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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAMONA ANAYA,

Applicant,

vs.

**HUENEME SCHOOL DISTRICT,
Keenan & Associates; NATIONAL
HOME CARE; TRAVELERS INS. CO.;
ZURICH AMERICAN INS. CO.,
Defendant(s).**

**Case No. VEN 81624; VEN 84732;
VEN 96728; VEN 97032**

**OPINION AND ORDER GRANTING
RECONSIDERATION AND DECISION
AFTER RECONSIDERATION**

Applicant and defendant, Hueneme School District, both seek reconsideration of the decisions issued by the workers' compensation referee (WCR) on November 14, 1996.

In case number VEN 081624, it was found that applicant sustained an industrial injury to her left knee on November 16, 1989, while employed as a homemaker by National Home Care, insured by Travelers Insurance. It was found that this injury caused permanent disability of 6 percent and the need for further medical treatment. The WCR's Opinion on Decision indicates the injury became permanent and stationary on January 15, 1990.

In the Joint Findings and Award concerning case numbers VEN 084732 and VEN 097032, it was found that applicant sustained industrial injuries to her left knee on July 17, 1990 and December 27, 1990, while employed as a homemaker by National Home Care, insured by Zurich Insurance. It was found that these injuries caused no permanent disability, but require further medical treatment. The WCR's Opinion on Decision indicates the injuries became permanent and stationary on December 17, 1991.

E. CHARLES MAKI

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1 In case number VEN 096728, it was found that applicant sustained an
2 industrial injury to both knees on February 11, 1993, while employed as an
3 instructional assistant by Hueneme School District, permissibly self-insured.
4 It was also found that applicant became permanent and stationary (P&S) on
5 November 23, 1993, that the injuries caused no ratable level of permanent
6 disability, and that applicant requires further medical treatment.

7 Applicant seeks reconsideration of the findings in all cases. Applicant
8 contends that the evidence justifies a finding that both her knee injuries
9 resulted in permanent disability, and that the permanent disability with
10 respect to the left knee alone is 40 percent. Applicant further contends
11 that the evidence does not justify apportionment, and that the WCR erred in
12 failing to distinguish between apportionment of permanent disability and
13 contribution.

14 Defendant Hueneme contends that the evidence does not justify a
15 finding that applicant sustained injury to both knees on February 11, 1993
16 as a result of her employment with the School District.

17 With respect to defendant's contentions, we note that one of the
18 conditions of compensation is that the injury be proximately caused by the
19 employment. Labor Code section 3600(a)(3). Proximate cause is absent if
20 the work does no more than provide a 'stage for the event.' (*Albertson's v.*
21 *Workers' Comp. Appeals Bd. (Bradley)* (1983) 33 Cal.App.3d 729, 734 fn. 3
22 [48 Cal.Comp.Cases 326, 329 fn. 3].)

23 As noted in *Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.*
24 (*Austin*) (1993) [58 Cal. Comp. Cases 323, at 326], "[i]n any given situation,
25 there can be more than one injury, either specific or cumulative or a
26 combination of both, arising from the same event or from separate
27 events...The number and nature of the injuries suffered are questions of fact

1 for the WCJ or the WCAB...For example, if an employee becomes disabled, is
2 off work and then returns to work only to again become disabled, there is a
3 question of fact as to whether the new disability is due to the old injury or
4 whether it is due to a new and separate injury...In addition, one exposure
5 may result in two distinct injuries, posing another question of fact."
6 (Citations omitted.)

7 In connection with the incident of February 11, 1993, it appears that
8 applicant's left knee gave out spontaneously at the school, causing a fall
9 which injured both knees. The record also indicates that after the injury of
10 November 16, 1989, the left knee gave out on other subsequent occasions,
11 including February 11, 1993. Thus, the subsequent injuries may have been
12 consequences of the original injury. Nevertheless, the WCR treated each
13 subsequent occasion as an independent injury and attempted to apportion
14 disability based on that assumption. Therefore, we conclude that the WCR
15 must revisit the number and date of the industrial injuries that may have
16 occurred.

17 With respect to applicant's contentions, the WCR's Report explained
18 his findings regarding permanent disability as follows:

19 "As shown in Applicant's Exhibit 1, on legal backer No. 1,
20 by report dated 3-30-95, Dr. Gross reported on behalf of
21 applicant. At page 7, discussion apportionment, on the left
22 knee, Dr. Gross apportioned 15% to the injury of 11-9-89 [sic],
23 35% to 12-27-90, and 50% to 2-11-93. With regard to
24 applicant's right knee, Dr. Gross apportioned 35% to 2-11-93,
25 50% to 11-17-94, and 15% to a continuous trauma. In that Dr.
26 Gross apportioned to dates of injury other than as claimed by
27 applicant or admitted by defendants, it would be proper to
apportion to other than industrial injury on dates of injury other
than 2-11-93 for the left and right knees.

"Dr. Berman, reporting on behalf of Hueneme School
District, as shown in Defense Exhibit B, on legal backer No. 1,
indicates applicant did not sustain injury at Hueneme School
District, apportioning all applicant's difficulties to factors prior

1 to her employment with school district. Although Dr. Berman
2 did do a review of applicant's medical records, Dr. Berman
3 ventured no opinion as to apportionment as to applicant's
4 previous injuries.

5 "Reporting for Zurich American Insurance on 12-1-94, as
6 shown in Defense Exhibit 1, at page 14, Dr. Kornblum was of the
7 opinion that, as to the right knee, 30% was due to the 11-9-89
8 [sic] injury, 10% due to the 12-27-90 injury, 20% due to 2-11-
9 93 and, 40% due to the incident of 11-17-94. For the left knee,
10 Dr. Kornblum was of the opinion that all applicant's disability
11 was due to the injury of 2-11-93. As Dr. Kornblum did not
12 apportion any portion of the right knee injury to the dates of
13 injury claimed by applicant in this matter, apportionment to
14 non-industrial injury would be appropriate.

15 "The rating provided that apportionment was to other
16 industrial injury. Had apportionment been to non-industrial
17 injury, applicant's assertion would be entirely correct, there
18 being no evidence of apportionment to non-industrial injury.
19 However, the apportionment was clearly to other than industrial
20 injury as asserted by applicant in this case."

21 Thus, it appears that the WCR apportioned disability to the incident of
22 November 17, 1994 by treating it as an unclaimed industrial injury, for
23 which it was appropriate to deny compensation. While the parties did file
24 four applications or claims of injury, none was filed for the November 17,
25 1994 incident. The WCR apparently reasoned that any party who did not
26 correctly identify every potential industrial injury implicated by the medical
27 record waived a finding of industrial disability. Given the complexity of
applicant's history of injuries, we conclude that the WCR's approach was
unsound. While it is good practice for parties to claim all injuries of which
they are reasonably aware, each potentially injurious incident does not
necessarily require a new application or claim form. A WCR may conform an
application to proof as long as the parties are afforded due process. If an
issue has been consciously tried by the parties, it is properly before the WCR

1 even though not alleged in the application. (See California Workers
2 Compensation Practice 3d (C.E.B.) (1985) § 9.5.)

3 Moreover, as with the February 11, 1993 incident, the record shows
4 that on November 17, 1994 applicant was in the parking lot, when her right
5 knee gave way and she fell. (Dr. Kornblum report, 12/1/94.) Applicant
6 indicated at her deposition of April 7, 1993, at pages 49 through 51 that all
7 injuries following 1989 were as a result of her knee giving out. Therefore,
8 this incident could be a compensable consequence of the original injury and
9 a new application need to be filed. (cf. *State Compensation Ins. Fund v. I. A.*
10 *C. (Wallin)* (1959) 176 Cal.App.2d 10, 24 Cal.Comp.Cases 302.)

11 In addition, we note that each of the WCR's four Opinions on Decision
12 states that the factors of permanent disability and the determination of
13 apportionment were based on a "review of the entire medical record." The
14 WCR's Report does not explain how the percentages given by the various
15 medical evaluators correlate to the WCR's rating instructions in each case.
16 The WCR's discussion of these issues does not allow for meaningful review by
17 the Appeals Board. Moreover, while the medical opinions relied upon by the
18 WCR may be helpful in resolving the issue of contribution, it is less certain
19 whether they are helpful in resolving the issue of apportionment. Dr. Gross
20 and Dr. Kornblum both assigned percentages of apportionment by reference
21 to dates of injury. However, Labor Code section 4750 does not permit
22 apportionment of causative factors; only disability may be apportioned
23 (*Pullman Kellogg v. Workers' Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d
24 450 [45 Cal.Comp.Cases 170, 172]). If the apportionment is based on medi-
25 cal opinion, the opinion must establish that the worker had a pre-existing
26 disability and must describe its exact nature and the basis for the opinion
27 (*Ditler v. Workers' Comp. Appeals Bd.* (1982) 131 Cal.App.3d 803 [47

1 Cal.Comp.Cases 492]; *Callahan v. Workers' Comp. Appeals Bd.* (1978) 85
2 Cal.App.3d 621 [43 Cal.Comp.Cases 1097, 1082]).

3 Finally, we note that the WCR's rating instructions referred to
4 apportionment of permanent disability under *Wilkinson v. Workers' Comp.*
5 *Appeals Bd.* (1977) 19 Cal.3d 491 [42 Cal.Comp.Cases 406]. Permanent
6 disability may be apportioned under *Wilkinson* where injuries to the same
7 body part occurring at different times all become permanent and stationary
8 at the same time. According to the WCR's Opinions on Decision in the four
9 cases, however, the various injuries did not become permanent and
10 stationary at the same time. If applicant's various injuries did indeed cause
11 successive permanent disability that can be separated, the percentage of
12 disability caused by each injury is determined, and the employer at the time
13 of the injury is liable for the number of weeks of permanent disability
14 indemnity provided by Labor Code section 4658 for that percentage of
15 disability. (See, e.g. *California Workers' Compensation Practice 3D* (C.E.B.
16 1985) § 16.65; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1
17 [41 Cal.Comp.Cases 42] As the record presently stands, it is uncertain
18 whether the WCR's rating instructions and determination of permanent
19 disability and apportionment took the foregoing principles into account.

20 When the Appeals Board identifies unanswered issues or a need for
21 further evidence, it has a duty to return the matter to the trial level for
22 further development of the record by the WCR to resolve these issues, as
23 deemed necessary. (*Glass v. Workers' Comp. Appeals Bd.* (1980) 105
24 Cal.App.3d 297 [45 Cal.Comp.Cases 441]; *Raymond Plastering Co. v. Workers'*
25 *Comp. Appeals Bd. (King)* (1967) 252 Cal.App.2d 748 [32 Cal.Comp.Cases
26 287]; *West v. Workers' Comp. Appeals Bd.* (1947) 12 Cal. Comp. Cases 86.)

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For the foregoing reasons,

IT IS ORDERED, that reconsideration of the Findings and Awards issued in cases VEN 84732, 81634, 96728, and 97032 on November 14, 1996 is hereby **GRANTED**, and that as the Decision After Reconsideration, said Findings and Awards are **RESCINDED**, and this matter is **RETURNED** to the trial level for further proceedings and new decision by the WCR, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

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I CONCUR.

[Handwritten signature: Richard P. Gannon]

[Handwritten signature: Catherine S. Casey]



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA.

JAN 27 1997

SERVICE BY MAIL ON SAID DATE TO ALL PARTIES LISTED ON THE OFFICIAL ADDRESS RECORD, INCLUDING LIEN CLAIMANTS.

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