**P.M. & Associates, California Indemnity Insurance Company, Petitioners vs. Workers Compensation Appeals Board, Sandra Wagner, Respondents**

**Civil No. D035250--**

**Court of Appeal, Fourth Appellate District, Division One**

***65 Cal. Comp. Cases 878; 2000 Cal. Wrk. Comp. LEXIS 6409***

**June 23, 2000**

**PRIOR HISTORY:** [**1]
: W.C.A.B. Nos. SDO 168360, SDO 178221, SDO 178223--WCJ J.P. McHenry SDO WCAB Panel: Commissioners Casey, Ruggles, Deputy Commissioner Dietrich (not participating)

**DISPOSITION:** : Petition for writ of review denied

## CALIFORNIA COMPENSATION CASES HEADNOTES

Cumulative Trauma--Date of Injury--WCAB found that applicant's date of injury with regard to her industrial cumulative trauma injury was the date she first suffered disability from her injuries, and not just symptoms WCAB was not required to find date of injury when applicant first suffered symptoms which she knew were employment related and received treatment, since applicant did not suffer disability at that time.[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 24.03[7][a], 31.13[2].*]

Apportionment--Preexisting **[**12]** Condition&mdash:WCAB properly refused to apportion applicant's permanent disability pursuant to *Labor Code § 4663*[Deering's], when there was no substantial medical evidence that applicant would have suffered a non-industrial disability, absent the industrial disability.[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[2][b], 8.06[4].*]

Stipulations--Discretion of WCAB--WCAB was not bound by the stipulations of the parties regarding applicant's temporary disability rate, but rather could make an award based on the evidence.[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d § 26.06[2].*]

Temporary Disability--Period of Disability--WCAB's award of temporary disability was supported by substantial medical evidence.[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 7.02, 34.16[1],[3].*]

Permanent Disability--WCAB's award of permanent disability was supported by substantial medical evidence.[See generally *Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[2],[3], 8.06, 34.16[1],[3].*]

## CALIFORNIA COMPENSATION CASES SUMMARY

Applicant alleged that she sustained an industrial CT injury from 10/28/90 through 10/28/91 to her back, carpal tunnels, and other body parts, while working as a controller for Defendant P.M. & Associates. Defendant was insured

from 3/1/89 through 11/23/89 by Golden Eagle Insurance Co., from 11/23/89 through 11/23/90 by Fairmont Insurance Company (Fairmont), and from 11/23/90 through 11/23/91 by California Indemnity Insurance Company (CIIC).

**[*879]** CIIC alleged that Applicant sustained CT due to her employment from 1/89 through 9/89 and a specific injury on 4/5/89. Applicant stipulated with CIIC and Fairmont that, at the time of her injury, she earned $950 per week. The parties also stipulated to a TD indemnity rate of $336 per week.

Applicant began experiencing upper extremity symptoms in 5/91, for which she received treatment at the Grossmont Hospital Emergency Room. She began treating with Dr. James McSweeney on 8/26/91. Dr. McSweeney reported that **[**2]** Applicant had bilateral carpal tunnel syndrome, bilateral impingement in her shoulders, and aggravation of a preexisting degenerative disc disease and degenerative joint disease of the cervico lumbar spine. He indicated Applicant's conditions were industrially related. Dr. McSweeney stated Applicant could return to full duty with no restrictions, but prescribed the wearing of braces for both wrists while at work.

Dr. McSweeney took Applicant off work at the end of 7/92 due to her back pain. Applicant received TD indemnity sporadically until 11/92, but received no TD after that date. Applicant received unemployment compensation disability benefits through EDD from 11/12/92 through 11/3/93.

Dr. McSweeney recommended back surgery in 7/92, however, surgery was not provided by any of the carriers until 3/93. Applicant had a total of four back surgeries, the last in 2/97. Applicant was off work for the entire period.

Applicant had arthroscopic carpal tunnel releases in 10/91 and 12/91. In 10/93, she had an open carpal tunnel release on the left wrist as well as a tenosynovectomy and release of the ulnar nerve at Guyon's canal. In 10/93, Applicant had exploratory surgery of the median **[**3]** nerve at the right wrist and lysis of adhesion within external and internal neurolysis at the median nerve. She also had an exploration and release of the ulnar nerve at the Guyon's canal on the right wrist. All of Applicant's surgeries were paid for by CHAMPUS.

Applicant continued to treat with Dr. McSweeney through at least 12/10/96, when Dr. McSweeney reported that her condition with regard to the lumbar spine was P&S. Applicant testified that she could not continue treatment with Dr. McSweeney because none of the carriers would pay the doctor for his services.

After a hearing in this matter, the WCJ found that Applicant sustained an industrial CT injury to her bilateral upper extremities and spine during her employment in 1990 and 1992. He found that the DOI was 8/26/91, when Applicant began treating with Dr. McSweeney. The WCJ also found that Applicant did not sustain a CT injury due to her employment on 4/5/89, or during the period 1/89 through 9/89. The WCJ awarded TD, PD without apportionment, and further medical treatment.

CIIC filed a Petition for Reconsideration. According to the WCJ's report and recommendation, CIIC contended in pertinent part that the WCJ erred in his **[**4]** finding on the DOI, the period of TD, the TD indemnity rate, PD, and apportionment.

The WCJ issued a report in which he recommended that reconsideration be denied. With regard to Applicant's DOI, the WCJ pointed out that the first evidence **[*880]** indicating that Applicant had a disability due to her CT was when she was seen by Dr. McSweeney on 8/26/91 and he reported that she should wear wrist braces. The WCJ indicated that this disability, coupled with Applicant's knowledge that the disability was work related pursuant to Dr. McSweeney's report, established the DOI under *Labor Code § 5412*[Deering's]. The WCJ noted that even though Applicant suffered symptoms which she knew were employment related as early as 5/91, and received treatment for the symptoms, Applicant had no disability prior to 8/26/91.

The WCJ opined that his findings with regard to TD, PD, and apportionment were supported by substantial evidence, and that he had the discretion to disregard the stipulations of the parties regarding the TD rate, and make an award consistent with the evidence.

The WCAB adopted and incorporated the WCJ's report and denied reconsideration without further comment.

CIIC filed a Petition for Writ of **[**5]** Review, contending in pertinent part that: (1) The WCJ erred in determining that the DOI was 8/26/91, when Applicant testified to disability as of 5/91 (2) The WCJ erred in failing to make a finding of apportionment under *Labor Code § 4663*[Deering's] when the medical record supported a finding of apportionment (3) The WCJ erred in finding liability for TD form 11/12/92 through 12/9/96, when there was no basis for the finding in the medical record (4) The WCJ erred in finding PD when the medical record indicated that all the PD re-

sulted from the natural progression of a preexisting condition and (5) The WCJ erred by disregarding the parties' stipulations in his finding regarding the TD rate.

WRIT DENIED June 23, 2000.

By the court:

"The petition for writ of review have been read and considered by Presiding Justice Kremer and Associate Justices Benke and O'Rourke.

Sandra Wagner was employed by P.M. & Associates as a controller. She worked 80 to 90 hour weeks. She was repeatedly required to lift and carry heavy boxes, including lifting them in and out of the trunk off her car. She performed extensive keyboard work. On May 28, 1991, she received treatment at an emergency room after awakening **[**6]** with numb hands. In August 1991 the insurance carrier referred her to Dr. McSweeney for treatment.

The Workers' Compensation Judge (WCJ) concluded she sustained a cumulative trauma to her bilateral upper extremities and spine arising out of her employment. The WCJ found that the date of injury was August 26, 1991, when she began treating with Dr. McSweeney. The WCJ awarded temporary disability, unapportioned permanent disability, and further medical treatment. The Workers' Compensation Appeals Board (the Board) denied reconsideration.

**[*881]** Review of a decision of the Board is limited to: whether it acted without or in excess of its powers whether the order, decision or award was unreasonable, not supported by substantial evidence or procured by fraud and whether findings of fact support the order or decision. (*Lab. Code ' § 5952.*) The findings and conclusions of the Board on questions of fact are conclusive and final and are not subject to review. (§ 5953.) "The credibility of witnesses, the persuasiveness or weight of the evidence, and the resolving of conflicting inferences, are questions of fact." (*Western Electric Co. v. Workers' Comp. Appeals Bd. (1979) 99 Cal. App. 3d 629, 644 [160 Cal. Rptr. 436, 44 Cal. Comp. Cases 1145.]*) **[**7]** The Board's factual determinations must be upheld if its findings are supported by substantial evidence in light of the entire record. (*Scott Co. v. Workers' Comp. Appeals Bd. (1983) 139 Cal. App. 3d 98, 106 [188 Cal. Rptr. 537, 48 Cal. Comp. Cases 65].*)

1 Further statutory references are to the Labor Code.

Petitioner contends the evidence does not justify the findings of fact, the findings of fact do not support the decision, and the WCJ acted in excess of his powers.

In specific, petitioner first contends that: "Based upon her testimony, the worker had disability within the meaning of *Labor Code § 5412*[Deering's] as of 5-28-91 when she went to the doctor, reported her workers' compensation claim and was told by the doctor that her problems were work-related. The applicant told her employer by that time that her problems were work-related. The applicant had stopped lifting items she considered heavy, and told her employer she was not lifting items. The applicant missed at least one day of work."

Section 5500.5 provides inter alia that liability for cumulative injuries is limited to the one-year period immediately preceding the date of injury pursuant to *section 5412*. Under *section 5412*, **[**8]** the date of injury is that date upon which the employee first suffered disability and either knew or should have known that such disability was caused by the employment.

In this case the employee was told by the doctor in May that her problems were work related. However, the WCJ found she had not suffered a disability at that time. Petitioner apparently relies on petitioner's testimony that she reported a workers' compensation claim and self-limited her work in May. Petitioner provides no authority that reporting a claim or self-limitation constitutes a disability. Petitioner also relies upon the employee having missed work in May. Because the testimony regarding the worker's time off was equivocal and the employer failed to substantiate any such time off by medical or personnel records, the WCJ concluded the worker had not suffered disability in May. His conclusion is reasonable. Also, assuming the worker missed one day of work in May, petitioner fails to cite authority holding a one day absence constitutes disability. Petitioner cites *American Bridge Company v. Workers' Comp. Appeals Bd. (1995) 60 Cal. Comp. Cases 869* (writ den.) as standing for the proposition that "need for **[**9]** significant treatment may establish a compensable disability." A writ denied case is not controlling authority. **[*882]** Moreover, although American Bridge refers to the possibility that a cumulative industrial injury might be based on the need for medical treatment even in the absence of disability, medical opinion in the case was that the cumulative work exposure had resulted in disability. Additionally, the same statutory sections were not involved.

Petitioner next contends the apportionment finding was improper. It is the employer's burden to establish the need for apportionment. Petitioner relies on the reports of three doctors. Petitioner fails to include Dr. Milling's report. Dr. Cummings' report was rejected by the WCJ based on the doctor having arbitrarily rejected the worker's testimony as to the work performed which the WCJ found to be credible and undisputed. Dr. Cummings acknowledged that if there was credible evidence confirming the worker's frequent heavy lifting he would need to reassess his opinion as to apportionment. Dr. McSweeney apportioned 20 percent of the back injury to a preexisting condition. The doctor's opinion is confusing regarding whether apportionment related **[**10]** to injuries suffered in previous motor vehicle accidents or to a pre-existing degenerative disk condition. Moreover, while Dr. McSweeney's report provides evidence that 20 percent of the disability is the result of the natural progression of a non-industrial pre-existing condition, it fails to provide any medical evidence the non-industrial disability would have occurred in the absence of the industrial disability. (See *King v. Workers' Comp. Appeals Bd. (1991) 231 Cal. App. 3d 1640, 1648 [283 Cal. Rptr. 98, 56 Cal. Comp. Cases 408]*.) The WCJ correctly concluded that applying the correct legal principles, no medical evidence supported apportionment.

With respect to temporary disability, petitioner, relying on Dr. Milling's and Dr. Cummings' reports, argues the medical record fails to support the award in total. As stated above, one report is discredited and the other not provided. Petitioner additionally contends gaps exist in which there is no medical support for a temporary disability award. Petitioner fails to supply the reports upon which it relies.

Once again relying on the reports of Drs. Milling and Cummings, petitioner argues an award for permanent disability is not warranted. **[**11]** For the reasons stated above, those reports provide no support for petitioner. Moreover, Dr. McSweeney's reports provided substantial evidence.

Petitioner finally contends the WCJ improperly awarded $490 per week in temporary disability rather than the $336 to which the parties stipulated. The WCJ is not bound by the stipulations of the parties and may make an award based on the evidence. (See *Turner Gas Co., Inc. v. Workmen's Comp. Appeals Bd. (1975) 47 Cal. App. 3d 286, 290 [120 Cal. Rptr. 663, 40 Cal. Comp. Cases 253]*.) Petitioner does not contend the award is not supported by the evidence.

The petition is denied."

**[*883]**

Kremer, P.J.

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**COUNSEL:** :For petitioners--Stockwell, Harris, Widom & Woolverton, by Barrance Q. Zak