WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SANDRA LaPLANTE, ***Applicant,*** **vs.** **WAL-MART, Insured By AMERICAN HOME ASSURANCE/AIG, Administered By FRANK GATES SERVICE COMPANY,** ***Defendant(s).***	**Case Nos. FRE 0197989** **FRE 0200410** **OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATON**

Defendant, Wal-Mart Stores, insured by American Home Assurance, seeks reconsideration of the Joint Findings and Award of November 9, 2007, as amended on November 27, 2007, wherein the workers' compensation administrative law judge (WCJ) found, inter alia, that applicant, while employed as a department manager, sustained industrial injury to her right lower extremity, right knee, right elbow, right ankle, and psyche on April 13, 1999 in Case No. FRE 0197989, and to her right knee, psyche, and right lower extremity during a period ending March 19, 2001 in Case No. FRE 0200410, and that applicant is entitled to permanent disability of 78% in the total dollar amount of $114,655.00, less amounts previously paid, plus a life pension.

Defendant contends that 1) the *Wilkinson* doctrine (*Wilkinson v. Workers' Comp. Appeals Bd.* (1977) 42 Cal.Comp.Cases 406, 408 [42 Cal.Comp.Cases 406]) should not be applied, given the Legislature's enactment of Labor Code sections 4663 and 4664, and its express intent that apportionment of permanent disability "shall be based on causation;" 2) the "*Wilkinson* doctrine cannot be applied because the medical record reflects multiple dates of injury to different body parts which became permanent and stationary on separate dates; 3) the WCJ erred in not applying

apportionment to the psychological component of applicant's permanent disability; 4) if only 90% of the orthopedic injury is industrial (80% to the specific injury of April 13, 1999 and 10% to the cumulative trauma claim), then only 90% of the 100% compensable consequence psychiatric claim could also be compensable on an industrial basis, and WCJ erred in finding that the psychiatric compensable consequence did not include at least a minimum 10% apportionment to the underlying non industrial factors; 5) the permanent disability rating should include apportionment in accordance with the agreed upon medical examiner's reporting, i.e. that applicant had a pre-existing condition of progressive osteoarthritis in the right knee which caused 10% of her current impairment, that applicant suffered a specific industrial incident on April 13, 1999 to her right elbow and right knee (see, October 31, 2002 AME report of Dr. Richard Baker at page 9), that approximately 80% of applicant's overall permanent disability was caused by the specific incident of April 13, 1999; and that approximately 10% of applicant's overall disability was caused by cumulative injury to her right knee through March 2001; 6) of the 90% overall psychological disability, 72% would be attributable to the April 13, 1999 specific injury (90% x 80% = 72%) and 9% would be attributable to the cumulative trauma through March 2001 (90% x 10% = 9%); and 7) it was stipulated that applicant should be classified under occupational group 214, that the occupational group 214 for knee injury (disability grouping 14.5) is "F," the occupational variant for occupational 214 for an elbow injury (disability group 7.5) is "F," the occupational variant for occupational 214 for a psychiatric injury (disability group 1.4) is "I," and that applicant was 48 years old at the time of injury on April 13, 1999, and 50 years old for the date of injury in the cumulative trauma through March 2001, resulting in 67% permanent disability after the use of the multiple disabilities table for the 1999 injury and resulting in 9% permanent disability after the use of the multiple disabilities table for the 2001 injury.

Based on our review of the record, and for the reasons stated herein, we will grant reconsideration, rescind the WCJ's decision, and return the case to the trial level for further proceedings and decision utilizing an analysis under *Benson v. The Permanente Group* (2007) 72 Cal.Comp.Cases 1620 (en banc).

At the outset, we note that although defendant filed an unverified petition on December 4, 2007, defendant filed an Amended Petition for Reconsideration on December 28, 2007 which included a proper verification. Therefore, we will address of the petition on its merits.

In *Benson, supra,* the Appeals Board held that the rule in *Wilkinson*, basically allowing a combined award of permanent disability in successive injury cases, is not consistent with the new requirement of apportionment being based on causation and therefore *Wilkinson* is no longer generally applicable.[1] Under *Benson*, the Board must determine and apportion to the cause of disability for each injury that is work related. Further, under *Benson, supra*, consideration must be given to all potential causes of disability, whether from a current industrial injury or a prior or subsequent industrial injury, or a prior subsequent nonindustrial injury or condition.

In *Benson*, we stated:

> "On the issue of apportionment to causation, however, the Legislature has not been silent. It has expressly stated: (1) that "[a]pportionment of permanent disability shall be based on causation" (Lab. Code, § 4663, subd. (a)); (2) that apportionment of permanent disability must be determined based on "what approximate percentage of the permanent disability was caused by the direct result of injury ... and what approximate percentage of the permanent disability was caused by other factors" (Lab. Code, § 4663, subd. (c)); and (3) that an employer "shall only be liable for the percentage of permanent disability directly caused by the injury." (Lab. Code, § 4664, subd. (a).) Thus, the plain language of the sections expresses – or, at least, necessarily implies – a legislative intent to abrogate the rule in *Wilkinson* due to the new causation regime created by SB 899.
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> . . .
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> "Here, the actual language of sections 4663 and 4664, subdivision (b), is not reasonably susceptible to more than one interpretation. The language unambiguously mandates apportionment to causation of disability in all cases, including successive industrial injuries to the same body part that become permanent and stationary at the same time.

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[1] The Appeals Board's en banc decisions are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn 6 [67 Cal.Comp.Cases 236, 239, fn. 6]; see also Govt. Code, § 11425.60(b).)

Benson, supra, did note that there may be some cases where the evaluating physicians could not parcel out with reasonable medical probability approximate percentages which each successive injury contributed to the overall permanent disability and that in these limited circumstances, a combined award of permanent disability may be viable.

We further stated in *Benson, supra*:

> "If the physician is unable to make an apportionment determination, he or she must give reasons why such a determination cannot be made after an evaluation by or consultation with at least one other physician.
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> "Though the basis for apportionment has changed, the difficult practical issues facing physicians addressing cases of successive injuries have not. In considering each separate injury, a physician must still rely upon his or her best medical judgment to make an apportionment determination, and prepare a report which constitutes substantial medical evidence by setting forth a sufficient basis for the report's conclusion by detailing the medical history and evidence in support thereof, as well as "how and why" any specific condition is causing permanent disability. (See *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369 [72 Cal.Comp.Cases 389]; *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc).)"

Finally, if the WCJ finds that medical reports are deficient under *Benson,* then further development of the record may be necessary, in accordance with *McDuffie v. Workers' Comp. Appeals Bd.* (2002) 67 Cal.Comp.Cases 138 (en banc); *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924, 926-927]; and *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261, 265].

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration, filed December 4, 2007, be, and the same hereby is **GRANTED**.

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IT IS FURTHER ORDERED as the Appeals Board's Decision After Reconsideration that the Joint Findings and Award of November 9, 2007, as amended on November 27, 2007 be, and the same hereby is **RESCINDED**, and the cases **RETURNED** to the trial level for further proceedings and decision.

WORKERS' COMPENSATION APPEALS BOARD

DEPUTY

NEIL P. SULLIVAN

I CONCUR,

RONNIE G. CAPLANE

ALFONSO J. MORESI

WORKERS' COMPENSATION APPEALS BOARD EUREKA SEAL

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

FEB 04 2008

SERVICE MADE BY MAIL ON ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES AS SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD:

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