WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CARYL ERICKSON,

Applicant,

vs.

SOUTHERN CALIFORNIA PERMANENTE MEDICAL GROUP/KAISER PERMANENTE, Permissibly Self-Insured,

Defendant(s).

Case Nos. POM 0246580
POM 0246582

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant, Southern California Permanente Medical Group/Kaiser Permanente, seeks reconsideration of the Amended Findings and Award issued by the workers' compensation administrative law judge (WCJ) on November 16, 2006.[1] In that decision, the WCJ found that applicant's two admitted industrial injuries to her neck and in the form of fibromyalgia, which she sustained while employed by defendant from 1994 through January 13, 2000 (Case No. POM 0246580) and on October 26, 1999 (Case No. POM 0246582), caused overall permanent disability of 72%. Applying Labor Code section 4664,[2] however, the WCJ also determined that applicant's permanent disability indemnity award must be "reduced by $14,171.00," which was the amount of the permanent disability indemnity payable under applicant's October 1, 1997 stipulated 25% permanent disability award for two earlier admitted low back injuries, which she sustained while employed by defendant from June 27, 1977 through May 14, 1994 (Case No. POM 0223242) and on May 19, 1994 (Case No. POM 0223243). Therefore, after apportionment under section 4664,

[1] Defendant's petition for reconsideration captions Case Nos. POM 0223242, POM 0223243, POM 0246580, and POM 0246582. Although the former two cases have bearing on the latter two, the former cases were not directly affected by the Amended Findings and Award at issue; therefore, defendant's petition will be deemed to have been filed only in the latter two cases.

[2] All further statutory references are to the Labor Code.

the WCJ found that applicant is entitled to 444.5 weeks of disability indemnity at the rate of $230.00 per week, in the total sum of $102,235.00, less $14,171.00, and thereafter, a life pension of $46.38 per week. The WCJ also allowed attorney's fees of $15,335.25.

In its petition for reconsideration, defendant contends, in substance, that the proper method for calculating the amount of permanent disability indemnity due after apportionment is to subtract the percentage of permanent disability under the prior stipulated award from applicant's current overall percentage of permanent disability, and then convert the remaining percentage to its dollar value.

No answer has been filed.

For the reasons that follow, we grant reconsideration and amend the WCJ's decision to defer the issue of the *calculation of the amount of the permanent disability indemnity due* to applicant, pending issuance of the Supreme Court's decision(s) in *Brodie v. Workers' Comp. Appeals Bd*., review granted November 15, 2006, S146979 (2006 Cal. LEXIS 13527), in *Welcher v. Workers' Comp. Appeals Bd*., review granted November 15, 2006, S147030 (2006 Cal. LEXIS 13523), or in any other case in which the Supreme Court issues an opinion that resolves this issue. We also defer the related issue of attorney's fees. Defendant should pay, or continue to pay, applicant any uncontested permanent disability indemnity, but it should withhold sufficient sums for attorney's fees, if possible. Upon request by applicant's counsel, an interim attorney's fee may be allowed by the WCJ – either from accrued sums, from sums withheld for fee purposes, or by way of commutation if deemed appropriate – after allowing a reasonable time for, and considering, any objections thereto.

I. BACKGROUND

The sole issue presented is how to calculate the amount of permanent disability indemnity due to applicant for her two current injuries, after apportionment for her two prior injuries. Defendant was permissibly self-insured for all four injuries.

As discussed above, an October 1, 1997 stipulated award determined that applicant's June 27, 1977 through May 14, 1994 cumulative injury and her May 19, 1994 specific injury combined

to cause low back disability of 25%, resulting in a permanent disability indemnity award of $14,171.00.[3] Defendant's verified petition alleges (and applicant has not disputed) that this stipulated 25% permanent disability rating was based on the February 19, 1997 report of George H. Lobley, M.D., whom the parties utilized as an agreed medical evaluator (AME) in orthopedics. Dr. Lobley found that applicant was prophylactically precluded from heavy lifting, repeated bending and stooping.

Thereafter, applicant sustained two admitted injuries to her neck and in the form of fibromyalgia, while employed by defendant from 1994 through January 13, 2000 and on October 26, 1999. The parties again utilized Dr. Lobley as the AME in orthopedics, and also utilized Seymour Levine, M.D., as the AME in rheumatology. Dr. Lobley found that applicant's neck disability precluded her from substantial work, from heavy lifting, and from work above shoulder level. Dr. Levine found that applicant's fibromyalgia limited her to semi-sedentary work, that it precluded her from work above shoulder level, and that it required her to avoid stress greater than ordinary stress. The Disability Evaluation Unit issued a recommended permanent disability rating, finding that these factors of disability resulted in 72% permanent disability, after adjustment for age and occupation. This 72% permanent disability, *before* apportionment, would result in permanent disability indemnity in the total amount of $102,235.00 (i.e., 444.5 weeks of indemnity at $230.00 per week), plus a life pension thereafter of $46.38 per week.

In his November 16, 2006 Opinion on Decision, the WCJ concluded in essence: (1) that if an employee has received a prior award of permanent disability indemnity, then, under section 4664, the permanent disability underlying that award is conclusively presumed to still exist; and (2) that where an employee suffers an industrial injury or industrial injuries causing permanent disability, and where there is a prior award of permanent disability, section 4664 requires the apportionment of any overlapping permanent disabilities. (See *Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229]; see also, *Strong v. City &*

[3] Applicant filed a timely petition to reopen this award, but by a separate decision also issued on November 16, 2006, the WCJ found that good cause had not been established to reopen for new and further disability.

County of San Francisco (2005) 70 Cal.Comp.Cases 1460 (Appeals Board en banc) [discussing overlap where the old and new injuries are to different regions of the body]; *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440 (Appeals Board en banc) [discussing overlap where the old and new injuries are to the same region of the body].) Further, the WCJ concluded that applicant's conclusively existing low back disability overlaps (and is subsumed by) her current neck and fibromyalgia disability. However, based on *E & J Gallo Winery v. Workers' Comp. Appeals Bd.* (*Dykes*) (2005) 134 Cal.App.4th 1536 [70 Cal.Comp.Cases 1644], the WCJ also concluded that the correct method for determining the amount of permanent disability indemnity payable to applicant for her current injuries is to subtract the $14,171.00 permanent disability indemnity award for her prior injuries from the $102,235.00 pre-apportionment dollar value of the permanent disability caused by her current injuries. Accordingly, the WCJ found that applicant's current injuries caused 72% permanent disability, entitling her to 444.5 weeks of disability indemnity at the rate of $230.00 per week (a total sum of $102,235.00), and a weekly life pension of $46.38 thereafter. However, apportioning under section 4664 and *Dykes*, the WCJ also found that applicant's permanent disability award is to be reduced by $14,171.00 – the amount of her prior permanent disability indemnity award.[4]

Defendant then filed its petition for reconsideration.

II. DISCUSSION

We grant reconsideration to amend the WCJ's decision to defer the calculation of the amount of permanent disability indemnity due after apportionment for the reasons that follow.

On April 19, 2004, Senate Bill 899 (SB 899) repealed the former apportionment statutes and replaced them with new sections 4663 and 4664.

On December 20, 2005, the Fifth Appellate District issued *Dykes*, *supra*. *Dykes* concluded that, after SB 899, the proper method for calculating permanent disability indemnity after

[4] The WCJ did not specify how the $14,171.00 reduction in applicant's current permanent disability indemnity award was to be applied (i.e., his decision did not state whether the $14,171.00 was to be: deducted from the initial payments of permanent disability; commuted from the far end of the permanent disability award - but before the life pension; commuted over the duration of the permanent disability award; or adjusted by the parties).

apportionment is to subtract the *actual dollar amount* of the permanent disability indemnity award for the prior injury from the *current dollar value* of the overall permanent disability caused by both the current injury and the prior injury (i.e., subtracting "old" dollars from "new" dollars). Thus, *Dykes* applied a variant of the "formula C" that the California Supreme Court had considered (and rejected) in *Fuentes v. Worker's Comp. Appeals Bd.* (1976) 16 Cal.3d 1 [41 Cal.Comp.Cases 42]. *Dykes*, however, expressly limited its holding to cases involving successive injuries with the same self-insured employer. (134 Cal.App.4th at pp. 1550-1551, see also, pp. 1540, 1553.) On March 1, 2006, the Supreme Court denied the employer's petition for review. (2006 Cal. LEXIS 2885.)

On June 8, 2006, the First Appellate District, Division Two, issued *Nabors v. Workers' Comp. Appeals Bd*. (2006) 140 Cal.App.4th 217 [71 Cal.Comp.Cases 704]. *Nabors* agreed with *Dykes* that formula C applies and that "old" dollars should be subtracted from "new" dollars. *Nabors* applied its holding to successive injuries with the same employer, whether self-insured or having two insurance carriers. (140 Cal.App.4th at p. 228.) On August 23, 2006, the Supreme Court denied the employer's petition for review. (2006 Cal. LEXIS 10100.)

On August 30, 2006, the First Appellate District, Division Three, issued *Brodie v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 685 [71 Cal.Comp.Cases 1007], review granted November 15, 2006, S146979 – a case involving successive injuries with the same self-insured employer. *Brodie* agreed with *Dykes* and *Nabors* that formula C should be applied, but *Brodie* subtracted "new" dollars from "new" dollars (i.e., it subtracted the *current dollar value* of the percentage of permanent disability found under the prior award from the *current dollar value* of the overall permanent disability caused by both the current injury and prior injuries). On November 15, 2006, the Supreme Court granted review. (2006 Cal. LEXIS 13527.)

On August 31, 2006, the Third Appellate District, issued *Welcher v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 818 [71 Cal.Comp.Cases 1087], review granted November 15, 2006, S147030 – a decision involving four consolidated cases with various factual scenarios, i.e., successive injuries with different employers with different carriers, successive injuries with

the same self-insured employer, and an industrial injury with pre-existing and subsequent non-industrial conditions. *Welcher* expressly disagreed with *Dykes* and *Nabors* and held that formula A of *Fuentes* still should be followed, i.e., subtracting the percentage of permanent disability under the prior award from the overall percentage of permanent disability caused by both the current industrial injury and the prior industrial injury (i.e., subtracting percentages from percentages). On November 15, 2006, the Supreme Court granted review. (2006 Cal. LEXIS 13523.)

The Supreme Court's grants of review in *Brodie* and *Welcher* automatically vacated those opinions, making them uncitable. (Cal. Rules of Court, rules 976(d)(1) [rule 8.1105(d)(1), eff. 1/1/07] ("Unless otherwise ordered …, an opinion is no longer considered published if the Supreme Court grants review") & 977(a) [rule 8.1115(a), eff. 1/1/07] (in general, "an opinion of a California Court of Appeal … that is not certified for publication … must not be cited or relied on by a court or a party in any other action"); see also, *Quintano v. Mercury Cas. Co.* (1995) 11 Cal.4th 1049, 1067, fn. 6 (a grant of review "ha[s] the effect of depublishing [the Court of Appeal's] opinion"); *People v. Rogers* (1978) 21 Cal.3d 542, 547 ("the granting of a hearing automatically vacates the opinion of the Court of Appeal").) Accordingly, *Brodie* and *Welcher* no longer have any precedential effect.

On November 30, 2006, the Sixth Appellate District issued its opinion in the consolidated cases of *Davis v. Workers' Comp. Appeals Bd*. and *Torres v. v. Workers' Comp. Appeals Bd*. (2006) __ Cal.App.4th __ [71 Cal.Comp.Cases ___, 2006 Cal. App. LEXIS 1893, 51 Cal.Rptr.3d 605], which both involved successive injuries with different employers having different insurers. *Davis*/*Torres* expressly disagreed with *Dykes* and *Nabors* and held that formula A of *Fuentes* still should be followed, i.e., subtracting percentages from percentages. *Davis*/*Torres* neither expressly limited its holding to the factual scenario before it nor expressly stated that its holding was intended to apply to all cases involving the calculation of permanent disability indemnity after apportionment. Although *Davis*/*Torres* will not be final until 30 days after its issuance (Cal. Rules of Court, rule 24(b)(1) [rule 8.264(b)(1), eff. 1/1/07]), it has immediate precedential effect because it was certified for publication upon its issuance. (Cal. Rules of Court, rule 977(d) [rule 8.1115(d),

eff. 1/1/07] ("A published California opinion may be cited or relied on as soon as it is certified for publication or ordered published"); see also, *Jonathon M. v. Superior Court* (2006) 141 Cal.App.4th 1093, 1098.)

Therefore, given the decisional history above, there is now both a viable conflict and clear uncertainty in the appellate case law regarding the calculation of a permanent disability award after apportionment.

Where a conflict exists between published opinions of different Courts of Appeal, the WCAB is free to choose between the conflicting lines of authority until either the Supreme Court resolves the conflict or the Legislature clears up the uncertainty by legislation. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456; *People v. Hunter* (2005) 133 Cal.App.4th 371, 382; *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4; *Maples v. Aetna Cas. & Surety Co*. (1978) 83 Cal.App.3d 641, 650, fn. 5.) The Supreme Court's grants of review in *Brodie* and *Welcher* are not "decisions" and, therefore, do not resolve the conflicts between *Dykes*/*Nabors* and *Davis*/*Torres*. (See Cal. Const., art. VI, § 14 ("Decisions of the Supreme Court … shall be in writing with reasons stated."); *cf. Ritter v. Thigpen* (11th Cir. 1987) 828 F.2d 662, 665-666 ("A grant of certiorari [by the U.S. Supreme Court] does not constitute new law.").)

Nevertheless, under the peculiar circumstances present here – where there is uncertainty and conflict in the current published appellate authority (i.e., *Dykes*/*Nabors* versus *Davis*/*Torres*), and where there have been grants of review by the Supreme Court (*Brodie*/*Welcher*) – we elect not to choose which of the conflicting lines of authority we will follow. Instead, we conclude that the strong public policies favoring judicial economy, uniformity in the application of the law, and the prevention of inconsistent judgments that undermine the integrity of the judicial system (e.g., *Jonathan Neil & Associates, Inc. v. Jones* (2004) 33 Cal.4th 917, 933; *Mooney v. Caspari* (2006) 138 Cal.App.4th 704, 717) provide compelling reasons for *deferring* the issue of how to calculate permanent disability indemnity after apportionment.

First, given the Supreme Court's grants in *Brodie* and *Welcher*, and given the very wide discrepancies in the potential outcomes in individual cases depending on which "formula" the

Supreme Court ultimately adopts,[5] we expect relatively few settlements; therefore, an unusually high number of cases will be litigated.

Second, if we were to consistently decide these litigated cases in accordance with *Dykes*/*Nabors*, in accordance with *Davis*/*Torres*, or in accordance with both lines of authority (i.e., applying *Dykes*/*Nabors* where there have been successive industrial injuries with the *same* employer and applying *Davis*/*Torres* where there have been successive industrial injuries with *different* employers), then the WCAB and the appellate courts likely would be flooded, respectively, with petitions for reconsideration and petitions for writ of review – if for no other reason than to enable the parties to preserve their rights pending the Supreme Court's decision(s) in *Brodie* and *Welcher*.

Third, even if some cases became final because the parties did not seek reconsideration or appellate review, the Supreme Court's decision(s) in *Brodie* and *Welcher* might be inconsistent with *Dykes*/*Nabors* or *Davis*/*Torres* or both. If the Supreme Court's decision(s) are not applied prospectively only – then, with respect to cases that are still within five years of the applicant's date of injury (Lab. Code, § 5804), many parties might file petitions alleging "good cause" to reopen based on a change in the law. (Lab. Code, § 5803.)[6] This could create "a landslide of reopenings of previously adjudicated cases" (*Atlantic Richfield Co. v. Workers' Comp. Appeals Bd*. (*Arvizu*) (1982) 31 Cal.3d 715, 728 [47 Cal.Comp.Cases 500]) that could strain the workers' compensation adjudication system and cause additional delays in the final resolution of these cases.

Finally, if the Supreme Court's decision(s) in *Brodie* and *Welcher* reach a result inconsistent with *Dykes*/*Nabors*, then in any cases in which *Dykes*/*Nabors* had been applied – but

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[5] For example, in *Davis*, the employee had a prior 35% permanent disability award, and then suffered a new injury that left her with overall permanent total disability (100%). Using formula A (i.e., subtracting percentages from percentages), the WCAB gave her a permanent disability award of $65,662.50 – based on 65% permanent disability after apportionment – with no life pension. Had the formula C of *Dykes* and *Nabors* been followed (i.e., subtracting "old" dollars from "new" dollars), the employee would have received $420,649.21, based on her life expectancy, including a life pension.

[6] We do not now express or imply any opinion on this question.

the defendants either timely sought appellate review or successfully petitioned to reopen – there could be issues of restitution or credit that, again, could cause delays in the final resolution of these cases and – if allowed – could significantly disrupt the applicants' benefits or have other serious adverse consequences for them.

Accordingly, deferring any finding regarding the calculation of the permanent disability indemnity appears to be both fair and in the best interests of applicants, defendants, and the workers' compensation adjudication system.[7] Indeed, it appears that the Supreme Court has adopted a policy of deferring the issue of the calculation of permanent disability after apportionment pending its decision in *Welcher/Brodie*. (See *Browning-Ferris Industries v. Workers' Comp. Appeals Bd.* (*Salter*), review granted December 20, 2006, S147883 [Supreme Court defers further action and "holds" case pending its decision in *Welcher*/*Brodie*].)

In light of the Supreme Court's grants in *Brodie* and *Welcher*, we recognize it is reasonably likely that petitions for review will be filed in *Davis* and *Torres* and that the Supreme Court will grant review. Nevertheless, the mere filing of a petition for review has no effect on a Court of Appeal decision. Moreover, given the timelines established by the California Rules of Court, there could be a several month delay before the Supreme Court acts on any petitions for review filed in *Davis*/*Torres*. Accordingly, *Davis*/*Torres* may continue to have precedential effect for some time.

If the Supreme Court does grant review in *Davis*/*Torres*, however, then this would render *Davis*/*Torres* uncitable. (Cal. Rules of Court, rules 976(d)(1) [rule 8.1105(d)(1), eff. 1/1/07], 977(a) [rule 8.1115(a), eff. 1/1/07]; *Quintano*, *supra*, 11 Cal.4th at p. 1067, fn. 6; *Rogers*, *supra*, 21 Cal.3d at p. 547.) This would leave *Dykes* and *Nabors* as the only published appellate authority addressing the issue of how to calculate permanent disability after apportionment in light of SB 899. Moreover, because *Dykes* and *Nabors* are consistent with each other, there no longer would be any "conflict" in the published case law.

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[7] The Appeals Board may defer the issue of the calculation of permanent disability indemnity due after apportionment, and then subsequently determine that issue, even though the statutory five-year period for filing a petition to reopen has elapsed. (E.g., *General Foundry Service v. Workers' Comp. Appeals Bd*. (*Jackson*) (1986) 42 Cal.3d 331, 337 [51 Cal.Comp.Cases 375]; *Douglas Aircraft Co. v. Industrial Acc. Com*. (*Chaffee*) (1948) 31 Cal.2d 853, 855-856 [13 Cal.Comp.Cases 116].)

Of course, under the principle of stare decisis, the WCAB is bound to follow any non-conflicting published decisions of the Courts of Appeal (*Auto Equity* Sales, *supra*, 57 Cal.2d at p. 455; see also *Brannen v. Workers' Comp. Appeals Bd*. (1996) 46 Cal.App.4th 377, 384, fn. 5 [61 Cal.Comp.Cases 554]; *Ryerson Concrete Co. v. Workmen's Comp. Appeals Bd*. (*Pena*) (1973) 34 Cal.App.3d 685, 688 [38 Cal.Comp.Cases 649].) As discussed above, the Supreme Court's grants of review in *Brodie* and *Welcher* are not "decisions" (see Cal. Const., art. VI, § 14) and, therefore, they do not affect the obligation of the WCAB to follow non-conflicting precedential Court of Appeal decisions. (See *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1626, fn. 12 (when the United States Supreme Court had granted certiorari on an issue of federal law, on which it is the ultimate arbiter, the doctrine of stare decisis still required the Court of Appeal to follow California Supreme Court decisions on that same issue despite the grant of certiorari); see also, e.g., *U.S. v. Bruno* (3rd Cir. 1990) 897 F.2d 691, 693, fn. 2 (federal Circuit Court of Appeals was bound by its prior decision, notwithstanding the United States Supreme Court's grant of certiorari in another Circuit's case in which a contrary conclusion was reached); *Ritter, supra*, 828 F.2d at pp. 665-666 ("A grant of certiorari does not constitute new law.").) Thus, if the Supreme Court grants review in *Davis*/*Torres*, then, at least for a time, the WCAB would be bound by *Dykes* and *Nabors*, notwithstanding the Supreme Court's grants of review in *Brodie* and *Welcher* on the same issue.

Nevertheless, even if the Supreme Court does grant review in *Davis*/*Torres* (or, indeed, if it grants review in any subsequent published case presenting the issue of how to calculate permanent disability indemnity after apportionment), this would not change our approach. That is, given the peculiar circumstances now present, including the fact that *Brodie* and *Welcher* are presently pending before the Supreme Court on grants of review – and given the public policies discussed above favoring judicial economy, uniformity in the application of the law, and the prevention of inconsistent judgments which undermine the integrity of the judicial system – we would still conclude that it is appropriate to *defer* the issue of how to calculate permanent disability indemnity after apportionment. Moreover, the principle of stare decisis would not be violated by *deferring*

this issue, because we would not be actually *deciding* it in a manner inconsistent with *Dykes*/*Nabors*.

We emphasize, however, that we are deferring a finding *solely* on the issue of *the calculation of the permanent disability indemnity* (and the related issue of attorney's fees). Any findings regarding the overall level of permanent disability or the percentage of permanent disability to be apportioned under section 4664 (or, for any section 4663 apportionment, the approximate percentages of industrial and non-industrial causation) are *not* being deferred. The parties should treat these findings as "final" for purposes of reconsideration, appellate review, and reopening.

For the foregoing reasons,

IT IS ORDERED that the defendant's petition for reconsideration, filed December 8, 2006, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board that the Amended Findings and Award issued by the workers' compensation administrative law judge on October 16, 2006 is **RESCINDED** and that the following Findings and Order is **SUBSTITUTED** therefore:

FINDINGS OF FACT

1. Applicant's two admitted industrial injuries to her neck and in the form of fibromyalgia, which she sustained while employed as an x-ray technician by defendant from 1994 through January 13, 2000 (Case No. POM 0246580) and on October 26, 1999 (Case No. POM 0246582), caused overall permanent disability of 72%, before apportionment.

2. Applicant's stipulated award of 25% permanent disability for her June 27, 1977 through May 14, 1994 cumulative injury and her May 19, 1994 specific injury to her low back shall be apportioned in accordance with Labor Code section 4664.

3. The calculation of the amount of permanent disability indemnity due, after apportionment, is deferred.

4. The issue of attorney's fees is deferred.

ORDER

IT IS ORDERED that these matters are **RETURNED** to the trial level for all further proceedings and decision as deemed appropriate by the workers' compensation administrative law judge.

WORKERS' COMPENSATION APPEALS BOARD

/s/ Merle C. Rabine

I CONCUR,

/s/ James C. Cuneo

/s/ William K. O'Brien

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

12/28/06

***SERVICE BY MAIL ON SAID DATE AS SHOWN BELOW*:**

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