WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VALOREE PERRINE, *Applicant*

vs.

SAFEWAY, INC., Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ11544195
Santa Rosa District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant Safeway, Inc., permissibly self-insured, seeks reconsideration of the January 25, 2021 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that, as a result of an admitted industrial injury to her low back on January 5, 2017, while employed as a checker by Safeway, Inc., applicant Valoree Perrine sustained 28% permanent disability, after apportionment to a prior award of 19% permanent disability to the low back per Labor Code section 4664(b).

Defendant contends the WCJ's apportionment determination is in error, arguing that applicant's permanent disability must be reduced by the full amount of her prior permanent disability from her 2009 cumulative trauma injury to her low back, including the 40% stipulated apportionment in the prior award to non-industrial causation from an earlier lumbar fusion. Defendant argues that applicant is bound by her prior stipulation to non-industrial apportionment, and the full amount of the prior disability must be deducted from the current award of permanent disability.

We have not received an Answer from applicant. 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 and the WCJ's Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant reconsideration for further development of the record on the issue of permanent disability and apportionment.

I.

At trial on October 27, 2020, the parties stipulated that applicant sustained an admitted industrial injury to her low back on January 5, 2017, and that her current disability before apportionment is 47%. In the Findings and Award, applicant was awarded 28% permanent disability, after apportionment to a prior award. The primary issue at trial was apportionment, with defendant raising the 2014 Stipulations with Request for Award for an industrial cumulative trauma injury to her low back ending in 2009. In the stipulated award, applicant received an award of 19% permanent disability, after 40% apportionment to non-industrial causation, per the reports of applicant's treating physician Dr. Eichbaum. The 2014 stipulated award provided:

> 32% PERMANENT DISABILITY WITH 40% APPORTIONMENT TO NON INDUSTRIAL CAUSATION TO LUMBAR SPINE PER PRIMARY TREATER DR. ELDAN EICHBAUM REPORT DATED 7/19/2012 AND 6/6/13 AND 2/21/12

In his Opinion on Decision, the WCJ explained that apportionment in this case turns on how the prior award of permanent disability is applied, pursuant to Labor Code section 4664(b). He stated:

> This case presents a simple issue, although one for which there appears to be no clear answer. The issue is this: where an applicant has executed stipulations, approved by Award, which indicate both industrial disability as well as non-industrial disability, does Labor Code §4664 require the presumption that the non-industrial portion continues to exist at the time of a subsequent injury. This court finds that the language of 4664(b) and the Court of Appeals decision in *Kopping v. Workers' Compensation Appeals Bd*, 71 Cal. Comp. Cases 1229, compel the court to conclude that only that portion of permanent disability actually awarded to the applicant is presumed to still exist.

However, to reach this issue, the WCJ also concluded that the medical evidence in this case precluded apportionment pursuant to Labor Code section 4663, because Dr. Wolfson, the Qualified Medical Evaluator, "found all three injuries 'inextricably intertwined.' Therefore, all apportionment must flow from Labor Code § 4664(b)."

Dr. Wolfson prepared a single report, dated November 20, 2019, in which he addressed apportionment as follows:

> It is difficult to apportion these injuries, what cause and what amount of impairment. They are all interlocked and inextricably intertwined. It is impossible to separate them. Ms. Perrine does not remember and I do not have the records, but she maintains that she never had any problems with her back prior to the original injury that occurred in her employment at Safeway, not before. So, I would apportion 100% to the multiple injuries. I will review additional records and reserve the right to change my opinion.
> (Jt. Ex. 5. 11/20/19 Dr. Wolfson QME Report, p. 34.)

Dr. Wolfson's discussion notes that applicant disclaimed statements in the claims adjuster's letter he received which provided information pertaining to applicant's medical treatment and prior award. In fact, throughout his report, he noted that applicant disputed facts contained in the letter, including whether she had prior lumbar surgery on a non-industrial basis. Dr. Wolfson also admitted to not having reviewed the records pertaining to applicant's prior medical treatment.

While Dr. Wolfson's review of applicant's medical record included many of Dr. Eichbaum's reports, he made no reference to Dr. Eichbaum's findings on apportionment that formed the basis for the 2014 stipulated award.

Given the extensive medical evidence of applicant's prior industrial and non-industrial low back injuries and treatment, Dr. Wolfson's report concluding that the all of applicant's disabilities are "inextricably intertwined" is not substantial medical evidence to support the WCJ's findings. Dr. Wolfson's opinion is expressly based upon an incomplete review of the medical record, and applicant's apparent imperfect memory. While he stated that he would review additional medical evidence, he never prepared a supplemental report.

Therefore, before we can address whether the WCJ appropriately applied apportionment pursuant to Labor Code section 4664(b), the record must include substantial evidence pertaining to apportionment to causation of applicant's January 5, 2017 injury pursuant to Section 4663. (*Escobedo v Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc).) For a medical opinion on apportionment to constitute substantial evidence, the 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*, 70 Cal.Comp.Cases at 621-622.) We will therefore return this matter to

the trial level for further development of the record, to allow Dr. Wolfson to review all of the relevant medical records and provide an opinion on the extent of applicant's permanent disability and apportionment for her 2017 industrial injury which is based upon an accurate record and follows the *Escobedo* requirements.

Such further development of the record is necessary when the existing record is insufficient to support a determination of the matters at issue, here permanent disability and apportionment. (See *Tyler v. Workers' Comp. Appeals Bd*. (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261]; *San Bernardino Community Hospital v. Workers' Comp. Appeals Bd*. (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986]; *McDuffie v. LACMTA* (2002) 67 Cal.Comp.Cases 138 [en banc].)

Accordingly, we will grant reconsideration, rescind the Findings and Award and return this matter to the trial level for further development of the medical record as indicated herein.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the January 25, 2021 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the January 25, 2021 Findings and Award is **RESCINDED** and the matter is **RETURNED** to the trial level for further proceedings to development of the medical record as indicated herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT, (See Dissenting Opinion)

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 5, 2021

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

VALOREE PERRINE
DELFINO, GREEN & GREEN
MULLEN FILIPPI

SV/*pc*

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

DISSENTING OPINION

I dissent from the disposition of the majority to return this matter for further development of the medical record. I would affirm the decision of the WCJ and deny defendant's Petition for Reconsideration.

Defendant carries the burden of proof to establish apportionment of applicant's permanent disability through substantial medical evidence. (*Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229] ["the burden of proving apportionment falls on the employer because it is the employer that benefits from apportionment."].) To establish apportionment under Labor Code sections 4663 and 4664, defendant must present evidence to establish that some percentage of the existing disability was caused by factors other than the industrial injury, or that applicant received a prior award of permanent disability for an injury to an overlapping part of the body. "The employer still has to prove the overlap, if any, between the previous disability and the current disability in order to establish that apportionment is appropriate." (*Kopping*, *supra* at 1114.)

Here, defendant filed a Declaration of Readiness to Proceed, confident that it had sufficient evidence to meet its burden of proof to establish apportionment. Furthermore, defendant's Petition for Reconsideration does not challenge the credibility of the medical evidence, but rather, the legality of the WCJ's determination of apportionment under Labor Code section 4664(b). The majority finds that the only medical evidence relevant to the issue of apportionment does not constitute substantial medical evidence because the absence of a complete and accurate medical history rendered the reporting insubstantial. As found by the majority, Dr. Wolfson's reporting is a record incapable of meeting defendant's burden under Labor Code Section 4663. While I may agree with the majority that the record presented before us is not ideal, I do not support allowing further development of the record where defendant was satisfied that it had met its burden. Defendant sought to move the case to trial but failed to develop an adequate record. While the majority allows defendant to further develop the record, I would deny defendant that opportunity, as it failed in the first instance to meet its burden. Defendant's lack of due diligence in establishing apportionment should inure to the benefit of the injured worker.

Accordingly, I would affirm the Findings and Award and deny defendant's Petition for Reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

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VALOREE PERRINE
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MULLEN FILIPPI

SV/*pc*

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