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. ADJ 7278184 (MDR) and ADJ 124368 (MDR)
HONORABLE ROBERT F. SPOERI, WCJ

AMICUS CURIAE APPLICATION and BRIEF BY CALIFORNIA WORKERS' COMPENSATION INSTITUTE IN SUPPORT OF PETITIONER SOUTHERN CALIFORNIA EDISON

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December 18, 2012

Court of Appeal - State of California
Second Appellate District – Division Four
300 South Spring Street
Los Angeles, CA 90013
Atten: Office Of the Clerk

Re: Southern California Edison v. Workers' Compensation Appeals Board, et al.
Case Number: Civil No. B245118

Dear Court Clerk:

Enclosed please find Application for Amicus Curiae Status and Proposed Amicus Curiae Brief of California Workers' Compensation Institute in support of Southern California Edison (original and four copies plus one for endorsement and return) in the above captioned matter.

We request that this be presented to the Court for consideration of granting *amicus* status and ordering the filing of the brief as requested.

The brief includes a certificate of interested parties, word count and verification as required by court rules, and copies of this transmittal letter and brief have been sent to all parties/attorneys as listed on the official address record per the Court's web site, as noted below.

Thank you for your professional courtesy in this regard.

Law Offices of Saul Allweiss

By:
Michael A. Marks

Cc:

Dann Boyd Bagby Gajdos & Zachary 15643 Sherman Way, Suite 440 Van Nuys, CA 91406	Workers' Compensation Appeals Board P.O. Box 429459 San Francisco, CA 94142-9459 Contact Name: Attn.: Writs
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I CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

California Rules of Court, Rule 8.208

Court of Appeal Case Caption:

Southern California Edison **B245118**

v. 2nd District- Div 4

WCAB, et al.

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, Rule 8.208 .

Date: December 18 , 2012

Signature of Attorney or Unrepresented Party

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State Bar No: 071817
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Party Represented: Amicus Curiae –
California Workers Compensation Institute

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TO THE HONORABLE CHIEF JUSTICE AND THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA, SECOND DISTRICT, DIVISION FOUR:

Pursuant to California Rule of Court 8.200(c) the California Workers' Compensation Institute (hereafter CWCI or Institute) hereby request an order granting *amicus curiae* status and filing of the within *Amicus Curiae* Brief in support of Petitioner Southern California Edison.

The CWCI is a private non-profit research, information, and educational organization dedicated to improving the California workers' compensation system. Its members include 22 large employers who self-insure their workers' compensation liability, and 24 insurer organizations that currently underwrite approximately 82 percent of California's $7.7 billion in workers' compensation insurance premiums. Its research, which is typically based on claims data collected from member companies, offers analyses and practical expertise on issues and trends affecting California workers' compensation, spotlights problems and concerns within the system, helps build consensus for workable solutions, and is often used to evaluate the impact of various legislative and regulatory proposals. CWCI is interested in administrative, statutory, and judicial matters that substantively affect the system of workers' compensation created by Article XIV, Section 4, of the Constitution of the State of California.

On behalf of its membership, the Institute further serves as a liaison with employer, labor, and medical communities within the workers' compensation system, and frequently provides input at legislative and regulatory hearings. Based upon its expertise in workers' compensation, the

Institute has made multiple appearances as *amicus curiae* before the California Supreme Court and Courts of Appeal Appeal [including the cases of *Christian v. WCAB* (1997), *SCIF v. WCAB (Stuart)* (1998), *Avalon Bay Foods v. WCAB* (1998), *Rosales v. Depuy Ace Medical Company* (2000), *Lockheed Martin v. WCAB (McCullough)* (2002), *Wal-Mart v. WCAB (Garcia)* (2003), *Honeywell v. WCAB (Wagner)(2005), Green v. WCAB* (2005), *Rio Linda School District v. WCAB (Schefiner)* (2005), *Nabors v. WCAB* (2006), *Yeager Construction v. WCAB (Gatten)* (2006), *Chang v. WCAB* (2007), *Vaira v. WCAB (2007), Brodie, et al. v. WCAB* (2007), *Pendergrass v. Duggan Plumbing)* (2007) , *Tanimura & Antle v.. WCAB (Lopez)* (2007), *Palm Medical Group v. State Compensation Insurance Fund* (2007), *Smith & Amar v. WCAB* (2007), *Facundo-Guerrero v. WCAB* (2008), *State Compensation Insurance Fund v. WCAB* (Sandhagen) (2008), *Smith & Amar v. WCAB)* (2009) , *Benson v. WCAB* (2009), *Boughner v. WCAB* (2009), *Aguilar v. WCAB (2009), El Aguila Food Products v. WCAB (Cervantes)* (2010), *Hertz Corp v. WCAB (Aguilar) (2010), Milpitas Unified School Dist. V. WCAB (Guzman) (2010), Baker v. WCAB & X.S. (2011), Ogilvie v. WCAB (2011), Valdez v. WCAB & Warehouse Demo. (2012)].*

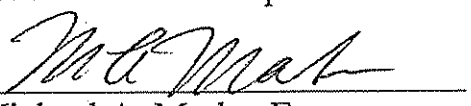
As appears more fully below, CWCI is familiar with the parties, the law, and the issues raised in this matter, and has completely reviewed all of the briefs heretofore submitted to this Court. Pursuant to California Rule of Court 8.200, the CWCI respectfully seeks an order granting it status as *amicus curiae* and ordering the filing of this proposed brief in support of Petitioner Southern California Edison.

In the view of the CWCI and its membership, the decision below involves an unwarranted and unauthorized departure from established

principles of substantial evidence, and ignores the series of legislative reforms which culminated in the creation of new paradigms for permanent disability rating and apportionment under Labor Code Sections 4663 and 4664 adopted as part of SB899, and is contrary to recent appellate court decisions (e.g., *Benson v. WCAB* (2009) 170 Cal. App. 4th 1535, *Milpitas Unified School Dist v. WCAB (Guzman)* (2010) 187 Cal App 4th 808, Labor Code Sections 4663 and 4664, as well as *Mercier v. WCAB* (1976) 16 Cal. 3d 711. Additionally, the decision regarding attorneys fees is improper in that it violates applicable regulatory guidelines regarding percentage of fees to be awarded, uses speculative calculations which are not historically borne out, and will year-after-year further diminish the value of the award of benefits to the injured worker rather than increasing at as intended by the Legislature. It is because of these important concerns, and the historical perspective we can bring to the analysis, that the CWCI asks this Court to grant it status as *amicus curiae* and an order that the within brief be filed.

Dated: December 18, 2012.

LAW OFFICES OF SAUL ALLWEISS
A Professional Corporation



Michael A. Marks, Esq.

V ISSUES PRESENTED FOR REVIEW

WHETHER AN AWARD THAT IS BASED UPON A MEDICAL OPINION WHICH ASSUMES FACTS THAT HAVE BEEN JUDICIALLY DETERMINED NOT TO BE CORRECT, MUST BE REVERSED AS NOT SUPPORTED BY "SUBSTANTIAL EVIDENCE"

WHETHER THE FAILURE TO APPLY ESTABLISHED PRINCIPLES OF APPORTIONMENT AND SUBSTANTIAL EVIDENCE RUNS AFOUL OF ***BENSON V. W.C.A.B.*** (2009) 170 CAL. APP. 4TH 1535, 74 CAL. COMP. CASES 113, LABOR CODE SECTIONS 4663 AND 4664

WHETHER THE FAILURE TO APPLY ESTABLISHED PRINCIPLES OF APPORTIONMENT OF PERMANENT DISABILITY RUNS AFOUL OF THE PROHIBITION AGAINST "CONDUCT(ING) A FISHING EXPEDITION THROUGH THE *GUIDES* SIMPLY TO ACHIEVE A DESIRED RESULT" IN *MILPITAS UNIFIED SCHOOL DISTRICT V. WCAB* (2010) 187 CAL. APP 4TH 808

THE AWARD OF ATTORNEY'S FEES AND PARTICULARLY THE METHOD OF COMMUTATION BASED ON SPECULATIVE PERPETUAL 4.6% ANNUAL FUTURE COST OF LIVING INCREASES, IMPROPERLY PUTS THE INFLATIONARY BURDEN SOLELY UPON THE INJURED WORKER, AND IS CONTRARY TO THE PURPOSE OF COLA ADJUSTMENTS AND CONTRARY TO MULTIPLE WCAB PANEL DECISIONS.

VI POINTS AND AUTHORITIES

A. AN AWARD THAT IS BASED UPON A MEDICAL OPINION WHICH ASSUMES FACTS THAT HAVE BEEN JUDICIALLY DETERMINED NOT TO BE CORRECT, MUST BE REVERSED AS NOT SUPPORTED BY "SUBSTANTIAL EVIDENCE"

This case presents a circumstance in which the Workers' Compensation Administrative Law Judge relied upon the opinion of a single physician (Dr. Levine) to find the employee totally and permanently disabled from the cumulative injury, without apportionment, despite the concurrent award of 29% permanent disability involving similar body parts attributed to a different industrial injury. For that outcome to be upheld on appeal, Dr. Levine's opinion must meet the "substantial evidence" test. (*Place v. WCAB* (1970) 3 Cal.3d 372, 378, 35 Cal. Comp. Cases 525].) That test has recently been articulated by the Court of Appeal in *Milpitas Unified School District v. WCAB (Guzman) (2010)* 187 Cal. App. 4th 808, as follows:

> In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. [Citation.] Also, a **medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories**, or on surmise, speculation, conjecture, or guess. [Citation.] Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the

physician's opinion, not merely his or her conclusions. [Citation.] (*Yeager Const. v. WCAB* (2006) 145 Cal.App.4th 922, 928 [52 Cal. Rptr. 3d 133, 71 Cal. Comp. Cases 1687].) (emphasis added)

The "substantial evidence" rule is further circumscribed by the longstanding admonitions prohibiting the court from ignoring portions of a physician's opinions that explain or clarify the opinions. Such admonitions include the following[1]:

> Where the workers' compensation judge or the WCAB rely upon the opinion of a physician, due consideration must be given to the entire opinion of the physician and not just selected parts. (See *Franklin v. WCAB* (1971) 18 Cal. App. 3d 682, 684, *Luchini v. WCAB* (1970) 7 Cal. App. 3d 141, 145, fn. 2, *Mann v. WCAB* (1968) 265 Cal. App. 2d 333, 339.) **Reliance on only part of a physician's opinion and ignoring other portions of his opinion which explain or clarify that part does not constitute substantial evidence.** Statements of physicians (as of any witness) may not be taken out of context. Further, the initial opinion of a physician may not be considered without reference to any subsequent modifying or clarifying reports. (*LeVesque v. WCAB. (1970) 1 Cal. 3d 627, 638-639,* fn. 22 see also, *Jones v. WCAB. (1968) 68 Cal. 2d 476, 479-480, State Comp. Ins. Fund v. WCAB (1977) 72 Cal. App. 3d 13, 16, fn. 1.*(emphasis added)

Applying this test, we note that Petitioner has correctly recited both in its opening brief[2] and in its reply brief[3] that Dr. Levine's opinion was that

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[1] Language and citations excerpted directly from *Pacific National Ins. Co v. WCAB* (1979) 44 CCC 968, 1979 Cal. Wrk. Comp. LEXIS 2751 (unpublished – Second District, Division 4).

[2] See Petition for Writ of Review, Pg. 4

[3] See Petitioner's Reply to Respondent's Response to Petition for Writ of Review, Pg. 1

there was no evidence of a specific injury and that based upon that opinion he concluded that the entirety of the disability was industrial and attributed it to the cumulative injury claim. Respondent's pleading in this Court tacitly admits Petitioner's factual position in this regard, and quotes extensively from the record below wherein Dr. Levine found there was no evidence of a specific injury (contrary to both the stipulation between the parties and a specific judicial finding), and that the entirety of the disability was industrial related to the cumulative trauma injury (despite the contrary judicial finding that there was permanent disability attributable to the specific injury which was concurrently adjudicated and not appealed).[4]

Ultimately, a decision by the Appeals Board based upon a medical report lacking a relevant factual basis cannot constitute substantial evidence to support the Board's determination. (Place v. WCAB (1970) 3 Cal.3d 372, 378, *and see* Kyles v. WCAB (1987) 197 CalApp3d 614, 621 ("A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises."). Given the uncontroverted fact that there was both a specific industrial injury in June 2001 and a cumulative industrial injury with an ending date in 2004, established by both a stipulation of the

[4] see , Response of Respondent to Petitioner's Petition for Writ of Review, Pg. 10-11

parties and a judicial finding, Dr. Levine's opinions to the contrary cannot be substantial evidence in support of the decision below and the resulting WCAB award must fail.

B. THE FAILURE TO APPLY ESTABLISHED PRINCIPLES OF APPORTIONMENT AND SUBSTANTIAL EVIDENCE RUNS AFOUL OF *BENSON V. W.C.A.B.* (2009) 170 CAL. APP. 4TH 1535, 74 CAL. COMP. CASES 113, LABOR CODE SECTIONS 4663 AND 4664

CWCI's membership sees the award in this case as part of an alarming trend of WCALJ's trying to subvert SB899's changes to permanent disability and apportionment through improper judicial reliance on only part of a physician's opinion while ignoring other portions of his opinion which explain or clarify that part, and then justifying the result as a "burden of proof" issue. This emerging tactic represents the latest in a series of similar ill fated efforts to blunt the implementation of the legislative reforms, all of which have been rejected by the Courts.[5]

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[5] A refusal to follow the express legislative directive to apply the new law to all pending matters, was rebuffed by the Appellate Courts [*see, e.g., Green v. WCAB (2005)* 127 Cal.App.4th 1426]; a strained interpretation of Section 47 of SB899's proscription against the new law being used to "reopen or rescind, alter or amend" a previously final WCAB award, was also rejected by the Appellate Courts [*See, e.g., Marsh v. WCAB*, (2005) 130 Cal. App. 4th 906; *Rio Linda Union School Dist. v. WCAB* (2005) 131 Cal.App.4th 517 (review den.); *Kleemann v. WCAB* (2005) 127 Cal.App.4th 274 (review den.)]; an effort to avoid the monetary impact of the new apportionment statute by mathematical legerdemain, was squelched by the Supreme Court [*see, Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313]; adopting an analytical framework misapplying the principles of "substantial evidence" and "burden of proof" as a means to circumvent the newly

In this case, the Court is factually presented with concurrent adjudication of two successive industrial injuries with partly overlapping disabling body parts (neck, right shoulder, hand, wrist and psychiatric) common to both cases. From the earlier of the two injury dates, the 2001 specific injury, the WCALJ awarded a 29% permanent disability after apportionment, while the later injury (the 2004 cumulative injury) produced an award of 100% total disability (without apportionment) based upon the same medical reports that were introduced into evidence in both cases. Labor Section 4664 creates a conclusive presumption that the disability awarded in the earlier injury existed at the time of the later injury to the same body parts. *Benson v. W.C.A.B.* (2009) 170 Cal. App. 4th 1535 requires apportionment of permanent disability as between successive injuries to the same body parts, but nowhere in the pending matter is there any meaningful discussion of how that conclusive presumption and otherwise mandatory apportionment was overcome … except the mere conclusory statement that defendant did not meet its burden of proof.

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enacted apportionment statutes was rejected [*see*, (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (2006) 145 Cal.App.4th 922]; an attempt to misapply the *Benson* exception of "inextricably intertwined" as a means to avoid the statutory mandate regarding apportionment to causation of permanent disability was rejected [State Compensation Insurance Fund v. WCAB (Dorsett) (2011) 201 Cal. App. 4th 443 (review den.)]

The manifest impropriety of the un-apportioned 100% total disability award is further underscored by the formal ratings issued by the WCALJ in these companion cases [see Petition for Writ of Review, fn. 44 and Petitioner's exhibit 14, Pg. 165 – Formal Ratings].[6] The formal ratings in the 2001 specific injury claim indicate that the permanent disability rated 60% before apportionment, and awarded 29% permanent disability in the 2001 specific injury after apportionment. That award was not appealed and has long since become final. The WCALJ's rating instructions specifically said 60% of the neck disability was caused by the 2001 specific injury, 60% of the right shoulder disability was caused by the 2001 specific injury, 66-2/3% of the right hand/wrist disability was caused by the 2001 specific injury, and 22% of the psychiatric disability was caused by the 2001 specific injury. The "flip side" of this equation is that only 40% of the neck disability could have been caused by the second cumulative trauma injury, only 40% of the right shoulder disability could have been caused by the second cumulative trauma injury, only 33-1/3% of the right hand/wrist

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[6] A WCALJ's formal rating instructions are essentially findings of fact, and reflect a WCALJ's conclusion that each element of the instructions is supported by substantial evidence. See *Blackledge v. WCAB* (2010 Appeals Board *En Banc*) 75 CCC 613 621-622 and multiple published appellate cases cited therein.

disability could have been caused by the second cumulative trauma injury, and only 78% of the psychiatric disability could have been caused by the second cumulative trauma injury. Though Labor Code Section 4663 limits an employer's liability to the percentage of disability directly caused by the injury, and the WCALJ issued rating instructions finding that only a portion of the disability to each body part could be attributable to the cumulative trauma injury, the ultimate award was 100% permanent disability without apportionment. Significantly, nowhere does the WCALJ or Appeals Board address this obvious contradiction. And as pointed out by Petitioner, although every body part for which there is permanent disability is only partially apportioned to the second cumulative injury, inexplicably an un-apportioned 100% award issued in that cumulative injury. Such a factual finding, order, decision or award is inherently unreasonable, illogical, arbitrary, improbable, and inequitable considering the entire record and overall statutory scheme, and cannot meet the substantial evidence threshold. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 227, 233*; *Bracken v. Workers' Comp. Appeals Bd. (1989) 214 Cal.App.3d 246, 254-255.*

C. THE FAILURE TO APPLY ESTABLISHED PRINCIPLES OF APPORTIONMENT OF PERMANENT DISABILITY RUNS AFOUL OF THE

PROHIBITION AGAINST "CONDUCT(ING) A FISHING EXPEDITION THROUGH THE *GUIDES* SIMPLY TO ACHIEVE A DESIRED RESULT" IN *MILPITAS UNIFIED SCHOOL DISTRICT V. WCAB (GUZMAN)* (2010) 187 CAL. APP 4TH 808

A significant concern raised by the parties and addressed by the Court in *Milpitas Unified School District v. WCAB (Guzman)* (2010) 187 Cal. App. 4th 808, 850-851, was that the AMA Guides might be manipulated by "conduct(ing) a fishing expedition through the *Guides* simply to achieve a desired result." In that regard, the Court expressly stated that,

> a physician's medical opinion that departs unreasonably from a strict application of the *Guides* can be challenged, and it would not be acceptable as substantial evidence or fulfill the overall goal of compensating an injured employee commensurate with the disability he or she incurred through the injury. If Guzman's carpal tunnel syndrome, for example, is adequately addressed by the pertinent sections of Chapter 16, an impairment rating that deviates from those provisions will properly be rejected by the WCJ.

Tested against this criterion, as shown in the Petition for Writ of Review (Pgs. 17-18) and for the reasons further detailed below, Dr. Levine's reporting regarding the cumulative trauma disability cannot be deemed substantial evidence.

As correctly described in the Petition for Writ of Review (Pg.18-19), the "four corners" of the AMA Guides expressly proscribe rating fibromyalgia and similar subjective pain syndromes where the underlying musculoskeletal condition from which it arises is adequately addressed via

impairment ratings contained in chapters of the Guides addressing the specific body parts. Contrary to *Guzman*, in arriving at his conclusions regarding fibromyalgia and disability using additional portions of the AMA Guides, Dr. Levine neither conducts an AMA Guides impairment rating of the underlying body parts (neck, right shoulder, right wrist, right hand, psychiatric, low back, left shoulder, left wrist, left hand) nor does he address why a "strict application of the Guides" would not adequately compensate the disability. Instead, he abandons the AMA Guides instructions, and instead describes the condition as "fibromyalgia", sleep and sexual dysfunction instead of its underlying body parts and opines the employee is totally disabled.

By avoiding rating each of the underlying body parts according to its applicable chapter of the AMA Guides, and instead jumping to the "fibromyalgia", sleep and sexual dysfunction, Dr. Levine (and thus the WCALJ and WCAB) are essentially trying to circumvent the apportionment to causation in the cumulative trauma case. Because the underlying body parts are all partially apportioned to causation other than the second (cumulative trauma) injury, the same apportionment must be applied to the any resulting loss of earning capacity.

The approach of using different language to describe the same disabilities from two separate injuries, thus avoid the apportionment, was expressly prohibited by the Supreme Court's decision in *Mercier v. WCAB* (1976) 16 Cal. 3d 711. In that case, the original rating instructions described one injury in terms work capacity guidelines and the other in terms of general "slight/moderate/severe" scale, without addressing how each impacted ability to compete in the labor market (i.e., without regard to overlap/apportionment). On appeal, that methodology was disapproved, with the Court stating,

> Here, the injuries arose out of separate industrial events. In such case, apportionment turns on whether the second injury decreases the em [*600] ployee's earning capacity or his ability to compete in the open labor market in the same manner as the first. The fact that the injuries occur to two different anatomical parts of the [**5] body while relevant, does not in itself preclude apportionment. ...
>
> The question of overlapping disabilities is one of fact--not of logic. The basic purpose of workers' compensation is to compensate diminished ability to compete in the labor market (*Lab. Code, § 4660, subd. (a)* [Deering's]) rather than to compensate every injury. Proper computation of overlapping disabilities--either partial or total--calls for determining the percentage of combined disability and then subtracting the percentage of disability due to the prior injury. (*Dow Chemical Co. v. Workmen's Comp. App. Bd. (1967) 67 Cal. 2d 483, 492 [32 Cal. Comp. Cases 431, 62 Cal. Rptr. 757, 432 P.2d 365] State Compensation Ins. Fund v. Industrial Acc. Com. (Hutchinson), supra, 59 Cal. 2d 45, 53 Subsequent Injuries Fund v. Workmen's Comp. Appeals Bd. (Royster) (1974) 40 Cal. App. 3d 403, 409-410 [39 Cal. Comp. Cases 407, 115 Cal. Rptr. 204].*) When all factors of disability attributable to the first injury are included

> in the factors attributable to the second, there is total overlap. We must conclude the rating properly was based on the combined injury. It is clear in this case that the injuries [**6] overlapped, and petitioner [**7] has failed to show that any disability factor in the first injury was not included in the instructions to the rating specialist." (Fn. omitted.)

Such a failure to address issues of overlapping disabilities, despite a finding of over-all total and permanent disability, has long been held fatally defective for rating purposes and not substantial evidence. (*see gen., Johns Manville Corp v. WCAB* (1978) 43 Cal. Comp. Cases 1372, *State Compensation Insurance Fund v. WCAB* (Gaba) (1977) 72 Cal. App. 3d 13, 16-17, *Doorman v. WCAB* (1978) 78 Cal. App. 3rd 1009, 1019). As stated in *Sanchez v. City of Los Angeles* (2005 – WCAB En Banc) 70 CCC 1440,

> The mechanics of rating overlap generally provided that each separate factor of permanent disability for both the new industrial injury and the pre-existing condition be set forth, so it could be determined what elements, if any, of one disability were included in the other. (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (***Gaba***), *supra*, 72 Cal.App.3d 13 (rating instructions for subsequent industrial heart injury described employee's disability as "moderate" but omitted any heart-related work restrictions; WCAB's decision was annulled and the matter remanded to **[*1447]** delineate work preclusions for heart and to determine extent, if any, to which employee's heart disability overlapped pre-existing back disability resulting in a limitation to light work).) The issue of apportionment would be resolved by determining the percentage of combined disability after the new injury, and then subtracting the percentage of disability due to the prior injury which overlapped—either partially or totally—the disability resulting from the new injury. (*Mercier v. Workers' Comp. Appeals Bd., supra*, 16 Cal.3d at p. 716; *Sidders v. Workers' Comp. Appeals Bd., supra*, 205 Cal.App.3d at p. 629; *Bookout v. Workers' Comp. Appeals Bd., supra*, 62 Cal.App.3d at p. 223.)

In the case currently under consideration, by describing the disability from the first injury in terms of each of the multiple body parts impacted, and describing the disability from the second injury simply as "fibromyalgia" and concluding the employee is totally disabled, Dr. Levine and the WCALJ and Appeals Board improperly abrogated their legal obligation to directly address and apportionment/overlapping disabilities issue, and this omission cannot be hidden behind the straw man of a generic statement regarding "burden of proof" . Because the decision below fails to consider the obvious apportionment/overlapping disabilities merely by creatively describing the two injuries involving overlapping body parts using different disability language, the decision below should be reversed.

THE AWARD OF ATTORNEY'S FEES AND PARTICULARLY THE METHOD OF COMMUTATION BASED ON SPECULATIVE PERPETUAL 4.6% ANNUAL FUTURE COST OF LIVING INCREASES, IMPROPERLY PUTS THE INFLATIONARY BURDEN SOLELY UPON THE INJURED WORKER, AND IS CONTRARY TO THE PURPOSE OF COLA ADJUSTMENTS AND CONTRARY TO MULTIPLE WCAB PANEL DECISIONS.

In *Baker v. WCAB (2011) 52 Cal. 4th 434,* the Supreme Court settled the question of how the cost of living adjustments to permanent and total disability and life pension awards under Labor Code Section 4659 were to be applied to the employee's weekly permanent disability payments ... but

did not address how attorneys fees should be calculated. Importantly, the Court clearly stated that the purpose of the annual cost of living increases (the so-called COLA adjustment) was to protect the value of the employee's long term weekly disability payments from the ravages of future inflation.[7]

What has occurred in this case is that based upon speculation regarding what the rate of future inflation will be, the attorney's fee has been calculated in such a fashion as to completely wipe out the employee's COLA inflation protection which is provided by statute. This occurred as a result of the commutation of attorneys fees to be deducted from the employee's benefits based on a 4.7% future inflation. As noted by Petitioner, this produces an immediate 35% reduction in the employee's weekly payments, and that reduction becomes more pronounced each subsequent year when the projected inflation is greater than the actual inflation (which has been the reality for at least the past 10 years!). Contrary to the legislative purpose of the COLA protecting the value of the worker's future benefit payments, the WCALJ's method of attorney's fee calculation actually makes the employee worse off every subsequent year because of the

[7] The Court stated, "In this case we construe … the annual indexing of … total permanent disability and life pension payments—to yearly increases in the state's average weekly wage (SAWW),so that lifetime disability payments made to the most seriously injured workers will keep pace with inflation."

speculatively excessive COLA used to inflate the attorney's fee, which is then deducted from the worker's payments.

The basic facts and adverse impact of the speculative COLA used to produce the attorney's fee, which is then deducted from claimant's award, are set out in the Petition for Writ of Review (Pg. 26-30) and the Reply to Response to Petition for Writ of Review (Pg. 4-6) and will not be repeated herein. What follows is a review of WCAB cases addressing the issue subsequent to the Supreme Court's decision in *Baker*.

In *Wilson v. Piedmont Lumber (2012 Cal. Wrk. Comp. P.D. Lexis 48) (opinion filed January 17, 2012)* one Appeals Board Commissioner and two Deputy Commissioners,[8] addressed the attorney's fee issue in the context of future COLA adjustments. They had noted the 4.6% DEU projected future COLA calculations, and observed that,

> a commuted attorney's fee is based on the *estimated* present value of the employee's lifetime PTD award using a *predicted* average annual increase in the SAWW and, therefore, a *predicted* average future COLA. But over his or her lifetime, the employee will receive *actual* annual COLAs based on the *actual* annual increase in the SAWW from year to year, if any. Accordingly, if the *predicted* average future COLA (e.g., 4.6%) is more than the *actual* COLA (e.g., 2.99% in 2010 or 0% in 2011) in any given year, then the employee's commuted bi-weekly benefits for that year will have been disproportionately reduced to

[8] Commissioner Brass and Deputy Commissioners Dietrich and Sullivan

> accommodate the attorney's fee. Moreover, this disproportionate reduction is exaggerated in each and every following year because the assumed 4.6% average future COLA compounds. This means that the attorney's fee being commuted will be based [*7] on ever escalating *assumed* PTD payments, whereas the injured employee's *actual* PTD payments may not increase by nearly as much. Of course, we realize there may be years during an injured employee's expected lifetime where the *actual* annual COLA will be greater than the *assumed* COLA. However, provided that the attorney's fee being an commuted is "reasonable" in light of the responsibility assumed, care exercised, time involved, and results obtained (*Lab. Code, § 4906(d)*; *Cal. Code Regs., tit. 8, § 10775*), we believe the risk that the actual COLA will be greater than the assumed COLA is better borne by the attorney. After all, it is the attorney, not the injured employee, who benefits from the commutation of the attorney's fee." (Italics in the original, footnote omitted.)

In that case, the Appeals Board ultimately approved a commuted attorneys fee based on other evidence justifying a 3% commutation using the "uniformly increasing reduction method" so as not to adversely impact the future inflation protection of the employee's benefit payments.

In Miramontes v. Lions Raisins (2012 Cal. Wrk. Comp. P.D. Lexis 91), a panel of three Appeals Board Commissioners[9] addressed the attorney's fee issue in the context of future COLA adjustments. The Commissioners unanimously approved an initial award of attorney's fees without regard to speculative percentages of potential future COLA adjustments. Instead, the Commissioners accounted for a supplemental attorney's fee to be paid annually thereafter based on 12% of that year's actual amount of the COLA.

[9] Commissioners Caplane, Lowe and Brass

The Commissioners approved the WCALJ's rationale for NOT commuting the future COLA for attorney's fee purposes, on the stated rationale that "... it was not seen how a commutation of an unknown sum (based on the rate of unknown COLA's over the course of applicant's life) would be in his best interest. Further, it was not seen how such a commutation, due to the lack of certainty concerning future COLA increases, could be based on substantial evidence." The opinion filed February 3, 2012 includes reference to WCALJ's observations as follows,

> There has been mention of a study performed by Mr. Blair McGowan, the former head of the Disability Evaluation Unit. Mr. McGowan's study concerned what happened to the average weekly wage for fifty years prior to the onset of the COLA legislation for life pensions. There is no way that one can predict what future COLA levels will be.
>
> It is applicant's attorney's position that he is entitled to a fee for any COLA increase which may take place in the future. It is not known what sort of COLA increase will take place in the future, if any. (It is noted that there is no COLA increase between the years 2010 and 2011.) To try to determine what the COLA would be for the years 2012 and 2013 would be an exercise in speculation. All decisions of this Board must be supported by substantial evidence. There is no evidence in this file which would meet the substantial evidence standard which would indicate the level of any future COLAs. It is known that the applicant's weekly life pension benefit will increase by 2.413512% as of January 1, 2012. However, there is no evidence concerning what the increase will be, if any, for the year 2013.
>
> *Labor Code section 5100(a)* states that a commutation is allowed when it is necessary for the protection of the person entitled thereto or for the *best interest* [*30] *of the applicant*. This code

section does not state for the best interest of applicant's attorney. It is not seen how a commutation of an unknown sum would be in applicant's best interest. The purpose of the COLA is to protect the applicant against inflation; it is not to be used as an additional source of attorney's fees (especially when the amount of a future COLA is impossible to ascertain). This Court finds that a commutation of an unknown future COLA is not applicant's best interest.

On February 17, 2012 the Appeals Board[10] issued an opinion in *Feliz v. Wired Electric* (2012 Cal. Wrk. Comp. P.D. Lexis 64) again addressing these issues. The Appeals Board rejected the DEU assumption of a COLA of 4.7% used to calculate the attorney's fee, and commented,

The 4.7% average future COLA is predicated on the assumption that the average annual increase in the SAWW over the preceding 50 years fairly reflects the rate of future increases. However, the percentage [*19] increase in the SAWW has almost uniformly been less than 4.7% during the seven years from 2004 through 2011. The only year during that span in which the SAWW increased by more than 4.7% was 2007, which saw a 4.96% increase. However, the percentage increases of the SAWW for the years 2005, 2006, 2008, 2009 and 2010 were, respectively, 1.97%, 4.01%, 3.93%, 4.55% and 2.99%. Moreover, the years 2004 and 2011 had no increase in the SAWW. Thus, the average increase over that span of time is less than 4.7%. We also believe it is reasonable in light of current economic conditions to anticipate that the average SAWW increase over the foreseeable future will also be less than 4.7%. For these reasons, we decline to adopt the DEU figure of 4.7% as a COLA factor in this case.

In considering the factor that should be used in this case, we conclude that a COLA of 3% is rational and reasonable in light of the above-described concerns. While allowing for reasonable increases over time in order to assure that the attorney is fairly compensated, a 3% factor places more of the economic risk of hyperinflation upon the attorney, instead of

[10] Commissioners Brass and Caplane, and Deputy Commissioner Dietrich

upon the injured worker. This is both appropriate and reasonable [*20] because the attorney obtains substantial benefit from the commutation by being assured that the fee that has already been earned is timely paid in full.

In its July 24, 2012 opinion in *Anderson v. Jaguar/Landrover* (2012 Cal. Wrk. Comp. P.D. Lexis 327), the Appeals Board[11] again addressed the attorney's fee commutation in the context of a COLA adjustment. In that case the Appeals Board rejected the DEU calculation of 4.6%,[12] and instead noted as follows:

> With regard to the calculation of the present value of the total permanent disability indemnity award for purposes of determining the attorney fee, we recognize that the actual amount of future SAWW increases is unknown. This presents a problem if the predicted average future SAWW is less than the actual SAWW in any given year because the employee's commuted bi-weekly benefits for that year will have been disproportionately reduced to accommodate the commuted attorney's fee. Moreover, the disproportionate reduction may be exaggerated in following years because the assumed average future COLA compounds. Of course, there may be years where the actual annual SAWW will be greater than the COLA that is assumed in calculating the amount of the commuted attorney's fee. Thus, it is important to carefully consider the factor used to calculate future COLA increases [*20] in determining the present value of the permanent disability award for purposes of commuting the attorney's fee.
>
> The 4.6% COLA the DEU applied in this case appears to be based upon the average annual SAWW increase over the prior 50 years. In the absence of a request by the WCJ or the parties to use a different percentage, the DEU uses that figure as an annual COLA in calculating the present value of an award of permanent disability indemnity for the purpose of determining the amount of a commuted attorney's fee. Prior

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[11] Commissioner Sweeney and Deputy Commissioners Dietrich and Sullivan

[12] *Contra, Luis v. Community Bridges* (2012 Cal. Wrk. Comp. P.D. Lexis 23)

decisions of the Appeals Board have endorsed use of this average to determine present value. (See e.g. *Bacha v. State of California* (2009) 2009 Cal.Wrk.Comp. P.D. LEXIS 613 (Appeals Board panel); *Pan v. State of California* (2007) 2007 Cal.Wrk.Comp. P.D. LEXIS 227 (Appeals Board panel) *(Pan); Munoz v. Barrocas Construction* (2007) 2007 Cal.Wrk.Comp. P.D. LEXIS 197 (Appeals Board panel).) As the panel wrote in *Pan:*

> "Where life expectancies are used for purposes of establishing the present value of an award, and in order to comply with *Labor Code section 4659(c)*, some type of formula or approach is necessary to establish a percentage figure for purposes of the statewide weekly [*21] wages factor, because the statute in fact requires that an injured worker's 100% permanent disability indemnity rate will be continually adjusted in the future." *(Pan, supra*, 2007 Cal.Wrk.Comp. P.D. LEXIS 227, at pp. 6-7.)

Although the panel in *Pan* concluded that the 4.7% SAWW average used by the DEU in that case was a "rational and reasonable" rate, it is important to note that use of this figure for the purpose of calculating the amount of a commuted attorney's fee has not been established by regulation or statute and it came into existence only as a result of an effort by the DEU to informally establish a reasonable estimated average future COLA that can be used state-wide in permanent total disability and life pension cases without delaying resolution of those cases, and without flooding the WCAB with litigation over the issue. While these goals are laudable, they are not the only factors we consider in addressing this issue.

The 4.6% average future COLA used in this case is predicated on the assumption that the average annual increase in the SAWW over the preceding 50 years fairly reflects the rate of future increases. However, the percentage increase in the SAWW has almost uniformly [*22] been less than 4.6% during the seven years from 2004 through 2011. The only year during that span in which the SAWW increased by more than 4.6% was 2007, which saw a 4.96% increase. However, the percentage increases of the SAWW for the years 2005, 2006, 2008, 2009 and 2010 were, respectively, 1.97%, 4.01%, 3.93%, 4.55% and 2.99%. Moreover, the years 2004 and 2011 had no increase in the SAWW. Thus, the average increase over that span of time is less than 4.6%. We also believe

it is reasonable in light of current economic conditions to anticipate that the average SAWW increase over the foreseeable future will also be less than 4.6%. For these reasons, we decline to adopt the DEU figure of 4.6% as a COLA factor in this case.

In considering the factor that should be used in this case, we conclude that a COLA of 3% is rational and reasonable in light of the above-described concerns. While allowing for reasonable increases over time in order to assure that the attorney is fairly compensated, a 3% factor places more of the economic risk of hyperinflation upon the attorney, instead of upon the injured worker. This is both appropriate and reasonable because the attorney obtains substantial benefit [*23] from the commutation by being assured that the fee that has already been earned is timely paid in full.

The issue these cases wrestle with is whether it is in the best interest of the applicant to commute the attorney's fee based on an informal DEU assumption of a 4.7% future COLA, at the substantial risk of diminishing the weekly benefit protection provided by statute ... or whether the attorney should shoulder the inflation risk by waiting for the COLA to be applied annually each year and having that sum be paid annually as it accrues to the employee. To be sure, the 4.7% COLA 50 year average hasn't been valid over the past decade. As indicated by the DEU calculations admitted into evidence (See Petition for Writ of Review, Exhibit 19, Pg. 185) the actual COLA average over the past decade has been only 2.758897%. It is therefore respectfully submitted that use of the 4.7% 50 year average as a predictor of the future is not supported by substantial evidence. Nor is it in the best interest of the applicant that the future COLA be estimated and deducted from the award via commutation, as this puts the entire burden of the speculative COLA calculation on the employee who is least able to suffer that burden. Instead, this Court should order the COLA to be

calculated annually as it arises and a percentage of that annual increase paid yearly to the attorney as a fee, rather than commuting it to present value and disproportionately reducing the employee's weekly benefit based on speculation.

VII CONCLUSION

Because the decision below rests on the opinion of a single physician whose factual assumptions and conclusions are directly contrary to judicial findings of fact and stipulations of the parties, the decision below cannot meet the test of "substantial evidence" and requires reversal. Additionally, the failure to apportion the permanent disability in the second (cumulative trauma) injury claim, which includes all of the same disabling body parts as adjudicated in the earlier injury clailm, violates the mandate of the Supreme Court's decision in *Benson* and must be reversed on that basis. The unexplained failure to follow the AMA Guides' instructions to use the chapter applicable to the injured body part, and to not use "fibromyalgia" where there is an underlying applicable chapter, violates both the Court of Appeal reasoning in *Guzman,* as well as the longstanding precedent in *Mercier* and *Gaba* prohibiting a change of descriptive terminology merely to avoid the obvious apportionment. Finally, the attorney's fees award's commutation using a speculative COLA is not in the best interest of the employee, disproportionately reducing the employee's future payments while excessively compensating the attorney, all contrary to the purpose of the COLA which is to protect future payments from the ravages of inflation.

For all of the foregoing reasons, CWCI urges this Court to grant review of this case and reverse the decision below in the cumulative trauma claim.

Dated: December 18, 2012

Respectfully submitted,

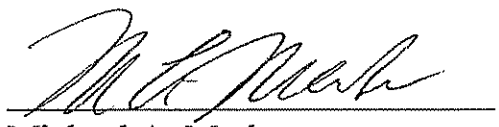
Law Offices of Saul Allweiss
A Professional Corporation

by: 
Michael A. Marks, Esq.

VIII VERIFICATION & WORD COUNT

I, Michael A. Marks, 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 7,204 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 Workers' Compensation Institute are absent from the County where my office is located and are unable to verify the petition, and because as attorney for California Workers' Compensation Institute I am more familiar with such facts and law than are the officers.

Sworn and executed this 18th day of December, 2012, at Essex, Vermont.



Michael A. Marks

DECLARATION OF SERVICE BY U.S. MAIL

I, Michael A. Marks, am a citizen of the United States of America and am employed in the Tarzana, California. I am over the age of eighteen years and not a party to the within action. My business address is: Law Offices of Saul Allweiss, 18321 Ventura Blvd., Suite 500, Tarzana, CA 91356. On the date noted below, I served the attached

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

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

Party	Attorney
Southern California Edison : Petitioner	Dann Boyd Bagby Gajdos & Zachary 15643 Sherman Way Suite 440 Van Nuys, CA 91406 Sharon Weiqing Wu P.O. Box 5038 Rosemead, CA 91770 Patricia A. Cirucci P.O. Box 800 Rosemead, CA 91770
Workers' Compensation Appeals Board : Respondent	Workers' Compensation Appeals Board P.O. Box 429459 San Francisco, CA 94142-9459 Contact Name: Attn.: Writs

Martinez, Elsie : Respondent	Lawrence Silver Goldschmid Silver & Spindel 3345 Wilshire Blvd. Suite 600 Los Angeles, CA 90010

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 18 , 2012, at Essex Junction, Vermont.

Michael A. Marks