7, found temporary disability from July 6, 2016 to July 17, 2017, yet in his Award, awarded temporary disability from July 7, 2016 to July 7, 2017. In addition, the WCJ, in Finding of Fact 8, found applicant permanent and stationary on July 17, 2017, yet in his Award, awarded permanent disability from July 8, 2017 to present and continuing.

[3] Unless otherwise stated, all further statutory references are to the Labor Code.

BACKGROUND

According to the Minutes of Hearing/Summary of Evidence of January 20, 2022 (MOH), applicant, while employed as a broccoli cutter: during the period from October 20, 2009 to October 20, 2010, sustained injury to his thoracic and lumbar spine and claimed injury to his neck, bilateral upper extremities, bilateral shoulders, hypertension, psyche, headaches, and GERD (ADJ7814539); during the period from June 20, 2010 to June 20, 2011, sustained injury to his cervical spine, right shoulder, right wrist, GERD, and headaches, and claimed injury to his psyche, bilateral shoulders, bilateral wrists, bilateral arms, bilateral hands, and hypertension (ADJ8102820); on July 22, 2013, claimed injury to his low back and hips (ADJ9099054); and during the period from September 6, 2015 to September 6, 2016, claimed injury to his head, neck, shoulders, arms, wrists, hands, back, legs, knees, hips, feet, sexual dysfunction, stomach, teeth, deconditioning, and psyche (ADJ11057424).

With respect to case number ADJ7814539, the parties entered into Stipulations with Request for an Award (Stipulations), and an Award for 29% permanent disability issued on December 5, 2011. The parties obtained an additional clarifying stipulation approved by an order on February 28, 2012. The parties based their Stipulations on the opinions of Qualified Medical Evaluator (QME) Dennis Sosine, M.D., dated March 14, 2011, who found 8% whole person impairment (WPI) for both the lumbar and thoracic spine based on DRE Category II in Tables 15-3 (page 384) and 15-4 (page 389) of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides). (Joint Ex. J-3.) QME Dr. Sosine, in his supplemental report dated July 17, 2011, added 3% WPI for pain. (Joint Ex. J-4.) Applicant filed a timely petition to reopen on April 23, 2013.

On January 20, 2022, the parties proceeded to trial. Among the issues submitted were period(s) of injurious exposure, permanent disability and apportionment.

The parties submitted the QME reports of Dr. Sosine (Joint Exs. J-2 to J-6), and Matthew Duncan, M.D. (Joint Exs. J-10 to J-13), as well as Agreed Medical Evaluator (AME) reports of Perry Segal, M.D. (Joint Exs. J-7 to J-9) and Allen Kaisler-Meza, M.D. (Joint Exs. J-14 to J-22).

AME Allen Kaisler-Meza, M.D., following his evaluation of applicant, stated in his report dated April 5, 2017, that applicant began working for defendant on July 1, 2006 picking broccoli. (Joint Ex. J-14 at p. 2.) After working for Jose Escamilla LLC from April to May 2010, he returned

to D'Arrigo in June 2010. (*Id.* at p. 3.) At D'Arrigo, he worked four to six days per week for six to ten hours per day, cutting mustard leaves 2 to 2.5 feet above the ground by bending forward, holding the leaves with his left hand, cutting with his right, and boxing them for packaging. (*Ibid.*) On October 20, 2010, without any prior injury or complaints, he accidentally fell into a hole with his left foot approximately 1.5 feet in depth sustaining injury. (*Ibid.*) He continued to work full time through November 2010 when the season ended, but first sought treatment with Keith Thomas Migotti, D.C., on December 15, 2010, who recommended treatment three times per week. (*Ibid.*) Applicant returned to work for D'Arrigo in March 2011, where he began developing pain in his neck, low back, right shoulder and left leg, which he attributed to repetitively bending down at the waist and reaching with his right shoulder to grab the mustard leaves and cut them. (*Id.* at p. 4.) On June 9, 2011, he sustained another injury when, while he was pulling the mustard plants with his right hand, he felt a pull in his neck and right shoulder. (*Ibid.*) On October 25, 2013, he subsequently transferred his care to Dhanu Panchal, M.D., of RehabOne Medical Group, Inc. (RehabOne). (*Ibid.*) Dr. Panchal diagnosed applicant with cervicogenic headaches, right shoulder impingement and left shoulder subscapularis tendinopathy and gave him a work restriction of no carrying over 40 pounds. (*Id.* at p. 4; see Joint Ex. J-26, Consultation Report, 10/25/2013, p. 3.) Applicant continued to work his usual and customary duties for D'Arrigo until July 22, 2013, when he fell again into a hole causing increased pain in his neck and low back. (Joint Ex. J-14, at p. 5.) He continued working unrestricted on a full-time basis until July 6, 2016, when Lisa Kroopf, M.D., of RehabOne placed him on light duty, which D'Arrigo could not accommodate. (*Ibid.*)

Dr. Kroopf diagnosed applicant with low back pain and a sacroiliac joint sprain, determined he had reached maximum medical improvement, and imposed work restrictions limiting him to working only three days per week, prohibiting lifting over 40 pounds, allowing him to stand or sit as needed, and permitting his use of a lumbar support during heavy lifting. (See Joint Ex. J-26, Progress Report, 09/21/2016, p. 6.)

After reevaluation, AME Dr. Kaisler-Meza determined that applicant had reached maximum medical improvement in a September 27, 2017 report. (Joint Ex. J-15.) AME Dr. Kaisler-Meza concluded that applicant's lumbar spine injury resulted from cumulative trauma from October 2010 to July 6, 2016, and that his cervical spine, right shoulder, and right wrist injuries resulted from a separate cumulative trauma from March 2011 to July 6, 2016. He was unable to sort out the fragmentally pled claims of injury. (*Id.* at p. 12.) In determining permanent

disability, he found 10% WPI to the cervical spine based on Tables 15-12 (page 418), 15-13 (page 420) and 15-14 (page 421) of the AMA Guides. (*Id.* at p. 10.) With respect to the lumbar spine, he found 13% WPI based on DRE Lumbar Category III in Table 15-3 (page 384) given "significant signs of radiculopathy." (*Ibid.*) With respect to the right shoulder, he found 2% WPI based on Table 16-3 (page 439) and Figures 16-40 (page 476), 16-43 (page 477) and 16-46 (page 479). (*Ibid.*) Finally, with respect to the right wrist, he found 11% WPI based on a 50% sensory deficit pursuant to Table 16-10 (page 482) and a 39% maximum upper extremity deficit due to sensory deficit for the median nerve pursuant to Table 16-3 (page 492). (*Id.* at p. 11.)

Following a further reevaluation of applicant, AME Dr. Kaisler-Meza stated in his March 11, 2019 report that he aggregated the WPIs by adding them, rather than using the CVC, resulting in a 36% WPI based on the burden of pain and its impact on activities of daily living (ADLs). (Joint Ex. J-19 at p. 8.) He found no new and further disability with respect to case number ADJ7814539. (*Ibid.*)

In his July 10, 2020 supplemental report, AME Dr. Kaisler-Meza stated that under section 4664, applicant's current permanent disability decreases by the 29% permanent disability award in case number ADJ7814539 and that the July 22, 2013 injury did not result in any impairment. (Joint Ex. J-20 at p. 7.)

AME Dr. Segal diagnosed applicant with a mild adjustment disorder with depressed mood. (Joint Ex. J-7, Report, 03/20/2015 at p. 12.) He found that applicant had a Global Assessment of Functioning of 62 corresponding to 12% WPI with 100% permanent disability apportioned to the cumulative injuries while employed by D'Arrigo. (Joint Ex. J-5, Report, 12/02/2017 at p. 14.) He further opined adding rather than combining by the CVC applicant's psychiatric and orthopedic impairments. (*Id.* at pp. 14-15.)

QME Dr. Duncan, in his evaluation report dated October 1, 2015, diagnosed applicant with muscle contraction headaches and gastrointestinal complaints from using medication. (Joint Ex. J-10 at p. 18.) With respect to applicant's gastrointestinal complaints, he opined that applicant had 2% WPI based on Class I in Table 6-3 (page 121) of the AMA Guides due to upper digestive tract symptoms and, with respect to headaches, he had 2% WPI as a pain add-on. (*Id.* at p. 25.) He found no basis for apportionment to nonindustrial factors. (*Id.* at p. 27.)

On April 26, 2022, the WCJ issued his Joint F&A, awarding applicant 59% permanent disability, calculated by the CVC, less credit for permanent disability paid under case number

ADJ7814539, commencing July 18, 2017 under case number ADJ11057424.

It is from this Joint F&A that applicant and defendant both seek reconsideration.

DISCUSSION

I. PERIOD(S) OF INJURIOUS EXPOSURE and DATE(S) OF INJURY

Pursuant to section 3208.1:

> An injury may be either: (a) 'specific' occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) 'cumulative' occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative trauma injury shall be the date determined under [§] 5412.

Section 3208.3 states that:

> When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

In addition, pursuant to section 5412:

> The date of injury in cases of occupational disease or cumulative injuries 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.

A date of injury under section 5412 requires more than evidence that an injured employee's work was tiring and causing pain. (*Chambers v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 556, 560 [33 Cal.Comp.Cases 722]; *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 475 [56 Cal.Comp.Cases 631]; *Kaiser Foundational Hospital v. Workers' Comp. Appeals Bd.* (*Ochs*) (2000) 65 Cal.Comp.Cases 933, 934 (writ denied).) Instead, "disability," as used in section 5412, is evidence that there is either compensable temporary disability or permanent disability. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998, 1003 [69 Cal.Comp.Cases 579].) Thus, no cumulative injury can occur without disability. (*Gordillo v. Camille's, Inc.* [2024 Cal. Wrk. Comp. P.D. LEXIS 443, *11]; *Van Voorhis v. Workmen's Comp. Appeals Bd*. (1974) 37 Cal.App.3d 81, 86–87 [39 Cal. Comp. Cases 137]; *Aetna Cas. & Surety Co. v. Workmen's Comp. Appeals Bd*. (*Coltharp*) (1973) 35 Cal.App.3d

329, 342–343 [38 Cal. Comp. Cases 720].) An injured employee obtains knowledge that their disability is industrial when they receive medical advice to that effect. (*Zenith Ins. Co. v. Workers' Comp. Appeals Bd.* (*Yanos*) (2010) 75 Cal.Comp.Cases 1303, 1305 (writ denied).) In short, for purposes of section 5412, medical evidence showing temporary or permanent disability caused by the injured employee's current or prior employment is generally required to establish the cumulative trauma date of injury.

Section 5412 sets the date of injury based on the first date the employee knows of the injury and disability, which may occur before the last injurious exposure.

A WCJ must decide (1) whether there are multiple cumulative trauma periods with different dates of injury pursuant to *Coltharp* and *Ferguson v. City of Oxnard* (1970) 35 Cal.Comp.Cases 452, 460 (Appeals Board en banc) (separate cumulative injuries occur where "periods of disability and/or need for medical treatment [are] interspersed within the alleged course of the repetitive activities"); or (2) whether there is a single cumulative trauma period with one date of injury because any periods of temporary disability are linked by a continued need for medical treatment under *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 237 [58 Cal.Comp.Cases 323]. Where the evidence establishes such injurious exposure, the WCJ must find multiple separate and distinct cumulative trauma injuries and must not merge them into a single injury pursuant to *Coltharp*. Conversely, where the evidence shows that an injured employee's post-return occupational activities did not cause further injurious trauma and that any subsequent disability or need for medical treatment resulted solely from an exacerbation or natural progression of the original injury, the WCJ must find a single cumulative trauma injury pursuant to *Austin*. (*Ortiz v. County of Los Angeles* [2018 Cal.Wrk.Comp.P.D. LEXIS 190, *11-12]; see *Spencer v. Mendon and Mendon, Inc.* [2015 Cal.Wrk.Comp.P.D. LEXIS 332, *11-12] ["the period of a continuous trauma, and/or the existence of multiple continuous traumas, is defined by whether or not there is a period of permanent and stationary (MMI) which serves to terminate one period and, if an applicant continues to deteriorate thereafter, to commence another, separate and distinct continuous trauma."].)[4]

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v.*

Thus, in determining the date of injury under section 5412, the WCJ must consider whether an injured employee sustained any lost time from work and whether, following a return to work after a period of temporary disability and/or medical treatment, an applicant's repetitive occupational activities again resulted in injurious trauma. Specifically, the WCJ must determine whether an injured employee's post-return employment activities caused or contributed to a new period of temporary disability, a new or increased level of permanent disability, or a new or increased need for medical treatment. These conclusions as to the underlying facts form the basis for the medical opinions, and the WCJ must rely on a competent medical opinion to determine whether the medical evidence supports the existence of a single cumulative injury or multiple cumulative injuries, and to identify the beginning and ending dates of each such injury.

It is axiomatic that substantial evidence must support the decisions by the Appeals Board. (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].) To constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].)

Here, AME Dr. Kaisler-Meza's opinion that there is one cumulative injury, merging all pled injuries including the prior stipulated award, based on legal inextricability, fails to constitute substantial medical evidence. First, he failed to analyze the issue in accordance with *Coltharp* and *Austin* in light of the fragmented periods of disability and overlapping temporal periods between the claims of injury, and his opinions fail to account for the statutory mandate in section 3208.2.

Workers' Comp. Appeals Bd. (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

Second, the parties did not raise at trial, AME Dr. Kaisler-Meza did not address, and the WCJ did not determine a "date of injury" pursuant to section 5412, which is essential in determining, among other issues, the applicability of section 4660.1(c)(1) on permanent disability, an issue raised by applicant on reconsideration. Third, section 5500.5(a) places the liability for a cumulative injury on the employers, or carriers, during the one-year immediately preceding either the last date of injurious exposure or the date of injury pursuant to section 5412, whichever comes first. Here, a pending petition for contribution exists as to liability between D'Arrigo and Jose Hernandez, LLP.

"[I]n order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process," the WCJ and the Appeals Board both have a duty to further develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924] (*Tyler*); *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701 and 5906; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).) Indeed, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases," and is therefore "clearly permitted" to admit evidence even after the discovery cut-off under section 5502(d)(3). (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264].) "[A]llowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims" and militates in favor of our presuming the continued vitality of sections 5701 and 5906, absent a clear legislative intention to the contrary. (*Tyler, supra*, 56 Cal.App.4th at p. 394.) An adequately developed record affords all parties due process of law and further provides for meaningful review by the Appeals Board of a WCJ's decision. (*Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]; *Hernandez v. Staff Leasing* (2011) [76 Cal.Comp.Cases 343, 346-347].)

Pursuant to sections 5701 and 5906, a WCJ or the Appeals Board may not leave undeveloped issues that, through the exercise of its specialized knowledge, recognizes as requiring further evidentiary development. (*Kuykendall, supra*, 79 Cal.App.4th at p. 404.)

Accordingly, upon return of this matter to the trial level, we recommend the WCJ direct the parties to obtain supplemental reporting or deposition testimony specifically addressing the analysis required under *Coltharp* and *Austin*. The WCJ must then determine whether a single

cumulative injury exists, whether more than one cumulative injury exists, and any dates of injury, including the "date of injury" under section 5412. Moreover, the WCJ should make findings as to injured body parts, which we acknowledge may require further medical reporting. If a date of injury predates January 1, 2013, section 4660.1(c)(1) will permit inclusion of applicant's psychiatric permanent disability in the overall permanent disability rating.

In addition, the WCJ will likely need to amend the stipulations to conform to the facts. (Cal. Code Regs., tit. 8, § 10517; see *Randa v. County of Alameda* [2024 Cal. Wrk. Comp. P.D. LEXIS 326. *14]; *Turner Gas Company, Inc. v. Workmen's Comp. Appeals Bd.* (1975) 47 Cal.App.3d 286, 291 [40 Cal.Comp.Cases 253]; *P.M. & Associates v. Workers' Comp. Appeals Bd.* (*Wagner*) (2000) 65 Cal.Comp.Cases 878, 882 (writ denied).) This may require dismissing any duplicate applications. (Cal. Code Regs., tit. 8, § 10455(a); *Garcia v. CKE Holdings* [2021 Cal. Wrk. Comp. P.D. LEXIS 149].)

II. PERMANENT DISABILITY

In *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court found that impairments "are generally combined" using the CVC though the "scheduled rating [under the CVC] is not absolute" and other methodologies may be used to calculate permanent disability. (*Id.* at pp. 613-614.)

For example, in *Athens Administrators v. Workers' Comp. Appeals. Bd*. (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied), the Appeals Board concluded that impairments resulting from cumulative injury to the bilateral hips may be added where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating of the level of disability than the rating that results from using the CVC. (See also *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ denied) [requires following a physician's opinion as to the most accurate rating method if they provide a reasonably articulated medical basis for doing so and does not require use of the term "synergistic"].)

In *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc), the Appeals Board held that an injured employee can rebut the CVC in the PDRS and add impairments where they can establish the impact of each impairment on the activities of daily living (ADLs). In addition, they must show either (a) there is no overlap between the effects on

ADLs between the body parts rated, or (b) there is overlap but the overlap increases or amplifies the impact on the overlapping ADLs. The Board explained that medical expertise is required:

> In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the *medical evidence* demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.

(*Id.* at p. 692, italics added.)

Our en banc decision in *Vigil* issued on June 10, 2024, after our Opinion and Order Granting Petition for Reconsideration dated June 24, 2022, and is mandatory authority on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10325(a); *Garcia*, *supra*, 126 Cal.App.4th at p. 316, fn. 5; *Gee*, *supra*, 96 Cal.App.4th at p. 1424, fn. 6; see also Govt. Code, § 11425.60(b).)

Here, the record reflects that AMEs Dr. Kaisler-Meza and Dr. Segal both recommended additive aggregation of applicant's impairments rather than use of the CVC. However, neither physician provided an analysis consistent with *Vigil*. Further, as discussed above, absent a judicial determination of the date of injury, we cannot determine whether section 4660.1(c)(1) applies to include psychiatric permanent disability in the rating calculation.

III. APPORTIONMENT

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, to allocate legal responsibility fairly. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 911 [70 Cal.Comp.Cases 787.].) A medical evaluator must parcel out industrial and non-industrial causation of permanent disability. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927 [71 Cal.Comp.Cases 1687].)

Apportionment of permanent disability is "based on causation" and 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, §§ 4663(a), 4664(a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo v.*

Marshalls (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc).) Apportionment now includes pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial evidence establishing that these other factors have caused permanent disability. Pursuant to *Escobedo*, a physician's opinion must constitute reasonable medical probability, must not be speculative, rely on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of its conclusions. (*Id.* at p. 621.) That is, they must explain the "how and why" of their apportionment opinion. (*Ibid*.)

Pursuant to *Benson v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1620 (Appeals Board en banc), a physician must consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or condition. (*Id.* at p. 1622.)

The burden of proof to establish apportionment falls on defendant. (*Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In other words, applicant does not have the burden of disproving apportionment. (*Alcantar v. Martinez* [2025 Cal. Wrk. Comp. P.D. LEXIS 231, *9]; *Moraido v. County of San Diego* [2024 Cal. Wrk. Comp. P.D. LEXIS 375, *13, fn. 3]; *Arias v. William Roofing Co.* [2024 Cal. Wrk. Comp. P.D. LEXIS 29. *5]; *Matias v. Naturipe Berry Growers* [2024 Cal. Wrk. Comp. P.D. LEXIS 52, *4].)

With respect to apportionment pursuant to section 4664, in *Kopping*, the Court determined that defendant retains the burden of proving overlap between the current permanent disability and previously awarded disability to establish its right to apportionment. (*Id.* at p. 1103.) If all factors of permanent disability existed before the work injury because of a prior injury or condition, there is total overlap and the employee is not entitled to any additional disability. If the subsequent industrial injury caused some additional factors of disability that were not preexisting, there is partial overlap and the employer is only responsible for the additional disability and only to the extent that the subsequent work injury resulted in additional restrictions or disability. (*Id.* at pp. 1106-1107; *Seafus v. County of Los Angeles* [2013 Cal. Wrk. Comp. P.D. LEXIS 671, *7-8].)

Here, the record shows that the stipulated award for 29% permanent disability for case number ADJ7814539 involved the thoracic and lumbar spine. However, on this record, there is only overlap for the lumbar spine between QME Dr. Sosine's finding of 8% WPI based on DRE Lumbar Spine Category II in Table 15-3 (page 384) of the AMA Guides and

AME Dr. Kaisler-Meza's finding 13% WPI based on DRE Lumbar Spine Category III in Table 15-3. We cannot discern any overlap for any permanent disability for the thoracic spine or any pain add-on that would merit apportionment by subtraction pursuant to section 4664. Therefore, upon return to the trial level, the WCJ will need to readdress if apportionment applies based on the prior discussion and any new evidence, including the additional medical reporting.

Accordingly, because the WCJ must first determine the period(s) of cumulative injury and the date of injury under section 5412, before addressing temporary disability, permanent disability, and apportionment, as our Decision After Reconsideration, we rescind the WCJ's decision and substitute a new decision solely rescinding the March 29, 2022 Findings and Award and deferring all other issues. We return the matter to the trial level for further proceedings consistent with this decision. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings & Award dated April 26, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

GOOD CAUSE APPEARING;

It is hereby ordered that the Findings and Award dated March 29, 2022 be, and hereby is, **RESCINDED**.

All other issues are deferred.

IT IS FURTHER ORDERED that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 25, 2026

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

INDALECIO CRUZ
DILLES LAW GROUP, PC
HAWORTH, BRADSHAW, STALLKNECHT & BARBER, INC.
STANDER, REUBENS, THOMAS KINSEY, LLP

DLP/md

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