WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NANCY JOHNSON, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION; legally uninsured, administered by State Compensation Insurance Fund, *Defendants*

Adjudication Numbers: ADJ4265793 (GOL 0097124) (MF); ADJ3983602 (GOL 0097125); ADJ7323352
Goleta 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.[1]

Applicant and defendant each seek reconsideration of the Joint Findings of Fact and Award (F&A) issued on June 14, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part that: in case number ADJ4265793, applicant while employed as a firefighter on April 26, 2001, sustained industrial injury to her lumbar spine and internal system in the form of hepatitis C, resulting in 39% permanent disability with the need for further medical treatment; in case number ADJ3983602, applicant while employed as a firefighter on February 1, 2002, sustained industrial injury to her lumbar spine and internal system in the form of hepatitis C, resulting in 39% permanent disability with the need for further medical treatment; and in case number ADJ7323352, applicant while employed during the period April 6, 2001 through March 6, 2002, sustained industrial injury to her neck, left shoulder, left knee and internal system in the form of hepatitis C, resulting in 55% permanent disability with the need for further medical treatment. The WCJ jointly awarded, in all three cases, temporary disability during the period from April 26, 2001 to April 25, 2007.

[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

Applicant contends that she is entitled to a joint award of 100% permanent disability based on inextricability between the three industrial injuries in accordance with *Benson v. Workers' Comp. Appeals Bd.* (2007) 72 Cal.Comp.Cases 1620 (Appeals Board en banc) (*Benson*).

Defendant contends that the WCJ erred in awarding temporary disability during the period from April 26, 2001 to April 25, 2007, since primary treating physician (PTP) Alan Moelleken, M.D., found applicant reached maximum medical improvement (MMI) on December 6, 2004, and that the WCJ failed to account for applicant's periods of incarceration rending her ineligible for temporary disability indemnity pursuant to Labor Code section 3370.[2] In addition, defendant contends that the WCJ erred in failing to apportion 50% permanent disability for the right knee to non-industrial causes based on the opinions of agreed medical evaluator (AME) Richard Scheinberg, M.D.[3]

We have not received Answers from either applicant or defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant reconsideration only to amend the temporary disability award to account for periods of incarceration where applicant was ineligible pursuant to section 3370.

We have considered the allegations in both Petitions and the contents of the WCJ's Report with respect thereto. Based on our review of the record and the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&A and substitute a new F&A that finds that applicant sustained injury during the period April 6, 2001 through March 6, 2002, to her neck, left shoulder, left knee, right knee, and internal system in the form of hepatitis C; that applicant is entitled to temporary disability benefits during the period April 26, 2001 to December 6, 2004, payable at the rate of $126.00 per week, less any ineligible periods under section 3370, not to exceed 240 weeks; and that applicant is 100% permanently and totally disabled.

BACKGROUND

Applicant, while employed as a firefighter, sustained the following industrial injuries:

(1) On April 26, 2001 (ADJ4265793), she sustained industrial injury to her lumbar spine and internal system in the form of hepatitis C.

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

[3] We note that the parties never raised at trial nor did the WCJ issue any findings on applicant's right knee injury. However, consistent with the opinions of AME Dr. Scheinberg, we will find that applicant sustained injury to her right knee. This conclusion does not change our conclusion with respect to applicant's permanent disability, but applicant is entitled to future medical care for her injury to her right knee.

(2) On February 1, 2002 (ADJ3983602), she sustained industrial injury to her lumbar spine and internal system in the form of hepatitis C.

(3) During the period from April 6, 2001 through March 6, 2002 (ADJ7323352), she sustained a cumulative industrial injury to her neck, left shoulder, left knee, and internal system in the form of hepatitis C.

On January 14, 2020, we issued our Opinion and Order Granting Petition for Reconsideration and Decision After Reconsideration (O&O), remanding this case back to the trial level. We did so because vocational expert (VE) David Van Winkle's permanent total disability opinion failed to address apportionment based on the AME reports of Dr. Scheinberg and in accordance with *Benson*. (O&O, p. 5.)

The parties jointly submitted into evidence the AME reports and deposition of Dr. Scheinberg M.D., (WCAB Ex. AA-PP, TT-BBB, App. Ex. 13-14) and the AME reports of Edward O'Neill, M.D., (WCAB Ex. QQ-SS). Applicant submitted into evidence the PTP report of Dr. Moelleken dated December 6, 2004 (App. Ex. 9), the panel qualified medical evaluator (PQME) report of James Strait, M.D., dated October 13, 2004 (App. Ex. 10) and the VE reports of Mr. Van Winkle (App. Ex. 1-2, 8, 15). Defendant submitted into evidence the VE reports of Donna Anami, M.S., and Ken Anami, B.A. (Def. Ex. A-B.)

PTP Dr. Moelleken, in his report dated December 6, 2004 (App. Ex. 9), found applicant MMI from her April 26, 2001 injury and provided her work restrictions. (*Id.* at p. 4.)

In his April 25, 2007 report, following his evaluation of applicant, AME Dr. Scheinberg reported that applicant sustained an industrial injury to her low back on April 26, 2001, when, while hiking out from a fire, she pulled her partner up from a cliff who had slipped off the mountain. (WCAB Ex. AA at p. 2.) Applicant treated through the correctional facility for low back pain with radiation into her left leg, including one month of bed rest and medication, and thereafter returned to work. (*Ibid*.)

AME Dr. Scheinberg further reported that on February 1, 2002, applicant sustained a second industrial injury to her low back while pulling a co-worker out of a mineshaft. This injury resulted in her undergoing a partial vertebrectomy at L4-5, anterior discectomy at L4-5 and L5-S1, and placement of cages at both levels, as well as causing a left foot drop. (*Id.* at pp 2-3, 5.)

AME Dr. Scheinberg restricted applicant to sedentary activities and apportioned, without explanation, 50% of the permanent disability for the lumbar spine equally between the April 26, 2001 and February 1, 2002 injuries and 100% of the permanent disability for the

cervical spine, left shoulder and left knee to the April 6, 2001 to March 6, 2002 date of injury. (*Id.* at p. 6.)

In his January 3, 2011 report, AME Dr. Scheinberg opined that, with respect to the cervical spine, applicant had intermittent, slight pain becoming moderate with repetitive cervical rotation or flexion-extension activities. (WCAB Ex. GG at p. 1.) With respect to her lumbar spine, she had frequent, slight pain becoming moderate with lifting, bending, stooping and prolonged weight bearing activities. (*Ibid.*) With respect to her left shoulder, she had intermittent, slight pain becoming moderate with at-or-above shoulder-level activities, repetitive reaching, pushing, or pulling with the left shoulder or heavy lifting using the left upper extremity. (*Ibid.*) Finally, with respect to her left knee, she had frequent, slight pain becoming moderate with squatting, kneeling, climbing, or prolonged weight bearing activities. (*Ibid.*)

In his January 7, 2016 report, AME Dr. Scheinberg amended his previous opinion on permanent disability as follows:

> Based on the significant improvement in this patient's gait and elimination of use of a cane, I believe she no longer is sedentary, as recommended in terms of restrictions in my prior reporting. At this point, I believe she should be considered semi-sedentary with an ability to sit or stand intermittently with a minimum of physical activity. I believe she can function and work in the open labor market in that capacity based on her present examination.

(WCAB Ex. NN at p. 4.)

In his March 22, 2016 report, AME Dr. Scheinberg, after reevaluating applicant, amended his opinion again finding that she had a work restriction of semi-sedentary, contemplating an ability to sit or stand intermittently with a minimum of physical activity, avoiding any at or above shoulder level activities, particularly with her left upper extremity and no lifting. (WCAB Ex. PP at p. 4.)

In his November 28, 2017 report, AME Dr. Scheinberg, after reevaluating applicant, noted that applicant's right knee had progressively worsened with her having to use a cane and brace for ambulation. (WCAB Ex. XX at p. 2.) Her left hand had worsened with some intermittent gripping, grasping, and numbness. (*Ibid.*) With respect to her left shoulder, AME Dr. Scheinberg restricted her from repetitive at-or-above shoulder-level activities and, with respect to her right knee, he restricted her from prolonged weight bearing, repetitive squatting, kneeling, or climbing. (*Id.* at p. 4.) With respect to apportionment, AME Dr. Scheinberg apportioned, without explanation, 50% of her right knee permanent disability to the April 6, 2001 to March 6, 2002 date of injury and 50% to degenerative arthritis. (*Ibid.*)

In his April 10, 2019 report, AME Dr. Scheinberg, after reevaluating applicant, noted that applicant's condition had worsened since her attempted spinal cord stimulator trial and finalized his opinion on permanent disability as follows:

> Based on my discussion with, the applicant today as well as her need for 5 Norco per day and her significant limitation of ability to sit or stand intermittently, I would concur with Mr. Van Winkle's assessment and agree that she is not capable of resuming work nor is she able to undergo vocational rehabilitation, and as such she has sustained 100% loss of future earning capacity.

(WCAB Ex. TT at p. 5.)

In his September 10, 2008 report, AME Dr. O'Neill, M.D., after evaluating applicant, noted that, after her anterior and posterior laminectomy and fusion with a cadaver bone graft, the Food and Drug Administration informed her that the cadaver bone was a stolen body part. After testing, she tested positive for Hepatitis C. (WCAB Ex. QQ at p. 2.) AME Dr. O'Neill opined that, with reasonable medical probability, she contracted Hepatitis C on an industrial basis as derivative of her back injury, with no other cause. (*Id.* at pp. 5-6.) She had no periods of temporary disability and no permanent disability from her Hepatitis C. (*Ibid.*)

In his September 29, 2014 report, VE Mr. Van Winkle, after evaluating applicant, opined on applicant's amenability to vocational rehabilitation as follows:

> To be amenable to vocational rehabilitation, an individual must possess the functional capacity required to complete a training program, conduct effective job search, or perform competitive work on a sustained basis. The combination of AME Scheinberg's work restrictions, the interference of chronic pain, and reliance on narcotic pain medication prevent Ms. Johnson from completing a training program, conducting effective job search, or performing work on a competitive basis and, as a result, Ms. Johnson is not amenable to vocational rehabilitation.
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> Ms. Nancy Johnson does not retain the functional capacity required to compete in the labor market, perform work on a sustained basis, and is not amenable to vocational rehabilitation, considering only the permissible vocational factors and the industrial disabilities arising from her employment as an inmate Forest-Fire Fighter.

(App. Ex. 1 at p. 25.)

In his July 24, 2016 report, VE Mr. Van Winkle, further opined on applicant's vocational feasibility as follows:

> In vocational rehabilitation counseling, a restriction to semi-sedentary work which allows for intermittent sitting and standing is interrupted as meaning that that individual needs a job that allows her to change between sitting and standing as

needed and that does not require sitting more than 50% of the time and that does not require standing/walking for more than 50% of the time. She would need a job in which all of the tasks can be performed while sitting or standing and that the act of changing position as needed would not disrupt her ability to perform work, the pace of work, and workflow. It is not enough that a job simply afford her the opportunity to sit 50% of the time and stand 50% of the time, it would have to accommodate the changing of position as needed.

In a vocational counseling context, Ms. Johnson requires a job in which all of the job tasks can be performed while sitting or standing, without exception, and that changing position as needed would not interrupt or disrupt her ability to perform the required tasks. Very few unskilled, entry-level jobs at the sedentary or light strength levels, such as Parking Lot Attendant, Bench Assembler and Bench Inspector exist in work settings that may afford the ability to accommodate that type of semi sedentary work restriction.

As indicated in this Consultant's prior report (9/29/2014), Parking Lot Attendants must walk rounds to monitor compliance with parking rules, inspect the facility, check tickets and license plates and, at times, lift and carry to move and position signs and barricades. If Ms. Johnson found it necessary to sit at a time when the job required her to inspect the parking facility, exit the cashier booth to assist a customer, or move and position signs and barricades, she would not be able to perform the job. Further, she would not be able to perform any required lifting and carrying.

AME Scheinberg prescribed restrictions regarding the cervical spine, ". . . she should avoid repetitive cervical rotation or flexion-extension-type activities," and regarding reaching, ". . . should avoid any at or above shoulder level activities, particularly using her left upper extremity. She should avoid lifting." Bench Assemblers and Bench Inspectors in some work settings may have the ability to periodically alternate standing and sitting without breaking from the required work pace, but those jobs do require frequent to continuous neck flexion/extension and rotation and occasional lifting and carrying. The physical demands of Bench Assembler and Bench Inspector exceed the work restrictions prescribed by AME Scheinberg.

This Consultant considered entry-level work as a Hotel Desk Clerk. Some of the tasks of a Desk Clerk may be performed while standing or sitting at a check-in counter and others require walking, standing, lifting, and carrying. Desk Clerks may escort guests on tours of the premises and to their rooms and to deliver messages, towels, and linen. Some jobs require that Desk Clerks vacuum, empty trash, and set-up folding beds. Not all of the tasks required of a Desk Clerk can be performed while sitting nor while standing. The physical demands of Desk Clerk exceed the work restrictions prescribed by AME Scheinberg.

This Consultant considered the occupation of Telemarketer in a call center. An automatic, adjustable height table, which are not found in many call centers, would be required in order to accommodate Ms. Johnson's need to change between sitting and standing as needed and not exceed the 50% time limit on both sitting and

> standing. Telemarketers perform frequent neck flexion/extension and rotation to operate a computer, view a monitor and documents, and/or handwrite while talking on the telephone. The physical demands of Telemarketer, even with access to an adjustable height table, exceed Ms. Johnson's work restrictions.
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> A singular restriction to semi-sedentary work in and of itself would not prevent Ms. Johnson from working, but the combined work restrictions prescribed by AME Scheinberg is a different story. Jobs do not exist in Ms. Johnson's labor market for which she is qualified that can be performed within the context of the combined work restrictions prescribed by AME Scheinberg.

(App. Ex. 2 at pp. 9-10.)

> In his June 12, 2020 report, VE Mr. Van Winkle opined on apportionment as follows:
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> [W]ith or without the right knee disability, Ms. Johnson had already been removed from the labor market, was not amenable to vocational rehabilitation, and experienced a 100% loss of future earning capacity based upon the work restrictions, chronic pain, and opioid medication dependency related to the cervical spine, left upper extremity, and low back, all of which are 100% industrial. In terms of work capacity and job placement, it does not matter if the right knee disability is 50% pre-existing and nonindustrial or 100% pre-existing and nonindustrial because Ms. Johnson is precluded from competing in the open labor market, is not amenable to vocational rehabilitation, and experiences a 100% loss of future earning capacity because of the work restrictions, chronic pain, and opioid medication use related to the cervical spine, left shoulder, and low back which are 100% industrial.

(App. Ex. 15 at pp. 9-10.)

On June 14, 2022, the WCJ issued his joint F&A, awarding temporary disability during the period April 26, 2001 to April 25, 2007, and separate permanent disability awards in each three cases with the need for further medical treatment.

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

DISCUSSION

I. TEMPORARY DISABILITY

Temporary disability indemnity is a workers' compensation benefit paid when an industrial injury prevents an employee from working and serves to replace lost wages. (*Gonzales v. Workers' Comp. Appeals Board* (1998) 68 Cal.App.4th 843 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd.* (*Butler*) (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases

224].) Its purpose is to provide a steady income during the period the employee is unable to work. (*Gonzales*, *supra*, 68 Cal.App.4th at p. 847.)

Section 4656(b) provides that, "[a]ggregate disability payments for a single injury occurring on or after January 1, 1979, and prior to April 19, 2004, causing temporary partial disability shall not extend for more than 240 compensable weeks within a period of five years from the date of the injury." (Lab. Code, § 4656(b).)[4]

In addition, section 3370(a)(2) provides that, "[t]he inmate shall not be entitled to any temporary disability indemnity benefits while incarcerated in a state prison." This provision ensures that the state does not pay benefits during periods when it already provides housing, food, and clothing to the former inmate. (*Ward v. Cal. Dep't of Corr.* [2013 Cal. Wrk. Comp. P.D. LEXIS 635, *15].)[5] Section 3370(a)(3) expanded that prohibition to other correctional facilities.

Here, PTP Dr. Moelleken found applicant had reached MMI on December 6, 2004, and AME Dr. O'Neill found no additional periods of temporary disability beyond that date for applicant's hepatitis C. While defendant did not specify applicant's incarcerated periods, to the extent there were any, we agree she would be ineligible. For those reasons, and in accordance with sections 3370 and 4656(b), we find the applicant is entitled to temporary disability during the period April 26, 2001 to December 6, 2004 at $126.00 per week, less ineligible periods under section 3370, not to exceed 240 weeks.

II. PERMANENT DISABILITY

Permanent disability refers to the lasting, irreversible effects of an injury. It includes conditions that impair earning capacity, limit the normal use of a body part, or create a competitive disadvantage in the labor market. Permanent disability payments compensate workers for both

[4] We note that the WCJ incorrectly applied section 4656(c)(3)(A), applicable to injuries on or after April 19, 2004, in his Opinion on Decision to extend the 104-week cap on temporary disability to 240 compensable weeks within a period of five years from the date of injury based on applicant's hepatitis C. (Opinion on Decision, p. 5.)

[5] 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. 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.

physical loss and the reduction, partial or total, of their future earning potential. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565].)

An employee may challenge the scheduled permanent disability rating by proving a calculation error or an omission of medical complications, or that the injury prevents rehabilitation and causes a greater loss of future earning capacity than the permanent disability rating schedule (PDRS) reflects. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1277 [76 Cal.Comp.Cases 624].) With respect to vocational evidence, where an employee's work restrictions due to industrial factors cause the loss of their ability to compete for jobs on the open labor market, this would result in a total loss of earning capacity and permanent total disability. (*Contra Costa County v. Workers' Comp. Appeals Board* (*Dahl*) (2015) 240 Cal.App.4th 746, 757 [80 Cal.Comp.Cases 1119]; *LeBouef v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587]; *Soormi v. Foster Farms* [2023 Cal. Wrk. Comp. P.D. LEXIS 170, *11-12] citing *Wilson v. Kohls Dep't Store* [2021 Cal. Wrk. Comp. P.D. LEXIS 322, *20–23.].)

Accordingly, to rebut the PDRS and establish permanent total disability, applicant must prove the following:

1) Applicant has received a work restriction(s), which requires substantial medical evidence.
2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires vocational expert evidence.
3) The work restriction(s) precludes applicant from competing on the open labor market, which requires vocational expert evidence.
4) The cause of the work restriction(s) is 100% industrial, which requires substantial medical evidence.

(*Valdovinos v. Universal Site Services, Inc.* [2025 Cal. Wrk. Comp. P.D. LEXIS 76, *14].)

Finally, 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) (*Escobedo*).) "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].)

Here, based on AME Dr. Scheinberg's work restrictions involving the neck, back, left shoulder, right and left knees, VE David Van Winkle concluded in his July 25, 2016 report that applicant was incapable of performing the duties of her usual or alternative occupations. Consequently, he found her unable to compete in the open labor market, resulting in 100% permanent disability. Relying on those substantial medical and vocational opinions, we find applicant permanently and totally disabled.

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) and 4664(a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 611.) 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, a physician must explain the "how and why" of their apportionment opinion (*Ibid.*) and consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or condition. (*Benson*, *supra*, 72 Cal.Comp.Cases 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, an employee does not have the burden of disproving apportionment while defendant remains passive. (*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]; *Herrera v. Maple Leaf Foods* [2018 Cal. Wrk. Comp. P.D. LEXIS 430, *15].)

In *Benson*, we explained that limited situations may justify a joint and several award of permanent disability across multiple dates of injury. (*Benson*, *supra*, 72 Cal.Comp.Cases at p. 1634.) Where the reporting physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the overall permanent disability, the employee is entitled to a combined award. (*Id.* at pp. 1622-1623; see, e.g., *Alea North American Insurance Co. v. Workers' Comp. Appeals Bd.* (*Herrera*) (2018) 84 Cal.Comp.Cases 17 (writ denied); *Flowserve Corp. v. Workers' Comp. Appeals Bd.* (*Espinoza*) (2016) 81 Cal.Comp.Cases 812 (writ denied); *Northrop Grumman Systems v. Workers' Comp. Appeals Bd.* (*Dileva*) (2015) 80 Cal.Comp.Cases 749 (writ denied); *Christiansen v. Facey Med. Foundation* [2024 Cal. Wrk. Comp. P.D. LEXIS 2, *12].) While *Benson* dealt with apportionment between successive industrial injuries, it remains defendant's burden to prove apportionment, whether it be to non-industrial causes or to other industrial injuries. (*James v. Pacific Bell Tel. Co.* [2010 Cal. Wrk. Comp. P.D. LEXIS 188, *11-12].)

With respect to vocational expert evidence, pursuant to *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc), the Appeals Board held as follows:

1. Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."

2. Vocational evidence may address issues relevant to the determination of permanent disability.

3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

(*Id.* at pp. 743-744.)

In addition, "[v]ocational evidence may also be used to parse permanent disability caused by multiple body parts or systems" to determine if applicant's permanent total disability was related to a single body part. (*Id.* at pp. 751-752.)

Accordingly, to constitute substantial evidence, the opinions of both the evaluating physician and the vocational expert must set forth the history and evidentiary basis for their conclusions, including an explanation of "how and why" a condition or factor results in permanent disability. (*Nunes*, *supra*, 88 Cal.Comp.Cases 894, 896.)

Here, in his April 25, 2007 report, AME Dr. Scheinberg apportioned 50% of applicant's lumbar spine permanent disability equally between the April 26, 2001 and February 1, 2002 injuries. (WCAB Ex. AA at p. 6.) In his November 28, 2017 report, he further apportioned 50% of the right knee permanent disability to the April 6, 2001 to March 6, 2002 date of injury and 50% to degenerative arthritis. (WCAB Ex. XX at p. 4.) However, those apportionment opinions consisted of conclusory assertions and do not explain the "how and why" underlying the doctor's conclusions. Although AME Dr. Scheinberg attributed a portion of the right knee permanent disability to degenerative arthritis, he did not identify or discuss any evidence in the record supporting that attribution. Equally unconvincing was AME Dr. Scheinberg's conclusory opinion apportioning the lumbar spine disability equally between the two specific injuries under *Benson*. Accordingly, absent such explanation or evidentiary support, those apportionment opinions do not constitute substantial evidence. However, we will find that applicant sustained injury to her right knee consistent with the opinions of AME Dr. Scheinberg.

In addition, VE Mr. Van Winkle tied his vocational opinion regarding permanent total disability to medically supported work restrictions, chronic pain, and opioid medication dependency. Significantly, he further relied on AME Dr. Scheinberg's opinion apportioning 100% of applicant's cervical spine and left shoulder permanent disability to industrial factors.

We acknowledge that "[t]he fact that a physician's opinions regarding apportionment are not substantial evidence, is not evidence that the physician 'cannot parcel out' the disability caused by the applicant's injuries" requiring development of the record. (*Caravez v. Red Bluff Meadows* (2023) 89 Cal.Comp.Cases 510, 515 [2023 Cal. Wrk. Comp. P.D. LEXIS 314].) However, because we

remanded this case back to the trial level in our O&O dated January 14, 2020, to address apportionment, and defendant failed to take any affirmative steps to cure the defects, we cannot countenance this invited error by remanding the case again for that same purpose. (See *Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (*Zuniga*) (2001) 92 Cal.App.4th 1159, 1167 [66 Cal.Comp.Cases 1290] ("under the doctrine of invited error, a party is estopped from asserting prejudicial error where his own conduct caused or induced the commission of the wrong.") Therefore, applicant is entitled to a joint award of permanent total disability.

Accordingly, as our Decision After Reconsideration, we rescind the F&A and substitute a new F&A that finds that applicant sustained injury to her neck, left shoulder, left knee, right knee, and internal system in the form of hepatitis C during the period from April 26, 2001 to March 6, 2002; that applicant is entitled to temporary disability benefits during the period April 26, 2001 to December 6, 2004, payable at the rate of $126.00 per week, less any ineligible periods under section 3370, not to exceed 240 weeks; and that applicant is 100% permanently and totally disabled.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings of Fact & Award dated June 14, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

JOINT FINDINGS OF FACT

1. Nancy Johnson, while employed on April 26, 2001, as a firefighter, occupational group number 480 at Fallbrook, California, by the California Department of Corrections and Rehabilitation, sustained injury arising out of and occurring within the course of employment to her lumbar spine and internal systems in the form of hepatitis C. (ADJ4265793)

2. While employed on February 1, 2002, as a firefighter, occupational group number 480 at Fallbrook, California, by the California Department of Corrections and Rehabilitation, applicant sustained injury arising out of and occurring within the course of employment to her lumbar spine and internal systems in the form of hepatitis C. (ADJ3983602)

3. While employed during the period April 26, 2001 to March 6, 2002, as a firefighter, occupational group number 480 at Fallbrook, California, by the California Department of Corrections and Rehabilitation, applicant sustained injury arising out of and in the course of employment to her neck, left shoulder, left knee, right knee, and internal system in the form of hepatitis C. (ADJ7323352)

4. At the time of the injuries, the employer was legally uninsured, administered by State Compensation Insurance Fund.

5. At the time of the injury, applicant's rate for indemnity purposes was minimum for both temporary and permanent disability.

6. Richard Scheinberg, M.D., is the orthopedic AME and Edward O'Neill, M.D., is the internal medicine AME.

7. Applicant is entitled to temporary disability benefits during the period April 26, 2001 to December 6, 2004, payable at the rate of $126.00 per week, less any ineligible periods under Labor Code section 3370, not to exceed 240 weeks.

8. Applicant is entitled to a permanent disability award of 100%, payable at $126.00 per week, beginning December 7, 2004 to present and continuing, less attorney fees.

9. Applicant is entitled to a joint award of permanent disability without apportionment.

10. Applicant is entitled to further medical treatment to cure or relieve the effects of the industrial injuries.

11. Applicant is entitled to reimbursement of all out-of-pocket medical expenses, subject to proof.

12. Applicant's attorney is entitled to a reasonable fee of 15% of all permanent disability indemnity awarded herein, payable first from any unpaid, accrued benefits. Any remaining attorney fees shall be commuted "off the side" from the award as a lump sum, or by an alternative commutation method agreed upon by the parties with jurisdiction reserved to the WCJ if the parties cannot agree on the exact amount.

13. The cases fall under the 1997 permanent disability rating schedule.

AWARD

AWARD is made in favor of applicant, Nancy Johnson, against defendant, California Department of Corrections and Rehabilitation, legally uninsured, administered by State Compensation Insurance Fund, as follows:

1. Temporary disability in accordance with Finding of Fact 7 above.

2. Permanent disability in accordance with Finding of Fact 8 above.

3. Further medical treatment in accordance with Finding of Fact 10 above.

4. Reimbursement for out-of-pocket medical expenses in accordance with Findings of Fact number 11 above.

5. Attorney fees in accordance with Finding of Fact 12 above.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 2, 2026

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

NANCY JOHNSON
LAW OFFICE OF ALAN FENTON
STATE COMPENSATION INSURANCE FUND

DLP/md

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