CASE NO.: B 245118

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

---

SOUTHERN CALIFORNIA EDISON, PERMISSIBLY SELF-INSURED,
Petitioner,
vs.
WORKERS' COMPENSATION APPEALS BOARD
and
ELSIE MARTINEZ,
Respondents,

---

WCAB NO. ADJ7278184 (MDR) and ADJ124368 (MDR)

HONORABLE ROBERT F. SPOERI, WCJ

---

# AMICUS CURIAE APPLICATION AND BRIEF BY CALIFORNIA CHAMBER OF COMMERCE IN SUPPORT OF PETITIONER SOUTHER CALIFORNIA EDISON

---

RICHARD M. JACOBSMEYER, ESQ.
SBN: 66300
SHAW, JACOBSMEYER, CRAIN & CLAFFEY
475 – 14th Street, Suite 500
Oakland, CA 94612
TEL NO: (510) 645-7172

Attorney for Applicant for Amicus Status
California Chamber of Commerce

## I. CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

**California Rules of Court, Rule 8.208**

Court of Appeal Case Caption:

Southern California Edison

v.

WCAB, et al.

B245118

2nd App. District – Div 4

| Name of Interested Entity or Person | Nature of Interest |
|---|---|
| | |
| | |
| | |

Please check here if applicable

There are no interested entities or parties to list in this Certificate per California Rules of Court 8.208(d).

Date: March 29, 2013

Signature of Attorney or Unrepresented Party


Printed Name: RICHARD M. JACOBSMEYER, ESQ.
State Bar No.: 66300
Address: SHAW, JACOBSMEYER, CRAIN & CLAFFEY
475 – 14th Street, Suite 500
Oakland, CA 94612
TEL NO: (510) 645-7172


Party Represented: Amicus Curiae-
California Chamber of Commerce

## II. TABLE OF CONTENTS

## III. TABLE OF AUTHORITIES

**Cases**



**Statutes**

## IV. APPLICATION OF AMICUS CURIAE STATUS

TO THE HONORABLE CHIEF JUSTICE AND HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEALS IN THE STATE OF CALIFORNIA IN THE SECOND DISTRICT DIVISION FOUR:

Pursuant to California Rules of Court Section 8.200(c) the California Chamber of Commerce (hereinafter CalChamber) requests an order granting a*micus curiae* status in the instant case and the filing of the amicus curiae brief in support of petitioner Southern California Edison herein.

The CalChamber is a non-profit business organization with over 13,000 members, both individual and corporate, representing virtually every economic interest in the state of California. For over 100 years, CalChamber has been the voice of California business. While the CalChamber represents many of the largest corporations in California, seventy-five percent of its members have 100 or fewer employees. The CalChamber acts on behalf of the business community to improve the state's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues. The CalChamber often advocates before the courts by filing *amicus curiae* briefs in cases involving issues of paramount concern to the business community. The issue presented in this case is but one example.

On behalf of its membership the CalChamber provides oversight and direction on legislative, judicial, and administrative issues involving employers and employee relations within the State of California including Workers' Compensation issues. Based upon its interest, knowledge and expertise in employment-related issues including Workers' Compensation the CalChamber has made multiple appearances as *amicus curiae* before the

California Supreme Court and the Courts of Appeals.

The CalChamber is familiar with the parties and issues raised in this matter; has reviewed all of the briefs previously submitted to the court as well as the pleadings and documentations from the administrative body for which review is sought. Pursuant to California Rules of Court Section 8.200(c) the CalChamber respectfully requests this court issue an order granted status as *amicus curiae* and ordering the filing of its proposed brief in support of the petition for hearing in this matter.

In the view of the CalChamber and on behalf of its 13,000 members, the decision issued by the Workers' Compensation Appeals Board (W.C.A.B.) involves a substantial departure from established principles of law especially as it addresses substantial evidence and ignores the meaningful legislative reforms involving both permanent disability and apportionment under Labor Code Section 4660, 4663 and 4664 adopted as part of SB899 and designed to save unnecessary and duplicative costs in the Workers' Compensation system. The holdings in this matter are contrary to recent appellant decisions including *Benson v. WCAB* (2009) 170 Cal.App.4th 1535 as well as *Milpitas Unified School District v. WCAB* (Guzman) (2010) 187 Cal.App.4th 808. The case also ignores a long standing precedent involving the rules of substantial evidence, overlap for permanent disability and other legal principles.

The CalChamber joins in the appeal of Petitioner regarding the award of attorney's fees as improper and contrary to the W.C.A.B.'s own rules on awarding attorney's fees in complex matters. As made, the award of attorney fees results in a potential wind-fall to the attorney representing applicant and serious detriment to the injured worker from over estimating the ultimate total of permanent disability to be paid in this matter without legal or

factual basis.

Because of the importance of the issues raised in this matter, the prospective of its 13,000 members the CalChamber asks this court to grant its status as *amicus curiae* and accept for filing the enclosed brief.

Dated: March 29, 2013

Respectfully Submitted:

**SHAW, JACOBSMEYER, CRAIN & CLAFFEY**

Richard M. Jacobsmeyer
Attorney at Law
Certified Specialist, Workers' Compensation Law
The State Bar of California Board of Legal Specialization

## V. ISSUES PRESENTED FOR REVIEW

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE W.C.A.B.'S FINDING THE APPLICANT IS TOTALLY DISABLED AS A RESULT OF THE CUMULATIVE INJURY

THE FAILURE OF THE W.C.A.B. TO APPORTION BETWEEN TWO JUDICIALLY DETERMINED INJURIES INVOLVING OVERLAPPING BODY PARTS IS LEGALLY IMPERMISSIBLE

THE AWARD OF 100% PERMANENT TOTAL DISABILITY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND DOES NOT REPRESENT A PERMISSIBLE UTILIZATION OF THE PRINCIPLES IN *MILPITAS UNIFIED SCHOOL DISTRICT V. W.C.A.B. (GUZMAN)*, (2010) 187 CAL APP. 4TH 808, 75 CAL. COMP. CASES 837 .

## VI. POINTS AND AUTHORITIES

THERE IS NO SUBSTANTIAL EVIDENCE TO SUPPORT THE W.C.A.B.'S FINDING THE APPLICANT IS TOTALLY DISABLED AS A RESULT OF THE CUMULATIVE INJURY.

There are multiple flaws with the analysis by the Workers' Compensation Judge (WCJ), adopted by the Workers' Compensation Appeals Board (W.C.A.B.), in finding the injured worker is "permanently and totally disabled" as a result of the cumulative trauma injury ending in May 2004. Any one of these flaws would be a basis for reversal of the W.C.A.B. finding but the combination of errors absolutely compels this Court to reverse the decision of the W.C.A.B. and remand the matter for further consideration.

A. The Medical Opinion of Dr. Seymour Levine Independent Medical Examiner Is Not Substantial Evidence As His Opinion is Based Upon an Erroneous Factual Assumption Contrary to A Specific Finding by the Workers' Compensation Appeals Board.

One of the first and most apparent flaws in the judge's analysis is his reliance upon the report of Dr. Seymour Levine to conclude the injured worker was totally disabled as a result solely of the cumulative trauma injury without reference to the other specific injury stipulated and judicially determined to having occurred on June 15, 2001. Dr. Levine makes an assumption such an injury never occurred (see report of Seymour Levine (December 3, 2010 Paragraph 3) which then skews his entire analysis. However the W. C. A. B. made a specific finding in the companion case to this matter (ADJ7278184) that a specific injury occurred on June 15, 2001 to applicant's neck, right shoulder, right wrist, right hand and psyche. The finding of injury in the instant case is identified as a cumulative trauma occurring from February 1998 through May 21, 2004 and involved injury to the "lumbar spine, cervical spine, and both shoulders, both wrists, both hands, psyche and fibromyalgia".

The fact Dr. Levine assumes for purposes of his evaluation that no injury occurred on June 15, 2001 is a fatal flaw to reliance upon his opinion that *all* of the applicant's disability

described by him arises from the cumulative trauma ending in May 2004.

It is well documented that a medical opinion which is based upon erroneous facts cannot be substantial evidence upon which a court can rely in making a finding. See *Place v. W.C.A.B.* (1970), 3 Cal. 3d, 372, 378, 35 Cal. Comp. Cases 525:

> "Expert medical opinion, however, does not always constitute substantial evidence on which the Board may rest its position. Courts have held that the Board may not rely upon medical reports which it knows to be erroneous (*McCoy v. Industrial Acc. Con.* (1966), 64 Cal. 2d 82, 92 [31 Cal. Comp. Cases 93, 48 Cal. Rptr. 858, 410 P.2d 362]), upon reports which are no longer germane [citation omitted] or upon reports based upon inadequate medical history of examinations [citations omitted], we held that "an expert's opinion which does not rest upon relevant facts or which assumes an incorrect legal theory cannot constitute substantial evidence ...." (35 Cal. Comp. Cases 525 at 529.

In accord with *Place v. W.C.A.B., cited supra*, is *LeVesque v. W.C.A.B.* (1970), 1 Cal. 3d 627, 35 Cal. Comp. Cases at 16 and *Stevens v. W.C.A.B.* (1971), 20 Cal. App. 3d 461, 36 Cal. Comp. Cases 610.

All of these cases stand for the proposition a physician's report which makes an assumption of an incorrect legal fact to arrive at a medical opinion is not substantial evidence. In *Stevens v. W.C.A.B., cited supra*, the W.C.A.B. relied upon a physician's conclusion that job stress could not contribute to coronary artery disease for a public safety officer. However as noted by the Appellate Court in its decision reversing the W.C.A.B., the legislature had already mandated a presumption in favor of heart trouble manifesting itself during the course of employment as an enumerated public safety officer as being work related. A physician's opinion unwilling to accept the legislative determination could not be substantial evidence.

In the instant case Dr. Levine rested his opinion there was no apportionment to injuries other than the cumulative trauma claim and declining to allocate to the injured worker's injury on June 15, 2001 upon the assumption that no such injury occurred. However that assumption is

contrary to the W.C.A.B.'s specific finding that such an injury did occur and allocating partial permanent disability to that injury. To the extent Dr. Levine's opinion contravenes that finding it cannot be substantial evidence and cannot be the basis upon which the Board issues the determination all of the injured worker's permanent disability is to be attributed to the cumulative trauma injury. The flaw in Dr. Levine's analysis, and ultimately the W.C.A.B.'s, is demonstrated by the WCJ's apportionment in the specific injury claim to the subsequent cumulative injury for the same parts of the body he later awarded a permanent total disability, without any apportionment.

B. Dr. Levine's Opinion Regarding Causation of the Applicant's Fibromyalgia Supports Allocation to More Than One Injury.

In his December 3, 2010 report Dr. Seymour Levine, the Independent Medical Examiner, appointed by the W.C.A.B. provided his diagnostic impressions regarding the applicant's condition. His diagnostic impressions included the following:

1. REPETITIVE STRAIN INJURY/OVERUSE SYNDROME OF THE CERVICAL SPINE AND BILATERAL UPPER EXTREMITIES ON A CUMULATIVE TRAUMA WORK-RELATED BASIS FOR THE DATES OF FEBRUARY 1998 TO MAY 21, 2004. TILLS (SIC) RESULTED IN STRAINS TO THE CERVICAL SPINE, BILATERAL SHOULDERS, BILATERAL ELBOWS, AND BILATERAL HANDS AND WRISTS, MORE PRONOUNCED ON THE RIGHT THAN ON THE LEFT. NERVE CONDUCTION STUDIES PERFORMED ON DECEMBER 14, 2001 DEMONSTRATED A MILD RIGHT-SIDED CARPAL TUNNEL SYNDROME SECONDARY TO THE REPETITIVE STRAIN INJURIES. THESE DIAGNOSES WERE DEFERRED TO THE AME IN ORTHOPEDICS. (Emphasis Added)

2. CHRONIC REGIONAL MYOFASCIAL PAIN SYNDROME INVOLVING THE MUSCULATURE OF THE CERVICAL SPINE AND THE MUSCULATURE OF THE BILATERAL SHOULDER GIRDLES, RIGHT SIDE MORE PRONOUNCED THAN LEFT, SECONDARY TO DIAGNOSIS NO. 1.

3. CHRONIC LUMBOSACRAL STRAIN SYNDROME SECONDARY TO REPETITIVE STRAIN INJURIES/OVERUSE SYNDROME ON A CUMULATIVE TRAUMATIC WORK-RELATED BASIS RESULTING IN A CHRONIC REGIONAL MYOFASCIAL PAIN SYNDROME INVOLVING THE MUSCULATURE OF THE LUMBOSACRAL SPINE, RIGHT SIDE GREATER THAN LEFT.

Most significantly is his Diagnostic Impression No. 4 which reads as follows:

4. FIBROMYALGIA WHICH EMERGED IN THIS PATIENT SECONDARY TO DIAGNOSIS NO. 1 THROUGH 3. THE FIBROMYALGIA HAS MANIFESTED ITSELF IN THIS PATIENT WITH WIDESPREAD PAIN, NON-RESTORATIVE SLEEP, DEPRESSION AND ANXIETY, HEADACHES, TEMPOROMANDIBULAR JOINT COMPLAINTS, SYMPTOMS COMPATIBLE WITH COGNITIVE DYSFUNCTION, VERTIGINOUS COMPLAINTS, SYMPTOMS COMPATIBLE WITH AN IRRITABLE BOWEL SYNDROME, HYPERSENSITIVITY TO ENVIRONMENTAL STIMULI SUCH AS BRIGHT LIGHTS, NOISE, STRESS AND WEATHER CHANGES. THIS PATIENT HAS ALSO NOTED A DECREASE IN LIBIDO DUE TO HER CHRONIC PAIN SYNDROME.

What stands out in reviewing this commentary from Dr. Levine is his conclusion the applicant's orthopedic complaints contained in Diagnostic Impressions 1 through 3 resulted in the development of fibromyalgia which included the development of the other symptoms such as widespread pain, depression (apportioned by the psychiatric AME), non-restorative sleep (apportioned by Dr. Levine), headaches, anxiety, etc. Dr. Levine specifically determines the multiple complaints from the applicant's fibromyalgia condition derive from the orthopedic complaints already described, and allocated between two injuries by both the orthopedic AME and the WCJ.

It should also be noted that at multiple places in his report Dr. Levine also defers to Dr. Friedman, the Agreed Medical Examiner in psychiatry, regarding the causation of the applicant's psychiatric disorder. In Diagnostic Impression No. 1, he defers to the orthopedic AME regarding the causation of the applicant's multiple orthopedic complaints. Presumably since the chronic

regional myofascial pain syndrome developed as a secondary factor from the orthopedic complaints (as indicated in Diagnostic Impression 2,) he would defer to the orthopedic specialist in that regard also. Regardless of whether Dr. Levine adopts the opinion of the orthopedic AME, the WCJ and W.C.A.B. did when they issued their decisions assigning partial permanent impairment to the specific injury in the companion case to this action.

As can be seen from the doctor's evaluation it is not as simple as the artifice created by the Workers' Compensation Judge that the applicant's fibromyalgia is solely related to the cumulative trauma. While Dr. Levine does state that conclusion, he also notes the fibromyalgia specifically arises from the orthopedic complaints which are deferred to the orthopedic medical-legal evaluator, Dr. Kanter. Dr. Kanter's opinion, adopted by the WCJ in ADJ7278184 as substantial evidence to support apportionment, allocates causation to both the specific injury of 6/15/2001 and the cumulative trauma injury described by Dr. Levine. Dr. Levine's opinions that he both defers to the Orthopedic and Psychiatric AME physicians while at the same time concluding all of the fibromyalgia condition is related solely to the CT injury results in an irreconcilable conflict in his mutually exclusive statements. He cannot at the same time defer to the other reporting physicians within their field of expertise, who allocate between specific and cumulative injuries and to non-industrial causes and then conclude differently than they have reported and as judicially determined by the W.C.A.B. in finding injury on June 15, 2001 and attributing a portion of the injured worker's condition to that injury.

As pointed out by both counsel for applicant in his Petition for Reconsideration and the petition for writ of review as well as the Workers' Compensation Judge in his Report and Recommendation on Reconsideration, the injured worker's orthopedic complaints are the result of a combination of non-industrial, industrially related to the June 15, 2001 injury and

industrially related to the cumulative trauma claim. Consequently it is neither medically supportable nor consistent with his own discussion regarding causation for Dr. Levine to conclude all of the injured worker's fibromyalgia complaints are related to cumulative trauma. Dr. Levine has also opined the injured worker's fibromyalgia is derivative of the orthopedic complaints and has deferred causation for the orthopedic condition to the orthopedic evaluator. Dr. Kanter, the orthopedic AME has separated out the applicant's complaints into industrial and non-industrial causes with two separate industrial causes.

It defies logic as well as the overwhelming weight of the medical record for the trial judge to isolate the one inconsistent portion of Dr. Levine's opinion and use it to conclude all of the applicant's fibromyalgia complaints arise solely from the cumulative trauma claim when at the same time, Dr. Levine also reports the symptoms are derivative of the applicant's orthopedic complaints.

It should also be noted that fibromyalgia is a diagnosis but does not necessarily attach itself to any specific body part and in this case is described as widespread complaints of pain principally on the applicant's right side. It is impossible to separate out the causative effect of the applicant's orthopedic complaints with the diagnosis of fibromyalgia based on Dr. Levine's opinion. Indeed it does not appear, based upon the report of Dr. Levine, that there are any other causes other than the symptoms which developed as a result of the applicant's chronic pain disorder deriving from her orthopedic complaints. As further noted by Dr. Levine, the psychiatric symptoms are derivative of the orthopedic complaints also (a conclusion supported by Dr. Friedman in his reports) and he repeatedly defers to Dr. Friedman on issues involving that diagnosis.

Given Dr. Levine's explanation as to the causation of the applicant's fibromyalgia there is

simply no rational explanation for the trial judge's conclusion that the fibromyalgia developed by the applicant is *solely related* to the cumulative trauma injury other than the legally incorrect conclusion drawn by Dr. Levine that there was only one injury in this matter. As such the doctor's opinion on causation of the condition leading to the applicant's impairments is not legally substantial evidence. The failure of Dr. Levine to even accept the W.C.A.B.'s factual findings renders his opinion on causation not just suspect but completely inadequate to meet the legal requirements to constitute substantial evidence.

## THE FAILURE OF THE W.C.A.B. TO APPORTION BETWEEN TWO JUDICIALLY DETERMINED INJURIES INVOLVING OVERLAPPING BODY PARTS IS LEGALLY IMPERMISSIBLE

That the two injuries identified by the Workers' Compensation Appeals Board as having occurred in this case involve overlapping body parts is medically indisputable. A review of the Findings of Fact and Award in both cases discloses multiple overlapping body parts including spine and upper extremities. While the injured body parts are not completely identical, there are unquestionably overlapping injured body parts including the spine and upper extremities. The Workers' Compensation Judge's declination to find overlap based upon the fiction that fibromyalgia is a separate condition unrelated to the applicant's orthopedic complaints has been addressed in part above. While the applicant's orthopedic complaints are clearly the cause of the applicant's fibromyalgia, the trial judge, in essence, concludes the fibromyalgia to be the *causative factor* (rather than the result) of the applicant's injury. In this case it is clear fibromyalgia is derivative of the applicant's orthopedic complaints and indeed the psychiatric condition described by Dr. Friedman is derivative of the applicant's orthopedic complaints and the fibromyalgia (at least in the hypothesis expressed by Dr. Levine).

It is therefore a judicially created fiction for the WCJ to conclude the applicant's

fibromyalgia is the *cause* of applicant's permanent impairment rather than the result of the applicant's complaints from the two work-related injuries. This fiction, based on the inconsistent testimony and opinions of Dr. Levine, causes the judge to incorrectly allocate liability for the fibromyalgia solely to the cumulative trauma injury. Dr. Levine does not indicate the fibromyalgia is a direct result of the cumulative injury but a derivative condition from the applicant's orthopedic complaints. It is the WCJ who creates a fiction that the applicant's development of fibromyalgia magically arose from the cumulative injury without contribution from the physical complaints that arose out of employment or the specific injury that was judicially determined to be a portion of the cause of those symptoms.

Dr. Levine in his DIAGNOSTIC IMPRESSIONS, as reference above, clearly reports the applicant's fibromyalgia is not something which arises *sua sponte* from applicant's work activities but in fact derives from the development of applicant's orthopedic complaints, leading to the myofascial disorder and then ultimately leading to the applicant's fibromyalgia. Indeed the doctor's ultimate description of the fibromyalgia is "chronic pain disorder" with pain being the foremost factor of the doctor's description of the injured worker's complaints. The doctor describes the applicant as having complaints when she wakes up as 6 on a scale of 10 and increasing thereafter (Dr. Levine Report December 3, 2010 page 5 under CURRENT SYMPTOMS #1). The applicant complained to Dr. Salick in his examination on August 26, 2004 of "total body pain with complaints of resulted decreased sleep). Indeed the applicant's pain complaints are the principal subjective complaints resulting in development of all of her other complaints such as depression, decreased sleep, decreased libido, etc.

Given that applicant's complaints of pain are the predominant factor of her symptomatology both for her orthopedic complaints and her rheumatological/fibromyalgia

condition, the issue of overlap must be addressed by the W.C.A.B. The WCJ's (and ultimately the W.C.A.B.'s) conclusion that applicant's fibromyalgia is a separate condition from the applicant's orthopedic complaints and therefore does not overlap simply fails to meet the burden of proof requirements outlined by the W.C.A.B. in its *en banc* decisions in *Sanchez v. City of Los Angeles* (2005), 70 Cal. Comp. Cases 1440 and *Strong v. City and County of San Francisco* (2005), 70 Cal. Comp. Cases 1460.

In both of these *en banc* decisions of the W.C.A.B., the Board addressed the issue of overlapping permanent disability for apportionment purposes. In *Sanchez v. County of Los Angeles*, *cited supra*, the Appeals Board dealt with the issue of overlapping permanent disability in the same region of the body. Whether it was apportionment involving the same region Labor Code § 4664 requires apportionment be considered. The Board further noted defendant had the burden of proving the existence of any prior permanent disability Award relating to that same region of the body (already decided by the W.C.A.B. in this case in the companion file) and that the permanent disability is *conclusively* presumed to exist pursuant to Section 4664.[1] In *Strong v. City and County of San Francisco*, *cited supra*, the Appeals Board addressed a similar issue but from a different perspective on how to consider overlap of impairments in different regions of the body but which resulted in similar disabilities/impairments. An example of this would be an injured worker who sustained a back injury with a preclusion from heavy work and then later sustained an injury to his cardiovascular system resulting in a limitation to light work (50%

[1] The W.C.A.B. in *Sanchez v. W.C.A.B.* and *Sanchez v. City of Los Angeles* and *Strong v. City and County of San Francisco* held once defendant had proved the existence of prior permanent disability the burden shifted to applicant to disprove the issue of overlap. This burden was altered in the court of appeal decision in *Kopping v. W.C.A.B.* (2006), 142 Cal. App. 4th 109, 48 Cal. Rptr. 3d 618. In that decision the court of appeal held the W.C.A.B. was incorrect in placing the burden on the applicant to disprove the issue of overlap but required defendant to prove the pre-existing disability overlapped the existing disability. In the instant case the pre-existing disability is determined with great exactitude by the W.C.A.B. and hence the issue of what parts of the body and what level of disability exist due to the pre-existing condition is easily ascertainable.

disability).[2] In that circumstance the injured worker's preclusion from heavy work with this resulting 30% permanent disability would overlap the limitation to light work. Therefore the 30% disability would be subtracted from the 50% disability and the heart attack would result in a 20% overall level of permanent disability after apportionment. (See *Mercier v. W.C.A.B.* (1976), 16 Cal. 3d 711.

In the instant case the applicant's symptomatology from the injury in June 2001 and the symptomatology resulting from the cumulative trauma injury ending in 2004 overlap both in terms of the same parts of the body (spinal and upper extremity injuries) and in the manner in which they affect the applicant's ability to perform work activities as discussed by Drs. Kanter and Friedman in their reports). Therefore apportionment considerations pursuant to *Strong v. City and County of San Francisco* and *Sanchez v. County of LA* are mandated pursuant to the W.C.A.B. decision in *Escobedo v. Marshalls* (2005), 70 Cal. Comp. Cases 604 (W.C.A.B. *en banc*). In *Escobedo* the W.C.A.B. determined that apportionment of permanent disability shall be based on causation referring to causation of the permanent disability. In this case the causation of the applicant's permanent disability is clearly identified by Dr. Levine as being derivative of the orthopedic complaints. Deference to the causation for the orthopedic complaints is given to Dr. Kanter who allocates as described by the Workers' Compensation Judge in the Findings and Award in the companion case in this matter. (Also as outlined in the judge's report and recommendation on reconsideration). Where liability for permanent disability has more than one cause the law does not allow the Board to not apportion between the two causes. (*Mello v. W.C.A.B.*, 70 Cal. Comp. Cases 1525).

This approach is also consistent with the landmark court of appeals decision in *Benson v. W.C.A.B.* (2009), 170 Cal. App. 4th 1535. In that case the Court of Appeal affirmed the

[2] All disabilities in this discussion are based upon the 1997 permanent disability rating schedule definitions.

W.C.A.B. ruling requiring apportionment of liability between two or more causes where there was substantial evidence to show that more than one cause was the basis for the injured worker's permanent disability. In *Benson, cited supra*, the court noted as follows:

> "Furthermore, Section 4663, Subdivision (a), provides that '[a]pportionment of permanent disability shall be based on causation.' The plain language of Section 4663, Subdivision (a), makes clear that the focus is no longer on the permanent disability itself, but on *its causes*. 'Apportionment ... based on causation' is not naturally limited to apportionment to non-industrial causes and previous permanent disability Awards. Rather '[a]pportionment ... is based on causation' must mean apportionment to all causes, including each distinct industrial injury. Had the legislature intended to insulate certain causes from apportionment, it would have said so."

The court goes on further to state as follows:

> "... We agree with the Board majority that the plain language of Section 4663, Subdivision (c), read in conjunction with the rest of the statutory scheme, suggests the legislature's intent to require apportionment on an injury-by-injury basis, and no longer only for 'previous permanent disability'.

In affirming the W.C.A.B.'s *en banc* decision compelling apportionment between multiple injuries the Court of Appeal in Benson v W.C.A.B., *cited supra*, noted the legislative history behind Senate Bill 899 which amended Labor Code §§ 4663, 4664 and 4750 to their current state. The Court pointed out the bill was intended to provide relief to the state from the effects of the then current workers' compensation crisis at the earliest possible time and was necessary for this act to take effect immediately. (Citations omitted). The perceived crisis the legislature sought to relieve was one caused by soaring workers' compensation costs noting that workers' compensation costs for employers have skyrocketed over 136% over the previous four years on average.

The issue of intertwining injuries similar to the one at hand was recently addressed by the Sixth Appellate District in *State Compensation Insurance Fund v. W.C.A.B. (Dorsett)* 2011), 201 Cal. App. 4th 443, 76 Cal. Comp. Cases 1138. In that case the W.C.A.B., much as in this case,

had sought to evade the requirement to apportion between two injuries involving similar or overlapping parts of the body. In *Dorsett, cited supra,* the W.C.A.B. had awarded a combined permanent disability Award on the basis that the initial injury sustained by the injured worker had also contributed to the second injury for the same employee and therefore it was not possible to separate out the two injuries. The W.C.A.B. effectively concluded that since the second injury was a compensable consequence of the first (as well as a separate injury in its own right) the two injuries should be combined to a single permanent disability rating.

The Court of Appeal however was unimpressed with this logic. Citing both *Benson v. W.C.A.B.* and the Supreme Court decision in *Brodie v. W.C.A.B.* (2007), 40 Cal. 4th 1313, 57 Cal. Rptr. 3d 644, 72 Cal. Comp. Cases 565, the Court ordered the W.C.A.B. to re-determine the issue of apportionment based upon the report of the Agreed Medical Examiner. The Court specifically noted the Agreed Medical Examiner had allocated liability "50% to the specific injury and 50% to the cumulative trauma injury" and in determining the approximate percentage of permanent disability caused by the work-related injuries the law required no further determination (citing *E.L. Yeager Construction v. W.C.A.B.* (2006), 145 Cal. App. 4th 922, 52 Cal. Rptr. 3d 1333).

In the instant case while the W.C.A.B. did not take the exact tact it did in *Dorsett, cited supra,* the result is much the same and evidences a disdain for the legislative intent in determining the issue of apportionment. In this case there is absolutely no question that there is overlapping disability between the applicant's two injuries. The only evidence relied upon by the Board to deny apportionment for the second injury rests upon a medical report which is legally not substantial evidence (Dr. Seymour Levine) and therefore cannot be the basis for finding of no apportionment. The Appeals Court should either make a determination that apportionment exists

or order for the development of the record in order to obtain an opinion which allows apportionment to be calculated. No other result can be confidenced by the current state of the law.

THE AWARD OF 100% PERMANENT TOTAL DISABILITY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND DOES NOT REPRESENT A PERMISSIBLE UTILIZATION OF THE PRINCIPLES IN *MILPITAS UNIFIED SCHOOL DISTRICT V. W.C.A.B. (GUZMAN),* (2010) 187 CAL APP. 4TH 808, 75 CAL. COMP. CASES 837 .

The Independent Medical Examiner in the field of rheumatology, Dr. Seymour Levine, offered multiple factors of impairment for applicant's fibromyalgia. In describing the employee's rheumatological condition the doctor identifies the condition as both causing and being caused by symptoms in multiple body parts (also described by the orthopedic AME) psychiatric disorder (also described by the psychiatric Agreed Medical Examiner) as well as sleep disorder, gastrointestinal symptoms and sexual dysfunction. In describing the rheumatological portions of the applicant's disability Dr. Levine ultimately concluded that Ms. Martinez, from an impairment standpoint, had a 50% overall impairment. In doing so Dr. Levine noted the AMA Guides did not specifically provide for an impairment rating for fibromyalgia, his diagnosis in this case, but formulated a rating based upon the injured worker's symptomatology and findings which he attributed to her fibromyalgia complaints. Interestingly Dr. Levine deferred to the psychiatric evaluator who apportioned a portion of the injured workers permanent impairment to her 2001 injury, deferred to the orthopedic examiner who apportioned a portion of her orthopedic complaints including her neck and upper extremity complaints to her 2001 injury as well as non-industrial factors and concluded that 50% of her sleep disorder was on a nonindustrial basis.

Even after allocating and deferring to substantial portions of the applicant's disability to other physicians or nonindustrial causes, Dr. Levine provides the inexplicable conclusion that the

injured worker has a fibromyalgia condition which is totally disabling and completely, and solely, related to the cumulative industrial injury. Dr. Levine had an opportunity to review the reports of Dr.'s Freidman and Kanter, the Agreed Medical Examiners in this matter, and after adopting their conclusions as to the causation of the applicant's orthopedic and psychiatric complaint, then proceeds to ignore those conclusions regarding the causation of applicant's injury and disabilities. He arrives at his conclusion even though he makes it absolutely clear the fibromyalgia is directly related to the applicant's orthopedic complaints described by Dr. Kanter. The doctor's conclusion that the injured worker's total disability is solely a result of the cumulative trauma injury and that no injury occurred in June 2001 makes his report fatally defective.

Additionally in considering Dr. Levine's opinion regarding the applicant's permanent disability, it is noted that his primary diagnosis (indeed his only actual diagnosis for impairment) is "fibromyalgia". The doctor notes the fibromyalgia itself does not carry an impairment rating in the AMA Guides for Evaluation of Permanent Impairment Fifth Edition [3] (See deposition Seymour Levine Page 9, Line 21 through Page 10, Line 11).

However the AMA Guides *does* specifically address permanent disability rating and impairments for individuals with fibromyalgia. In Chapter 18 at Page 568 the Guides note as follows:

> "The other strategy is to conduct constructive diagnoses based on a person's symptoms and on subjective physical examination findings. The assumption of physicians employing this strategy is that a biological underpinning for the symptoms exists, but that medical science has not yet identified it. For example, the diagnosis of fibromyalgia is based on individual's reports widespread pain and their reports of tenderness during physical examination. Despite extensive research no specific underlying biological abnormality has been discovered to explain the reports of these people."

[3] The AMA Guides are incorporated into the permanent disability rating process pursuant to Labor Code § 4660.

Because of the lack of identifiable organ damage or dysfunction fibromyalgia falls into that category of symptoms that are identified as "ambiguous or controversial pain syndromes" and is further discussed at Page 571 of the Guides. In that section the Guides provide as follows:

> "As noted above, physicians disagree sharply about whether individuals with chronic pain should be construed as having conditions with definite, albeit obscure biological underpinnings. The alternative is to describe these people as having CPS, psychogenic pain disorders or some other term implying that their pain cannot be associated with a well-accepted biologic abnormality. For purposes of this chapter, the pain of individuals with ambiguous or controversial pain syndromes is considered unratable."

To get around the fact the AMA Guides considers fibromyalgia unratable, Dr. Seymour describes impairments which he believes can be reasonably attributed to the condition. These include widespread pain in the spine and upper extremities, sleep disorder, sexual dysfunction and gastrointestinal complaints. He also describes the combining effects of those symptoms with the applicant's pain complaints and psychiatric disorder in order to arrive at a permanent total disability. In doing so Dr. Seymour effectively usurps the descriptions of impairments by both Dr. Friedman, the Agreed Medical Examiner in psychiatry, and Dr. Kanter, the Agreed Medical Examiner in orthopedics. Neither of those physicians describe impairments that are anywhere close to a permanent total disability. Only Dr. Levine by stretching the unratable impairment of fibromyalgia into an umbrella diagnosis which includes all the other symptomatology that the injured worker has (including multiple conditions that Dr. Levine describes as apportionable) is able to conclude the injured worker is unable to be employed and lacks an ability to compete in the open labor market in its entirety, without any apportionment to the non-industrial causes already described by Dr. Levine. In doing so he in essence takes an impairment which according to the Guides is unratable and turns it into a permanent and total disability.

One of the hallmarks of the legislative package known as SB 899 was the change to the permanent disability rating system embodied in the amendments to Labor Code § 4660 which provides as follows:

"(D) The schedule shall promote consistency, uniformity, and objectivity."

The same language was contained in the Legislative Digest preceding the provisions of SB899. It is beyond comprehension how a permanent disability rating based upon an impairment rating which is virtually nonexistent in the AMA Guides can nonetheless be stretched into a permanent total disability rating in spite of an almost complete lack of any demonstrable organic disorder on the part of the injured worker. One of the hallmarks of the AMA Guides is a requirement there be an objective basis for descriptions of impairment and the unreliability of subjective complaints (pain) as a basis for impairment.

However Dr. Levine effectively has taken the injured worker's impairment rating for pain and elevated it to a level that is far beyond anything ever anticipated by the AMA Guides. Even the most severe pain disorders in the AMA Guides do not carry a total impairment rating. As an example, in the colon, rectal and anus section in Table 6.4. Page 128, a Class 4 impairment rating includes "persistent disturbance of bowel function present at rest with severe persistent pain". Combined with other described factors the impairment table calls for a 50 to 75% impairment of the whole person certainly not a permanent total even in the face of severe pain. Similarly Table 13.11 at Page 331 provides ratings for cranial nerve "trigeminal nerve" pain. Class 3 symptoms are described as "severe, uncontrolled, unilateral or bilateral facial neurologic pain which prevent performance of activities of daily living" and carries a 25 to 35% impairment of the whole

person.

It therefore can be seen within the AMA Guides there are varying degrees in impairment for severe symptomatology but permanent total impairment is not ordinarily contemplated for purely subjective complaints.

The Court of Appeal decision in *Milpitas Unified School District v. W.C.A.B., cited supra,* allows a physician under certain limited circumstances to deviate from the traditional AMA Guides impairment rating and provide an alternative rating in rebuttal to the AMA Guides rating that "most accurately reflects the injured employee's impairment." However the W.C.A.B. in its decision which was upheld by the 6th Appellate District also noted:

> "We emphasis that our decision does *not* permit a physician to utilize any chapter, table, or method in the AMA Guides simply to achieve a desired result. e.g., a WPI that would result in a permanent disability rating based directly or indirectly on any schedule in effect prior to 2005. A physician's opinion regarding an injured worker's WPI under the Guides must constitute substantial evidence; therefore, the opinion must set forth the facts and reasoning which justify it. Moreover, a physician's WPI opinion that is not based on the AMA Guides does not constitute substantial evidence."
>
> *Guzman v Milpitas USD,* 74 Cal. Comp. Case 1084 (W.C.A.B. en banc) at Page 3.

In this case there is little question that while Dr. Levine described an impairment rating using various chapters and tables in the AMA Guides his conclusion the injured worker was unable to compete in the open labor market is not taken from the AMA Guides and, in fact, represents a legal conclusion on the part of the doctor as to the injured worker's ability to earn. As such his impairment rating does not reflect any of the tables, charts or methodologies in the AMA Guides or any of the relative considerations of impairments for varying degrees.

Perhaps even more importantly Dr. Levine's opinion does not reflect the multiple

causation factors that both he and the other evaluating physicians particularly the Agreed Medical Examiners indicate are applicable in this matter. Dr. Levine while concluding that the injured worker is permanently and totally disabled solely as a result of the injury in this matter also concludes the injured worker's symptoms are directly related and even derivative of factors other than the industrial injury. He attributes one half of her sleep disorder to nonindustrial causes and defers to both Drs. Friedman and Kanter to causation of the injuries when they are in their field of expertise effectively agreeing with their allocation of liability to factors other than the industrial injury in question. It defies logic therefore for Dr. Levine on one hand to conclude that the worker is totally disabled solely as a result of the instant industrial injury and in another portion of his report to conclude that significant portions of her impairments are unrelated to the injury in question.

The inconsistencies in Dr. Levine's report are simply too great for his opinion on the issue of permanent disability to constitute substantial evidence. His opinion is clearly flawed on the issue of causation and is not substantial evidence as a matter of law. To rely upon his conclusion on the level of permanent disability without recognizing his lack of understanding of the legal requirements as well as his failure to explain the how and why of his permanent impairment rating is simply impermissible under our existing permanent disability rating system.

In its decision in *Milpitas Unified School District v. W.C.A.B., cited supra,* the Court of Appeal notes:

> "By using the word "incorporate" and retaining a prima facie standard for the introduction of the PDRS ratings, the legislature obtained a more consistent set of criteria for medical evaluations which allow for cases that do not fit neatly into the diagnostic criteria and descriptions laid out in the *Guides.* The *Guides* itself recognizes that it cannot anticipate and describe every impairment that may be experienced by injured employees. To accommodate those complex or extraordinary cases, it calls for the physician's exercise of clinical judgment to

evaluate the impairment most accurately, even if that is possible only by resorting to comparable conditions described in the *Guides*..."

*Milpitas Unified School District v. W.C.A.B.* 75 Cal. Comp. Cases 837 at 855.

What is interesting is that the Guides does address fibromyalgia and specifically determines the condition does not meet the scientific criteria necessary for accurate impairment descriptions. The Guides concludes that fibromyalgia itself represents a purely subjective syndrome and that subjective syndromes are not viable for impairment ratings absent some objective evidence of organ damage, disease or impairment. Therefore it is difficult to argue that fibromyalgia is one of those conditions that is not contemplated by the Guides or taken into account by that publication when it is specifically addressed in the Guides and excluded as being a viable basis for impairment.

Nonetheless conditions which are associated with fibromyalgia may very well support an impairment rating as described by Dr. Levine. His description of impairment for sleep disorder (which of course includes his apportionment) along with his gastrointestinal and sexual dysfunction ratings may very well be appropriate ratings under the AMA Guides without resort to the use of rebuttal ratings under *Milpitas USD v W.C.A.B. (Guzman), cited supra.* However his extension (or inflation) of the overall rating to a permanent total disability is not one which incorporates any of the tables, charts, graphs or methodologies of the Guides and steps dramatically outside the evaluation ambit of the physician. While a doctor may exercise his or her judgment to modify the impairment rating using the information in the Guides, there is nothing in the Guides which instructs a physician that he may consider the employee totally impaired particularly where the total impairment is a result solely of a subjective component. This clearly flies in the face of the legislatively expressed mandate for impairment ratings to be applied in a uniform, consistent and objective manner.

It was exactly this kind of permanent disability description under the prior permanent disability rating system that led the legislature to modify the methodology for describing permanent disability to one which would be more objectively verified. The wholesale description of overwhelming disabilities without any objective support for such has resulted in two rounds of reform to the permanent disability rating schedule, one in 2004 and most recently with SB863 which has substantially modified the permanent disability rating schedule yet again in an effort to avoid some of the inconsistencies that have developed between 2005 and 2012. This case represents yet another example of the kind of inconsistency that the legislature is trying to avoid in the permanent disability rating system.

## VII. CONCLUSION

Amicus requests this Court to grant the Petition for Writ of Review of Southern California Edison on the above described issues as well as those raised in the arguments of Petitioner and Amicus, California Workers' Compensation Institute, filed herein. The decision of the WCJ, adopted by the W.C.A.B. is based upon the inconsistent and legally unsupportable opinion of Dr. Levine. The doctor's opinion is internally inconsistent based on his deferral of causation of the injured employee's underlying complaints to the orthopedic and psychiatric AME physicians while at the same time concluding causation differently (without explanation) from those evaluators. His opinion is legally unsupportable as he assumes that a judicially determined injury did not occur and his opinion ignores this very salient fact.

Failing to have either legal or medical support for it decision, the W.C.A.B. has abandoned it obligation to fairly and accurately determine benefits that are due and to apply the statutory scheme in the fashion dictated by the Legislature. The evidence cited and relied upon

by the WCJ and the W.C.A.B. fail to meet the test of "substantial evidence" on multiple basis and the record therefore provides a compelling basis for this Court to accept the Petition for Writ of Review and reverse the decision, instructing the W.C.A.B. to follow its own guidelines and statutory authority in awarding benefits in a consistent, legally supportable fashion based opon substantial evidence.

For all of the above reasons, Amicus, The California Chamber of Commerce urges this Court to grant review and reverse the decision of the W.C.A.B. herein.

Dated: March 29, 2013

Respectfully Submitted:

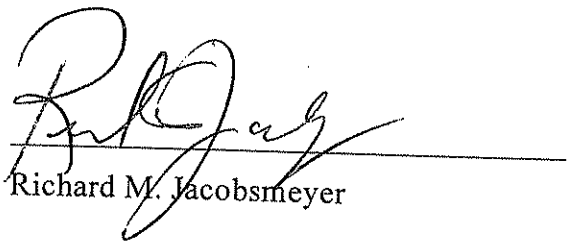
**SHAW, JACOBSMEYER, CRAIN & CLAFFEY**

Richard M. Jacobsmeyer
Attorney at Law
Certified Specialist, Workers' Compensation Law
The State Bar of California Board of Legal Specialization

## VIII. VERIFICATION AND WORD COUNT

I, Richard M. Jacobsmeyer, swear that I have read the within Application for *Amicus Curiae* Status and *Amicus Curiae* Brief and know the contents thereof; that the within brief contains 7,248 words, based on the automated word count of the computer word-processing program; that I am informed and believe that the facts and law stated therein are true and on that ground allege that such matters are true; that I make such verification because the officers of California Chamber of Commerce are absent from the County where my office is located and are unable to verify the petition, and because as attorney for California Chamber of Commerce I am more familiar with such facts and law than are the officers.

Sworn and executed this 29th day of March, 2013, at Oakland, California.



Richard M. Jacobsmeyer

## DECLARATION OF SERVICE BY U.S. MAIL

I, Ernesto Campos II, am a citizen of the United States of America and am employed in Oakland, California. I am over the age of eighteen years and not a party to the within action. My business address is: Shaw, Jacobsmeyer, Crain and Claffey, 475 – 14th Street, Suite 500, Oakland, CA 91356. On the date below, I served the attach

APPLICATION FOR AMICUS CURIAE STATUS AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER SOUTHERN CALIFRONIA EDISON

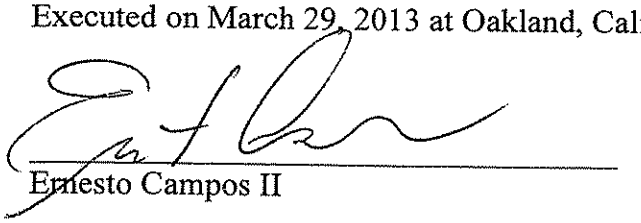
by placing a true copy thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the US Post Office in Oakland, California, addressed as follows:

| Party | Attorney |
|---|---|
| Southern California Edison: Petitioner | Dann Boyd<br>Bagby, Gajados & Zachary<br>15643 Sherman Way, Suite 440<br>Van Nuys, CA 91406<br><br>Sharon Weiqing Wu<br>P.O. Box 5038<br>Rosemead, CA 91770<br><br>Patricia A. Cirucci<br>P.O. Box 800<br>Rosemead, CA 91770 |
| Workers' Compensation Appeals Board: Respondent | Workers' Compensation Appeals Board<br>P.O. Box 429459<br>San Francisco, CA 94142-9459<br>Contact Name: Attn: Writs |
| Elsie Martinez: Respondent | Lawrence Silver<br>Goldschmid, Silver & Spindel<br>3345 Wilshire Blvd., Suite 600<br>Los Angeles, CA 90010 |

| | |
|---|---|
| California Workers' Compensation Institute: Petitioner | Michael Marks<br>Law Offices of Saul Allweiss<br>18321 Ventura Blvd., Suite 500<br>Tarzana, CA 91356 |

I declare under penalty of perjury that the foregoing is true and correct.

Executed on March 29, 2013 at Oakland, California.



Ernesto Campos II