2nd Civil No. B279412

COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

MAUREEN HIKIDA, *Petitioner*, vs. WORKERS' COMPENSATION APPEALS BOARD; COSTCO WHOLESALE CORPORATION, adjusted by HELMSMAN MANAGEMENT SERVICES, Respondents.	WCAB Nos.: ADJ7721810; ADJ7721392

ANSWER TO PETITION FOR WRIT OF REVIEW

TO THE HONORABLE PRESIDING AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL:

RESPONDENT, Costco Wholesale Corporation adjusted by Helmsman Management Services (hereinafter "Respondent" or "Costco") Answer the Petition for Writ of Review of the Opinion and Order Denying Petition For Reconsideration issued by the Respondent, Workers' Compensation Appeals Board (hereinafter "WCAB") on October 25, 2016. (Exhibit1). WCAB applied appropriate precedent, established statutory law and interpretation of the doctrine of apportionment of permanent disability pursuant to Labor Code sections 4663(a), 4663(c), 4664(a) as well as the holdings in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [En Banc] and *Brodie v. Workers' Compensation Appeals Board* (2007) 40 Cal.

4th 1313, 57 Cal.Rptr. 3d 644. Petitioner's reliance on the Dissent (Exhibit 10 page 6-8) rather than the opinion of the majority in the Opinion and Decision after Reconsideration dated February 8, 2016 (Exhibit 10 page 3) is misplaced. Respondent asserts that judicial review is unwarranted in light of the WCAB's adoption of the Workers' Compensation Judge's (hereinafter "WCJ") determination of apportionment of permanent disability based on substantial evidence.

I.

MEMORANDUM OF POINTS AND AUTHORITIES:

i. **THE WORKERS' COMPENSATION APPEALS BOARD CORRECTLY APPLIED THE LAW OF APPORTIONMENT AS THIS CASE INVOLVES A SINGLE CONTINUOUS TRAUMA INJURY WITH NON-INDUSTRIAL AND INDUSTRIAL CAUSATION**

ii. **THE WORKERS' COMPENSATION APPEALS BOARD DID HAVE A CLEAR LEGAL BASIS TO APPORTION PERMANENT TOTAL DISABILITY, AS THIS CASE INVOLVED ONLY ONE INJURY AND THERE WAS NO ISSUE AS TO PRIOR INJURIES, PRIOR AWARDS, PRIOR IMPAIRMENT, DIAGNOSIS OR DISABILITY**

II.

SUMMARY OF FACTS:

Maureen Hikida (hereinafter "Petitioner") was employed during the period November 3, 1984 to May 17, 2010 as a Sales Auditor by Costco and sustained injury to her cervical spine, thoracic spine, upper extremities, elbows, fingers and psyche and developed chronic regional pain syndrome (hereinafter "CRPS") including a variety of symptoms including chronic pain, headaches but did not sustain an injury in the form of hypertension, irritable bowel syndrome and urology arising out of and in the course of employment (Exhibit 6).

Doctor Chester Hasday the Agreed Medical Examiner in the field of orthopedics (hereinafter "AME") determined that applicant had sustained injuries which rendered her permanently and totally disabled. (See Exhibit 2, page 17) in the doctor's deposition on October 14, 2014 he testified that applicant's injury in the form of carpal tunnel syndrome was 90% caused by industrial factors and 10% by nonindustrial factors. He testified that the surgery was 90% caused by industrial factors and 10% caused by nonindustrial factors. He then testified that the CRPS was 100% the result of the surgery. (Exhibit 3 page 16 line 25 and page 17 lines 1 through 20)

The matter proceeded to trial before the Worker's Compensation Judge (hereinafter "WCJ") on February 3, 2015, (Exhibits 4) and on April 1, 2015 (Exhibit 5). The WCJ issued a Findings, Award and Order dated June 22, 2015 finding that Petitioner was entitled to 90% permanent disability award based on the opinion of the AME. (Exhibit 6) The WCJ concluded that Dr. Hasday's analysis with respect to causation of disability provided sufficient support to correctly apportion applicant's disability

which arose out of medical treatment provided for an injury that was 90% industrially caused and 10% due to nonindustrial factors. (Exhibit 6 Opinion On Decision page 5)

On February 8, 2016, the WCAB returned the case to the trial level further proceedings after affirming the WCJ's opinion on apportionment. (Exhibit 1 lines 10 and 11).

Pursuant to the Findings Award and Order dated June 22, 2015, the matter was returned to the WCJ to develop the record with regard to psychiatric impairment and to issue a further determination regarding impairment with the addition of any psychological disability. (Exhibit 6) The first amended Findings and Award and Order dated August 3, 2016 increased the permanent impairment to 98% after consideration of psychiatric impairment but did not otherwise alter the prior apportionment analysis. (Exhibit 13 page 4 and 5) Petitioner filed a second Petition for Reconsideration again asserting that the WCJ was in error regarding his analysis of apportionment of permanent disability previously affirmed by the WCAB. (Exhibit 14).

On October 25, 2016 the WCAB again rejected petitioner's arguments and issued an Opinion and Order Denying Petition for Reconsideration (Exhibit 1). The dissenting opinion again framed the issue as medical treatment for an industrial injury partly industrial and partly nonindustrial which caused total disability precluded apportionment.

III.

ARGUMENT

i. THE WORKERS' COMPENSATION APPEALS BOARD CORRECTLY APPLIED THE LAW OF APPORTIONMENT AS THIS CASE INVOLVES A SINGLE CONTINUOUS TRAUMA INJURY WITH NON-INDUSTRIAL AND INDUSTRIAL CAUSATION

Petitioner advocates a significant restriction on the doctrine of apportionment contending that disability resulting from failed medical treatment stands alone as the cause of disability. In reaching their conclusion they misconstrue the current apportionment scheme. Labor Code section 4663(a) provides in pertinent part as follows:

Apportionment of permanent disability shall be based on causation.

Labor Code section 4663(c) outlines a reporting physicians duties insofar as is pertinent as follows:

> ... a physician shall make an apportionment determination by finding out what approximate percentage of the permanent disability was caused by the direct result of injury arising out of an occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors...

These sections are to be read in conjunction with Labor Code section 4664(a) which provides:

> (a.) The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of an occurring in the course of employment.

Until the amendment of Labor Code section 4663 and the enactment of Labor Code section 4664 in 2004 apportionment based on causation was prohibited. Disability resulting from industrial and nonindustrial causes was apportionable "only if the WCAB finds that part of the disability would have resulted from the normal progress of the underlying nonindustrial disease." *Pullman Kellogg v. Workers' Compensation Appeals Board* (1980) 26 Cal. 3rd 450. This analysis rendered employers liable for any portion of the disability that would not have occurred but for the current industrial cause; if the disability arose in part from an interaction between an industrial cause and a nonindustrial cause, the nonindustrial cause would not alone have given rise to the to a disability, no apportionment was to be allowed. (See Discussion *Brodie v. Workers' Compensation Appeals Board* (2007) 40 Cal. 4th 1313, 1326)

It should be noted that the Agreed Medical Examiner made this analysis in his deposition concluding that the carpal tunnel syndrome injury was 90% caused by industrial factors and 10% by nonindustrial factors. In addition, he stated that the medical treatment including surgery caused CRPS was also caused 90% by industrial and 10% nonindustrial factors. If the medical treatment is, in fact, the cause of the CRPS using petitioner's own analysis the disability resulting from the medical treatment is also 90% by industrial factors and 10% by nonindustrial factors. (Exhibit 3 page 16

line 25 and page 17 lines 1 through 20)

The current Labor Code section 4663(a) and 4664(a) eliminate the bar against apportionment based on pathology in asymptomatic causes. *E.L. Yeager Construction v. Workers' Compensation Appeals Board* (2006) 145 Cal. 4th. 922, 926 and 927.

The expansion of the apportionment doctrine after the passage of SB899 is discussed thoroughly in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 an [En Banc] decision of the Workers' Compensation Appeals Board where the WCAB addresses the effect of legislative action as follows:

> We conclude that, in repealing former sections 4663, 4750 and 4750.5 in adopting new sections 4663 and 4664(a), the Legislature intended to expand rather than narrow the scope of legally permissible apportionment. The legislative intent is established not only by its declaration in adopting SB899, but also by the language of section 4663 itself. That is, section 4663(c) provides for apportionment based on what approximate percentage of permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.... The language stating that apportionment may be based "other factors both before and subsequent to the industrial injury" does not limit what nonindustrial factors may be considered as a cause of permanent disability for the purposes of apportionment. Thus, this language appears to require apportionment based on any other (nonindustrial) factor, either pre-or post-injury. This language as applied to our facts requires an analysis that rejects the relief sought by Petitioner and adopt the

apportionment analysis set forth by the WCJ in his Opinion on Decision at page 5 (Exhibit 6) and affirmed in the Opinion and Decision After Reconsideration dated February 8, 2016 (Exhibit 10).

ii. THE WORKERS' COMPENSATION APPEALS BOARD DID HAVE A CLEAR LEGAL BASIS TO APPORTION PERMANENT DISABILITY TOTAL DISABILITY, AS THIS CASE INVOLVED ONLY ONE INJURY AND THERE WAS NO ISSUE AS TO PRIOR INJURIES, PRIOR AWARDS, PRIOR IMPAIRMENT, DIAGNOSIS OR DISABILITY

There is nothing in Labor Code sections 4663 or 4664 or in the *Escobedo* case that states valid apportionment should be negated merely because medical treatment caused further and additional impairment and disability than the original injury did.

The apportionment in this continuous trauma claim of 10% for non-industrial factors must be deemed to pass through from the injury to the disability. It would cause an employer to be liable for a greater percentage of the permanent disability than was directly caused by the injury arising out of an occurring in the course of employment.

Petitioner is not able to cite any case law or statute that would support their contention that the apportionment and causation of the original continuous trauma injury is negated as a result of medical treatment causing further and additional disability. Petitioner correctly

states that the injured worker is entitled to the additional compensation directly relating to the additional disability, but the case law that they cite all predates the 2004 changes in Labor Code section 4663 and 4664. (*Fitzpatrick v. Fidelity & Casualty Co.* (1936) 7 Cal.2d 230; *Nation v. Certainteed Corp.* (1978) 84 Cal.App.3d 813; *Heaton v. Kerlan* (1946) 27 Cal.2d 716.)

Petitioner states that no doctor has said that the disability from the effects of the chronic pain syndrome is apportionable. Doctor Hasday has concluded that there is apportionment for the impairment arising from the carpal tunnel injury that has directly led to the chronic pain syndrome. (Exhibit 17, page 46 lines 5 through 10)

Moreover, the Panel QME evaluator in pain medicine and neurology Dr. Ezekial Fink has also found apportionment. (Exhibit 22, page 18)

Pursuant to the second amended formal rating instructions and rating dated July 15, 2016 and July 18, 2016 respectively, the factors of impairment for the upper extremities feature 20% nonindustrial apportionment. The sleep disorder was found to be 52% non-industrial. The headaches were found to be 36% non-industrial, by Dr. Fink the Qualified Medical Examiner. Thus, there appear to be multiple factors of non-industrial apportionment herein in assessing the applicant's disability. (Exhibit A)

The Workers' Compensation Appeals Board did not fail to follow judicial precedent. Petitioner misinterprets causation as applied in Labor Code 4663 (a) and the holding in *Escobedo*, while the WCAB made their decisions in accordance with Labor Code sections 4663 and 4664 relating to apportionment and causation of the disability, as well as the

apportionment and causation of the injury.

Petitioner also cites the cases of *County of Sacramento (Probation Department), PSI v. WCAB (Chimeri)* (2010) 75 Cal.Comp.Cases 159, 162(W/D); *Nilsen v. Vista Ford, Pacific Compensation Insurance Company* (2012) Cal.Wrk.Comp. P.D. LEXIS 528 (W/D) and *Moran v. Dept. of Youth Authority, Legally Uninsured State Compensation Insurance Fund* (2011) Cal.Wrk.Comp. P.D. LEXIS 43, but those cases can be distinguished from the current case as hand, on a factual basis.

Our case herein involves a continuous trauma claim, of which the causation was multifactorial, both industrial and non-industrial. The cases cited above by applicant all involve prior or pre-existing injuries. In those cases, medical and judicial determinations were made that show that prior back injuries or prior conditions were not legally apportionable factors of the new injuries involved in those cases. In those cases it was simply determined that the prior injury or problems were not legally apportionable, and not a cause of the current level of disability.

In the case at hand, there is a single continuous trauma claim, and there is no basis to negate the non-industrial apportionment as a cause of the current level of disability.

IV.
CONCLUSION

The Workers' Compensation Appeals Board has correctly applied the apportionment scheme adopted by the legislature in 2004. Petitioner intends to isolate the word causation in an effort to avoid the legislative intent in amending Labor Code section 4663 and adopting 4664 with the expressed intent of expanding the apportionment doctrine.

The reliance on *Escobedo* and Labor Code section 4663(a) is misplaced. Any reading of the holding in *Escobedo* as well as the Supreme Court analysis in *Brodie* demonstrates conclusively that apportionment to nonindustrial factors, preexisting and subsequent factors have been dramatically expanded. Application of the current apportionment scheme to the undisputed facts of this case can only yield the result reached by the WCAB of apportionment of disability based on the opinion of the Agreed Medical Examiner.

Dated: December 28, 2016

Respectfully submitted,

MULLEN & FILIPPI, LLP

By: _____

DANIEL NACHISON FOR
JAY S. COHEN
Attorneys for Defendant
COSTCO WHOLESALE
CORPORATION, PSI,
adjusted by HELMSMAN
MANAGEMENT SERVICES

VERIFICATION
(CCP §§446, 2015.5)

I declare that:

I, Daniel Nachison, am an attorney of record in the above-entitled action; I have read the foregoing **ANSWER TO PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES OF COSTCO WHOLESALE CORPORATION ADJUSTED BY HELMSMAN MANAGEMENT SERVICES** and know the contents thereof; the same is true of my own knowledge, except as to those matters which are therein stated upon my information or belief, and as to those matters I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct, and that this verification was executed on December 28, 2016, at Van Nuys, California.

DANIEL NACHISON, ESQ.

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to the California Rules of Court, the enclosed Answer to Petition for Writ of Review was produced using 13-point type including footnotes and contains 2,378 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: December 29, 2016.

Respectfully submitted,

MULLEN & FILIPPI, LLP

BY: _____
DANIEL NACHISON

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adjusted by Helmsman Mgmt. Services