WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JASON ZAPATKA, *Applicant*

vs.

CITY OF LOS ANGELES POLICE DEPARTMENT, permissibly self-insured, *Defendants*

Adjudication Number: ADJ18866949
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the arbitrator with respect thereto. Based on our review of the record, and for the reasons stated in the arbitrator's report, which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

Labor Code[1] section 5909 provides that a petition for reconsideration is deemed denied unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.) However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493]; see *Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635 fn. 22 [70 Cal.Comp.Cases 312] ["irregularity which deprives reconsideration under the statutory scheme denies due process"].) In *Shipley,* applicant sought a writ of review of a decision of the Appeals Board denying his petition for reconsideration by operation of law (Lab. Code, § 5909). The Court there granted a writ of review, stating that while the "language [section 5909] appears mandatory and jurisdictional, the time periods must be based on a presumption that a claimant's file will be available to the board; *any other result deprives a*

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

claimant of due process and the right to a review by the board." (*Shipley, supra,* 7 Cal.App.4th at pp. 1107-1108, italics added.)

In *Shipley,* the Court of Appeal reversed the Appeals Board, holding that the time to act on the petition was tolled during the period the file was misplaced and unavailable to the Appeals Board. (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) The Court emphasized that "Shipley's file was lost or misplaced through no fault of his own and due to circumstances entirely beyond his control." (*Shipley, supra,* 7 Cal.App.4th at p. 1007.) "Shipley's right to reconsideration by the board is likewise statutorily provided and *cannot be denied him without due process*. Any other result offends not only elementary due process principles but common sensibilities. Shipley is entitled to the board's review of his petition and its decision on its merits." (*Id.*, at p. 1108, italics added.) The Court stated that its finding was also compelled by the fundamental principle that the Appeals Board "accomplish substantial justice in all cases..." (Cal. Const., art. XIV, § 4), and the policies enunciated by section 3202 "to construe the act liberally 'with the purpose of extending their benefits for the protection of person injured in the course of their employment.'" (*Id*., at p. 1107.) The Court in *Shipley* properly recognized that in workers' compensation, deprivation of reconsideration without due process – without this full de novo review of the record in the case – "offends" the fundamental right of due process, as well as the Appeals Board's mandate to "accomplish substantial justice in all cases..." (*Shipley, supra,* 7 Cal.App.4th at p. 1107-1108.)

We note that all timely petitions for reconsideration filed *and received* by the Appeals Board are "acted upon within 60 days from the date of filing" pursuant to section 5909, by either denying or granting the petition.[2] The exception to this rule are those petitions *not received* by the Appeals Board within 60 days due to irregularities outside the petitioner's control. (See *Rea, supra,* 127 Cal.App.4th at p. 635, fn. 22.) Pursuant to the holding in *Shipley* allowing tolling of the 60-day time period in section 5909, the Appeals Board acts to grant or deny such petitions for reconsideration within 60 days of receipt of any such petition, and thereafter to issue a decision on the merits. By doing so, the Appeals Board also preserves the parties' ability to seek meaningful

[2] The Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909 based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350], *Le Vesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision." (See Lab. Code, § 5908.5.)"]; *Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 893.)

appellate review. (Lab. Code, §§ 5901, 5950, 5952; see *Evans v. Workmen's Comp. Appeals Bd*. (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350].) This approach is consistent with *Rea* and other California appellate courts,[3] which have consistently followed *Shipley's* lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.[4]

In this case, the arbitrator issued the Findings and Award on November 9, 2023, and defendant filed a timely Petition for Reconsideration on November 29, 2023. Thereafter, the Appeals Board failed to act on defendant's petition within 60 days of its filing, through no fault of petitioner. Accordingly, considering that the Appeals Board's failure to act on the petition was in error, we find that our time to act was equitably tolled.

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[3] See e.g., *Hubbard v. Workers Compensation Appeals Bd. of California* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; see also, *Frontline Medical Associates, Inc. v. Workers' Comp. Appeals Bd. (Lopez, Leonel; Sablan, Yolanda)* (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers' Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Compensation Appeals Bd. of California* (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers' Compensation Appeals Board and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers' Compensation Appeals Board and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers' Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v.Workers' Compensation Appeals Board. et al. (Lomeli)* (2022) (C095051)); Third District (*Ace American Insurance Company v. Workers' Compensation Appeals Board and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Carlos Piro v. Workers' Compensation Appeals Board and County of San Bernardino* (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Patricia Lazcano v. Workers' Comp. Appeals Bd*. (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Comp. Appeals Bd., et al. (MelendezBanegas)* (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Board et al. (Haynes*) (2022) 87 Cal.Comp.Cases 905).

[4] The holding in *Zurich American Ins. Co. v. Workers' Comp. Appeals Bd.* (2023) 97 Cal.App.5th 1213 (*Zurich*) is not inconsistent with *Shipley* and other California Appellate Court precedent concurring and/or affirming the finding in *Shipley* that equitable considerations may exist to toll the 60-day time limit of section 5909. Indeed, the *Zurich* Court expressly declined to "resolve" the question of whether section 5909 was intended to be "mandatory and jurisdictional." (*Zurich, supra,* 97 Cal.App.5th at p. 1236, fn. 17.) Under *Zurich*, as in *Shipley*, "equitable considerations" may provide grounds to excuse an action by the Appeals Board outside the 60 days provided for in section 5909. (*Zurich, supra,* 97 Cal.App.5th at p. 1238.) The *Zurich* Court found that the Appeals Board acted "in excess of its jurisdiction," *and* that there were no equitable considerations sufficient enough to toll the time limit in section 5909 beyond 60 days. (*Id.* at p. 1239.)

We note that the *Zurich* Court failed to consider that Labor Code section 5803 provides for continuing jurisdiction by the Appeals Board over all of its "orders, decisions, and awards," and that section 5301 provides for "full power, authority and jurisdiction" by the Appeals Board for all proceedings under section 5300. Additionally, jurisdiction is conferred on the Appeals Board when a petition is timely filed under Labor Code section 5900(a), and the Appeals Board may review the entire record, even with respect to issues not raised in the petition for reconsideration before it. A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal.724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 10, 2024

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

JASON ZAPATKA
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
CITY ATTORNEY-LOS ANGELES
LINDA DAVIDSON-GUERRA, ARBITRATOR

PAG/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

INTRODUCTION

Defendant, City of Los Angeles has filed this timely and verified petition for reconsideration challenging the November 8, 2023, Arbitrator's decision wherein I found, that Applicant, a police officer was entitled to an unapportioned Award of 33% permanent disability to the lumber spine and left shoulder. Defendant contends by the decision or award this Arbitrator acted without or in excess of her powers; that the evidence does not justify the findings of fact and the findings of fact do not support the order, decision or award. Specifically, Defendant contends it was error to find that apportionment under Labor Code Section 4664(b) was precluded because it was inconsistent with the anti-attribution clause of Labor Code Section 4663(e). Applicant had a prior Award of 17% permanent disability to the low back which Defendant asserts requires apportionment under Labor Code 4664(b). An answer to the petition has been received from Applicant.

STATEMENT OF FACTS

Jason Zapatka was employed as a police officer for the City of Los Angeles and sustained injury arising out of and in the course of his employment to the left shoulder and lumbar spine during the period July 6, 1998 through April 8, 2019. Applicant had a prior cumulative trauma injury during the period July 6, 1998 through December 17, 2013 which resulted in an Award of 34% permanent disability which seventeen per cent (17%) of the permanent disability was attributed to the lumbar spine.

The matter proceeded to arbitration pursuant to Labor Code Section 3201.7 on November 1, 2023. The issues were: permanent disability, apportionment, need for future medical care, attorneys' fees and whether Defendant was entitled to apportionment via the subtraction method under Labor Code 4664(b) for the prior 17% lumbar spine disability or if Labor Code 4663(e) precluded such apportionment. The exhibits offered were limited. Offered as joint exhibits were the two (2) reports of AME Dr. Gary Brazina dated May 16, 2022 and March 1, 2023. Defendant also offered two (2) exhibits: the prior Award of May 4, 2017 and the AME report of Dr. David Heskiaoff dated August 19, 2016 upon which the prior award was based. No testimony was taken.

Prior to the Arbitration the parties reached an agreement as to the permanent disability to the left shoulder and did stipulate to 18% percent disability after apportionment. Additionally, they stipulated that if apportionment did not apply to the lumbar spine injury, then the 8% WPI assessed by Dr. Brazina would rate out to 18% permanent disability.

On November 8, 2023 I issued a finding of 33% permanent disability based on the parties' stipulation of 18% permanent disability to the left shoulder and 18% to the lumbar spine without apportionment. I determined based on the analysis in *Bates v County of San Mateo 84 Cal. Comp. Cases 648 , [2019 Cal. Wrk. Comp. P.D. LEXIS 72]* and *California Highway Patrol v. W.C.A.B. (Santiago, Thomas), 87 Cal. Comp. Cases 1011, 2022 Cal. Wrk. Comp. P.D. LEXIS 72 (writ*

denied) that Labor Code 4664(b) apportionment would not apply here because it was precluded by the anti-attribution clause under Labor Code 4663(e).

DISCUSSION

1. Defendant's petition may be dismissed on procedural grounds for failing to cite to the record as mandated by 8 Cal. Code Reg. §10945.

Pursuant to 8 Cal Code Reg. §10945:

(a) Every petition for reconsideration, removal or disqualification shall fairly state all of the material evidence relative to the point or points at issue. Each contention shall be separately stated and clearly set forth. A failure to fairly state all of the material evidence may be a basis for denying the petition…

(c)(1) Copies of documents that have already been received in evidence or that have already been made part of the adjudication file shall not be attached or filed as exhibits to petitions for reconsideration, removal, or disqualification or answers. Documents attached in violation of this rule may be detached from the petition or answer and discarded.

(2) A document that is not part of the adjudication file shall not be attached to or filed with a petition for reconsideration or answer unless a ground for the petition for reconsideration is newly discovered evidence.

Here Defendant violated both subsection (b) and (c) of Regulation 10945. Attached to the petition are copies of the AME reports of Dr. Brazina and Dr Heskiaoff, both of which were received in evidence and are part of the record. They are designated as Joint Exhibits X and Y and Defense Exhibit B, respectively. Additionally, Defendant, without explanation or a showing of good cause, included new documents in the form of the interrogatory sent to Dr. Brazina dated December 22, 2022 (designated as Exhibit A in the petition) and a legislative history report of Labor Code 4663(e) from LRI History LLC. These two (2) documents were not received into evidence and are not part of the Arbitration file. As the petition was filed electronically the option of discarding or detaching them as allowed under Reg. 10945(c)(1) was not possible. Accordingly, it is requested that the petition be dismissed on procedural grounds.

2. The anti-attribution clause under Labor Code Section §4663(e) precludes application of Labor Code §4664(b) subtraction of Applicant's prior Award from his current level of disability.

Labor Code Section 3213.2 affords certain law enforcement personnel a presumption of industrial injury to the lumbar spine ("duty-belt" presumption) if certain conditions are met. Relevant to the discussion here is the following:

"In the case of a member of a police department of a city, county, or city and county,… who has been employed for at least five years as a peace officer on a regular, full-time salary and has been required to wear a duty belt as a condition of employment, the term "injury," as used in this division, includes lower back impairments…(b) The lower back impairment so developing or manifesting itself in the peace officer shall be presumed to arise out of and in the course of the employment…"

There is no dispute that the Applicant is entitled to the "duty belt" presumption under Section 3213.2. Defendant contends that notwithstanding the fact that this is a presumptive injury subtraction of the prior lumbar spine award is mandated by Section 4664(b). Defendant argues that failure to apply apportionment here results in a double recovery and unjust enrichment for the Applicant and creates an undue burden on Defendant. Additionally, Defendant argues that it was error to rely on the analyses in *Bates* and *Santiago* as they are non-binding decisions. Defendant argues the appropriate level of permanent disability for the lumbar spine must include subtraction of the prior 17% Award.

Defendant is correct that under Labor Code Section 4664(b) apportionment to a prior Award is conclusively presumed to exist and establish a prior level of permanent disability. The Section specifically states,

"…(b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury…"

This case however involves an injury specifically excluded under the anti-attribution clause, Labor Code 4663(e). Section 4663(e) states as follows:

(a) Apportionment of permanent disability shall be based on causation…

(b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.

(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries….

(d) An employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities or physical impairments.

(e) Subdivisions (a), (b), and (c) do not apply to injuries or illnesses covered under Sections 3212, 3212.1, 3212.2, 3212.3, 3212.4, 3212.5, 3212.6, 3212.7, 3212.8, 3212.85, 3212.9, 3212.10, 3212.11, 3212.12, 3213, and 3213.2.

In my decision I acknowledged that while panel decisions are not binding, they nonetheless may be cited as authority on issues of contemporaneous administrative construction of statutory language. A WCAB decision reported in the California Workers' Compensation Reporter is a properly citable authority, especially as an indication of contemporaneous interpretation and application of workers' compensation laws. *Griffith v. WCAB, 209 Cal. App. 3d 1260,1264,fn.2,*

257 Cal. Rptr. 813, 54 Cal. Comp Cases 145. Therefore, it was not error to follow the rationale set forth in *Bates* and *Santiago (supra)*.

In *Bates* the WCAB concluded that Labor Code Section 4663(e) precluded apportionment under Labor Code 4664(a) in cases of involving presumptively compensable injuries under *Labor Code § 3212 et seq. Santiago,* relying on the analysis in *Bates*, held that the anti-attribution provision of Labor Code Section 4663(e) also applied to apportionment under Labor Code Section 4664(b).

The WCAB rejected Defendant's argument that the anti-attribution clause only applied to Labor Code 4663(a)-(c) apportionment and not to Labor Code 4664(a) apportionment. In its analysis the WCAB found that while there was overlap of disability between the Applicant's current and prior disabilities, and that would ordinarily allow for subtraction of the prior award, the clear language of Labor Code Section 4663(e)prohibited application of apportionment where there are presumptive compensable injuries. In deciding the issue the WCAB first found that the apportionment to causation provision of Labor Code 4664(a) is a general statute whereas Labor Code Section 4663(e) is a specific institute precluding apportionment to causation between two (2) or more industrial injuries which are presumed compensable.

Next the WCAB considered the legislative history of Section 4663(e) noting that the Section was enacted January 1, 2007 after Section 4664(a) which was part of Senate Bill 899 (SB 899) and which became effective on April 19, 2004. The WCAB stated, "It would be inconsistent with the Legislature's unified scheme of apportionment based on causation to conclude that Section 4664(a) somehow overrides the specific and later enacted provisions of section 4663(e)."

The WCAB also considered both section 4663 and 4664 as " manifesting a single unified legislative approach to apportionment citing *Brodie v. Workers' Comp. Appeals Bd. (2007) 40 Cal. 4th 1313, 1327 [57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 Cal. Comp. Cases 565]; Kleemann v. Workers' Comp. Appeals Bd. (2005) 127 Cal. App. 4th 274, 284 [25 Cal. Rptr. 3d 448, 70 Cal. Comp. Cases 133]* and *Benson v. Workers' Comp. Appeals Bd. (2009) 170 Cal. App. 4th 1535 [89 Cal. Rptr. 3d 166, 74 Cal. Comp. Cases 113]*. Therefore, to read section 4664(a) as overriding the later-enacted and specific language of section 4663(e) would "effectively render the provisions of section 4663(e) null and void." *Bates 656*.

The issue I was presented with here, whether apportionment under section 4664(b) mandates subtraction of Applicant's prior award was specifically addressed in *Santiago*. In *Santiago*, Applicant a Highway Patrol Officer had a presumptively compensable injury to the heart resulting in 55 per cent permanent disability. He had a prior award of 18% for heart trouble also a presumptively compensable injury. Defendant sought subtraction of the 18% prior award. The WCJ found the Applicant was entitled to an unapportioned award. Defendant filed a petition for reconsideration. The WCAB denied the petition and held that defendant was not entitled to apportionment of applicant's permanent disability under Labor Code Section 4664(b) even though defendant established overlap between his prior and current disabilities, because the anti-attribution provision of Labor Code Section 4663(e) precluded apportionment in cases of involving presumptively compensable injuries under *Labor Code § 3212 et seq.*

The facts in this case are almost identical to those in *Santiago*. Here Applicant had a prior award of 17% disability to the lumbar spine, a presumptively compensable injury. The medical reporting established both Dr. Brazina, the current AME and Dr. Heskiaoff the prior AME assessed impairment of 8 % WPI to the lumbar spine based on AMA Guides, Table 15-3, p. 384 (DRE Category II). While the disability is identical and thus a complete overlap of the prior level of disability and the existence of the prior award was established by Defendant, as required under *Kopping v. WCAB) (2006) 142 Cal. App. 4th 1099, 71 Cal. Comp. Cases 1229)*, here as in *Santiago* both injuries are presumptive and subject to Section 4663(e). Therefore, they are specifically excluded under the anti-attribution clause.

One of the factors considered in the WCAB's analysis in *Santiago* was the legislative history of AB 1368 which indicated a concern by the Legislature that apportionment not result in decreased permanent disability for specified public employees thereby diluting the intended benefit conferred to presumptive injuries under Labor Code 3212-3212.12, 3213 and 3213.2. Although Defendant contends that failure to apply apportionment via subtraction to Applicant's presumptive injury was a deviation from established principles and precedent, both *Bates* and *Santiago* found that the Labor Code 4664 apportionment requirement should be precluded given the later enacted Labor Code 4663(e). As indicated in both *Bates* and *Santiago* viewing the statutes together it is evident that the legislature intended to approach apportionment to causation in a cohesive singular manner. As the Board stated in *Bates* Labor Code 4663 and 4664 have long been viewed as a single unified legislative approach to apportionment and the language of section 4663(e)which precludes the application of the apportionment provisions of section 4663(a)-(c) to injuries or illnesses covered by section 3212.2 *Bates, 656.*

Finally, as pointed out in Applicant's answer the cases cited by Defendant interpret federal statutes and not Labor Code Section 4663 or 4664 which are at issue here. As such they should be deemed irrelevant to the underlying legal arguments. Further, here there is but one employer and following the approach in *Santiago* "does not conflict with the employer only being liable for the percentage directly caused by the industrial injury as the entire amount of permanent disability has been caused by the same single employer."

RECOMMENDATION

It is respectfully recommended that Defendant's petition be DENIED for the reasons set forth above.

Dated: December 13, 2023

ARBITRATOR LINDA DAVIDSON-GUERRA
Workers Compensation Administrative Law Judge (Ret.)