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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

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BARBARA SHERMAN,
Applicant,

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT, Legally Uninsured, administered by SEDGWICK CMS,

Defendant(s).

Case No. VNO 0418888
VNO 0418889

**OPINION AND DECISION
AFTER RECONSIDERATION**

On June 17, 2005, the Workers' Compensation Appeals Board (Appeals Board) granted reconsideration to further study the factual and legal issues. This is our decision after reconsideration.

In the Joint Findings and Award of April 8, 2005, the workers' compensation administrative law judge (WCJ) found, in relevant part, that on April 3, 1998, applicant sustained industrial injury to her left upper extremity, specifically the left shoulder, right shoulder, cervical spine, lumbar-sacral spine, left hand and wrist, right hand and wrist, left knee, right knee, musculoskeletal system in the form of seronegative rheumatoid arthritis, and psyche, causing permanent partial disability of 98% and the need for further medical treatment. In addition, the WCJ allowed applicant's attorney a fee of \$20,000.00.

Applicant and defendant both sought reconsideration of the WCJ's decision.

Applicant's petition contended, in substance, that the WCJ erred in allowing a fee of less than 15% of the permanent disability award, that the WCJ erred in not allowing a fee against the value of the life pension, and that the fee should be commuted from the far end of the award, before commencement of the life pension.

Defendant's petition contended, in substance, that the WCJ erred in not finding apportionment pursuant to Labor Code section 4663, that in light of applicant's continued

1 employment, the finding of 98% permanent disability is unreasonable, excessive and not
2 supported by substantial evidence, and that it was improper for the WCJ to base the
3 Findings and Award on proceedings that happened after trial.

4 Applicant filed an answer.

5 With regard to defendant's petition, we note that the findings by the WCJ are
6 based on the agreed medical evaluator (AME) reports by Drs. Levine (internal medicine)
7 and Stalberg (psyche). Defendant contends that, to the extent applicant's disability is
8 related to rheumatoid arthritis, it is not industrial. Thus, the central issue is whether the
9 WCJ erred in not apportioning permanent disability to applicant's rheumatoid arthritis,
10 pursuant to Labor Code section 4663.

11 We are not persuaded that the new law of apportionment under section 4663
12 destroyed the principle that a compensable injury and disability may result from the
13 "lighting up" of an underlying disease. (See, e.g., *Granado v. Workmen's Comp. Appeals Bd.*
14 (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647].) Under such circumstances, it is necessary
15 for the Appeals Board to consider what disability was directly caused by the injury and
16 by other factors. This analysis requires separating the cause of injury from the cause of
17 disability, as discussed in *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 [Appeals
18 Board en banc] and *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant
19 Panel Decision].

20 In this case, we agree with the WCJ that the medical opinion of AME Levine
21 justifies the finding that applicant's injury was proximately caused by her employment.
22 (Labor Code section 3600(a)(3).) That is, Dr. Levine opined that although applicant's
23 trauma did not cause the rheumatoid arthritis, it 'lit up' the disease, allowing it to emerge
24 and be diagnosed. Therefore, the WCJ correctly found that the rheumatoid arthritis was
25 proximately caused by the employment trauma.

26 Proximate cause of the injury having been determined, the next step is to analyze
27 the issue of permanent disability and apportionment. In this case, there is an issue as to

1 what permanent disability was directly caused by the rheumatoid arthritis injury, and
2 what percent of that disability, if any, is attributable to other factors. We turn to what
3 those other facts may be, and how they contribute, if at all, to the disability.

4 Defendant asserts, in essence, that Dr. Levine's deposition supports a finding of
5 apportionment of disability to applicant's rheumatoid arthritis. However, defendant's
6 petition fails to mention Dr. Levine's subsequent report of May 7, 2004, wherein the
7 doctor clearly stated that although the employment trauma did not cause the rheumatoid
8 arthritis, it lit the disease up, that the applicant had no illness recognizable as rheumatoid
9 arthritis and no disability in her joints before the employment trauma, that the work
10 restrictions offered by him were caused by the rheumatoid arthritis, and that
11 apportionment is "entirely industrial." Under these circumstances, we conclude that Dr.
12 Levine's medical opinion, as expressed in his report of May 7, 2004, establishes that it is
13 medically reasonably probable, although not scientifically certain, that the permanent
14 disability attributable to applicant's rheumatoid arthritis is not subject to apportionment
15 under section 4663. (See *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408
16 [33 Cal. Comp. Cases 660] and *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th
17 1692 [58 Cal.Comp.Cases 313, 319].) For similar reasons, we deny defendant's
18 contentions that the award of permanent disability is excessive, and that the WCJ should
19 have followed the medical opinion of defense qualified medical evaluator (QME), Dr.
20 Feldman, who opined that applicant's disability resulting from rheumatoid arthritis is not
21 work-related.

22 Finally, for the reasons stated in the WCJ's Report, which we adopt and
23 incorporate on this issue, we reject defendant's argument that it was improper for the
24 WCJ to base the Findings and Award on proceedings that happened after trial.

25 With regard to applicant's petition, we have considered the allegations of the
26 petition and the WCJ's Report and Recommendation (Report) with respect thereto. Based
27 on our review of the record, and for the reasons stated in said Report, which we adopt

1 and incorporate on the issue of attorney's fees, we will amend the WCJ's Findings and
2 Award relevant to attorney's fees, and return this matter to the trial level for further
3 proceedings and re-determination of attorney's fees by the WCJ.

4 For the foregoing reasons,

5 IT IS ORDERED, as the Appeals Board's Decision After Reconsideration, that the
6 Joint Findings and Award of April 8, 2005 is hereby AFFIRMED, EXCEPT that Finding 8
7 and Paragraph (a) of the Award are AMENDED in the following particulars:

8 Finding of Fact

9 "8. The issue of attorney's fees is hereby deferred, pending further
10 proceedings and new determination by the WCJ, jurisdiction reserved.

11 Award

12 "(a) Permanent disability indemnity of 98%, equivalent to 678.50 weeks of
13 indemnity, in the total sum of \$156,055.00, payable at the rate of \$230.00
14 per week from the permanent and stationary date of February 23, 2002
15 and continuing for 678.50 weeks or until the total amount hereof shall
16 have been paid, thereafter a permanent disability life pension of \$146.88
per week, less credit for any sums heretofore paid on account thereof, if
any, less reasonable attorney's fees, which are to be determined by the
WCJ at the trial level, jurisdiction reserved."

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SHERMAN, BARBARA

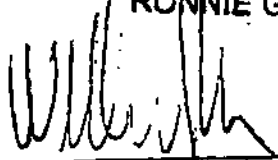
1 IT IS FURTHER ORDERED, as the Appeals Board's Decision After
2 Reconsideration, that this matter is RETURNED to the trial level for further
3 proceedings and new determination by the WCJ on the issue of attorney's fees,
4 consistent with this opinion.

5 WORKERS' COMPENSATION APPEALS BOARD

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9 FRANK M. BRASS

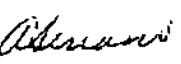
10 I CONCUR,

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13 RONNIE G. CAPLANE

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16 WILLIAM K. O'BRIEN



17 DATED AND FILED IN SAN FRANCISCO, CALIFORNIA
18 **OCT 28 2005**
19 SERVICE BY MAIL ON SAID DATE TO ALL PARTIES SHOWN ON THE OFFICIAL
20 ADDRESS RECORD, EXCEPT LIEN CLAIMANTS.

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SHERMAN, BARBARA