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 OF THE STATE OF CALIFORNIA; and ELSIE MARTINEZ,
Respondents.

WCAB CASE NOS. ADJ7278184; ADJ124368
HONORABLE ROBERT F. SPOERI, WCJ

APPLICATION OF CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANT AND RESPONDENT ELSIE MARTINEZ

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, 2nd APPELLATE DISTRICT, DIVISION 4	Court of Appeal Case Number: B245118
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Robert E. Willyard, Esq. 160098 Law Offices of Robert E. Willyard, APLC 2940 East La Palma Ave., Suite A Anaheim, Ca 92806 TELEPHONE NO.: 714-237-1700 FAX NO. (Optional): 714-237-1710 E-MAIL ADDRESS (Optional): Rwillyard@planetrew.com ATTORNEY FOR (Name): California Applicants' Attorneys Association	Superior Court Case Number: FOR COURT USE ONLY
APPELLANT/PETITIONER: Southern California Edison RESPONDENT/REAL PARTY IN INTEREST: WCAB; Elsie Martinez	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): California Applicants' Attorneys Association

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest *(Explain):*
(1)	
(2)	
(3)	
(4)	
(5)	

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date:

Robert E. Willyard, Esq. ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF PARTY OR ATTORNEY)

Form Approved for Optional Use
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APP-008 [Rev. January 1, 2009]

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Cal. Rules of Court, rules 8.208, 8.488
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JUSTICE AND TO THE HONORABLE
ASSOCIATES JUSTICES OF THE COURT
OF APPEAL OF THE STATE OF
CALIFORNIA, SECOND JUDICIAL
DISTRICT, DIVISION FOUR

Pursuant to Rule 8.520(f) of the California Rules of Court, California Applicants' Attorney Association[hereinafter "CAAA"], hereby requests leave to file a brief as amicus curiae in support of Respondent ELSIE MARTINEZ in the above-captioned case. In support of this application, CAAA states as follows:

1. CAAA is an association and organization comprised of members of the California State Bar who regularly engage in the representation of men and women in the state who sustain injuries arising out of, and occurring in the course of, their employment. As a regular part of its activities, CAAA, after leave is granted, files Amicus Curiae briefs before the WCAB, Courts of Appeal, and the Supreme Court, in cases of far-reaching significance and/or first impression. CAAA respectfully submits that this is such a case.

2. The Court's ruling and decision in the instant case will have an immediate impact upon Amicus Curiae, its members and their clients.

3. CAAA is familiar with the issues before this court and the scope of their presentation. CAAA was granted leave to and did participate in the proceedings before the Court of Appeal in this case as amicus curiae. CAAA believes that further briefing is necessary to address matters not fully addressed by the parties' briefs.

4. CAAA therefore requests leave to file the following proposed amicus curiae brief.

DATED:

Respectfully Submitted,

Law Office of Robert E.Willyard, APLC

By: _____

Robert E. Willyard, Esq.

CAAA Amicus Curiae Committee

California Applicants' Attorney Association

IV.

FACTUAL INTRODUCTION

The facts in this matter are straightforward.

On March 26, 2012 and April 25, 2012, two workers' compensation claims were heard: one for a specific injury of June 15, 2001, case number ADJ7278184; and one for a cumulative trauma injury, case number ADJ124368.

On July 17, 2012, Workers' Compensation Judge Robert F. Spoeri ("WCJ") issued his Findings of Fact and Award for each Case.

In case number ADJ7278184, WCJ found a specific June 15, 2001injury to the neck, right shoulder, right wrist, right hand and psyche resulting in 29% permanent disability.

In case number ADJ124368, WCJ found a cumulative trauma injury from February 1998 through May 21, 2004 to the lumbar spine, cervical spine, and both shoulders, both wrists, both hands, psyche, and fibromyalgia resulting in 100% permanent disability without apportionment. WCJ based this finding upon Applicant's credible testimony and Independent Medical Examiner Dr. Seymour Levine's opinions.

Based on Dr. Levine's opinions, WCJ found the rheumatological injury separate from the orthopedic and psychiatric injuries, and therefore not subject to apportionment. WCJ found Applicant permanently and totally disability based on the rheumatological condition only.

Petitioner argued many different reasons for reduction of the total disability award in case number ADJ12368. The WCAB denied reconsideration.

Upon petition for writ of review, Petitioner reiterates much of the same arguments in favor of apportionment, all of which are grounded in Sections 4660, 4663, and 4664.

V.

QUESTION PRESENTED

Petitioner argues that WCJ's permanent total disability award is not "substantial evidence" because he failed to apportion the cumulative trauma total disability award by not invoking Sections 4660, 4663, 4664 and related case law.

In *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal. 3d 274, 280-281, our Supreme Court In Bank explained that a WCAB's decision must be supported by "substantial evidence in light of the entire record."

This standard, "substantial evidence in light of the entire record," is not some metaphysical concept. (*Insurance Co. of North America v. Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 905, 911). The word "substantial" means that the evidence relied on must be reasonable in nature, credible, and of solid value—it must be substantial proof "of the essentials which the law requires in a particular case." (*Id.* at 910).

The "essentials which the law requires" in this case is not a forced-application of Sections 4660, 4663, and 4664 as urged by Petitioner. Such an analysis misses the critical question presented by

this case. The critical question, which is *not presented by Petitioner*, is:

> Whether or not a permanent total disability finding made on one injury "in accordance with the fact" pursuant to Labor Code Section 4662 is subject to apportionment?

The answer, of course, is that it is not. In fact, to interpret Section 4662 in such a way to allow apportionment of a PTD award under Sections 4660, 4663 and 4664 would negate the plain language of section 4662 or render it superfluous, contrary to rules on statutory construction. (*Klein v. United States of America* (2010) 50 Cal. 4th 68, 80; *Shoemaker v. Myers* (1990) 52 Cal. 3rd 1, 22). Such interpretation would also be contrary to the longstanding definition and purpose of permanent disability awards exemplified in *LeBoef v. Workers' Comp. Appeals Bd.* (1983) 34 Cal. 3d 234, which has survived both Senate Bill 899 and Senate Bill 863.

VI.

LEGAL ARGUMENT

A. Statutorily, There Are Two Distinct Categories Of Permanent Disability: Permanent *Partial* Disability And Permanent *Total* Disability.

Article 3, Chapter 2 of Division 4 of the Labor Code, Sections 4650 through 4664, titled "Disability Payments" encompass payments for "permanent disability." Within this framework, there are two

distinct categories of permanent disability[1]: one for "permanent partial disability" ("PPD"); and another for "permanent total disability" ("PTD"). (See *Coca-Cola Enterprises, Inc./Coca Cola Bottling Co. v. WCAB (Jaramillo)*(2012 Writ Den.) 77 Cal. Comp. Cases 445).

The fact that PPD and PTD are distinguishable categories of benefits is reflected in the different methods for ***computing disability payments*** and ***computing permanent disability*** in these statutes.

Specifically, computing ***disability payments*** is described in Sections 4658 and 4659. With respect to PPD, Section 4658(d), states "the percentage of permanent disability to total disability," shall be determined and the basic disability payment computed on a table that covers disability of only up to 99.75%. With respect to PTD, on the other hand, Section 4659(b) computes payments based on average weekly earnings under section 4453 for life. Clearly, PPD and PTD are categories of permanent disability that are distinct.

This distinction is underscored in Sections 4660 and 4662 with respect to computing ***percentages of permanent disability***. With respect to PPD, Section 4660(b)(1) and (2) determine percentages of disability, "[b]ased on measurements of physical *impairments* and the corresponding *percentages of impairments* published in the American Medical Association (AMA) Guides to Evaluation of Permanent Impairment (5th Edition)." To this end:

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[1] "Permanent disability," not statutorily defined, is understood as the irreversible residual of an injury that causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market ." (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal. App. 4th 1099, 1111).

"Impairment percentages or ratings...reflect the severity of the medical condition and degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL) *excluding* work. Impairment ratings were designed to reflect functional limitations and not disability. The whole person impairment percentages listed in the Guides estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding work...*"

(AMA *Guides*, 5th Ed. at page 4).

"As a result, impairment ratings are *not intended* for use as direct determinants of *work disability...*"

(*Id.* at p5).[2]

Conversely, Section 4662 *is* intended to focus on the concept of "work disability." It does not compute PTD in terms of percentages of disability grounded in a medical impairment analysis. Section 4662 PTD depends upon conclusive presumptions which may require judicial determinations of *facts in a particular case*. With respect to the latter, Section 4662 provides:

"In all other cases, permanent total disability shall be determined in accordance with the fact."

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[2] The Guides are geared towards impairments of less than 100%. While it is theoretically possible to obtain a 100% rating using the Combined Values Chart, the result is highly improbable, even in cases involving "factually" total loss of earning capacity. (*Coca-Cola Enterprises, supra, at 448*).

In this connection, PTD means:

> "[a] level of disability to which an employee has sustained a *total loss of earning capacity*."
> (2005 Permanent Disability Rating Schedule, pp.1-2; emphasis added).

In other words, distinct from Section 4660, "work" and "work disability" are essential concepts determined "in accordance with the fact" for a Section 4662 PTD award.

It naturally follows, then, that a *total loss of earnings capacity*, i.e. work disability "in accordance with the fact," could not mean "in accordance with the percentage [of permanent disability]" under Section 4660 because work disability, by definition, has nothing to do with this section. "In accordance with the fact" under Section 4662 means that each case is different, and that the percentage of permanent disability equivalent to a total loss of earning capacity varies from case to case.

The importance and dominance of Section 4662 can be seen by a simple comparison of a Section 4660 medical impairment analysis under the Guides to a Section 4662 conclusive presumption. For example, an injured worker who is "legally blind" may not rate to 100% under a Section 4660 medical impairment analysis; even if after correction. (AMA *Guides*, Chapter 12). However, our legislature has determined that certain people are so disabled, irrespective of any kind of medical-disability analysis[3], that such workers are afforded a "conclusive presumption" of PTD under Section 4662(a). CAAA

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[3] Section 4662, originally enacted in 1937, has survived all subsequent legislation, including both Senate Bills 899 and 863.

submits that affording conclusive presumptions for injured workers with zero earning capacity is the legislative intent, or theme, underlying Section 4662. This intent is fulfilled, as in this case, by a determination "in accordance with the fact."

In this case, WCJ found Applicant PTD for one condition (rheumatology-fibromyalgia) on one injury based on the factual determination that Applicant suffered a total loss of earning capacity due to this condition. Clearly, WCJ's award is a Section 4662 PTD finding, not one founded in percentage of disability under a pure medical impairment analysis. It is a factual finding based on evidence demonstrating that Respondent now has permanent disability amounting to a total loss of earning capacity, or, PTD. This finding has nothing to do with the other category of permanent disability—the other category being PPD.

This being the case, the issue narrows to whether or not WCJ's Section 4662 finding is apportionable.

B. Apportionment Applies To PPD, *not* To PTD.

Sections 4663 and 4664 treat the different categories of permanent disability, namely PPD and PTD, differently. They do not lend themselves to Section 4662. Specifically, Section 4662 PTD awards are a category of permanent disability not subject to "apportionment. " (See *City of Santa Clara, PSI v. Workers' Comp. Appeals Bd. (Juan Sanchez)* (Writ Den. 2011) 76 Cal. Comp. Cases 799; see also *Kaiser Found. Hosp. v. Workers' Comp. Appeals Bd. (Dragomir-Tremoureux)*(Writ Den. 2006) 71 Cal. Comp. Cases 538).

"Apportionment" is the process employed by the Board to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate legal responsibility. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal. 4th 1313at 570).[4] [5]

Sections 4663 and 4664 address apportionment in this regard. Specifically, Section 4663 authorizes apportionment by *causation* when a physician determines there is a *percentage of disability* caused by different injuries or nonindustrial conditions. It is therefore premised primarily upon a Section 4660 impairment analysis requirement derived from the AMA Guides.

Similarly, Section 4664 limits an employer's liability to the *percentage of permanent disability* directly caused by the injury in question. Because it considers segregation in terms of *percentage of permanent disability*, it too is necessarily connected to a section 4660 impairment analysis requirement derived from the AMA Guides. Put another way, the essence of Sections 4660, 4663 and 4644 insofar as permanent disability is concerned, unlike Section 4662, is *percentages of permanent disability*. Section (c)(1), highlights this concept as well as the concept that Section 4662 PTD determinations, which are not

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[4] In this case, WCJ attributes PTD to only one injury, and thus there are no residuals from another injury to deduct. Nonetheless, CAAA submits that because both injuries occurred at the same employer, and found at the same time, there is no meaningful difference from PTD and PPD in this particular case. Put another way, two injuries at one employer, judicially found at the same time, which, under Petitioner's version, resulted in a total inability to compete in the open labor market. In terms of legal responsibility, it would not be "fair" to segregate the two for purposes of permanent disability. Doing so would not effectuate the purposes of either permanent disability or apportionment.

[5] Apportionment is the employer's burden of proof. (See *Kopping, supra).*

based on percentages, are not intended to be subject to segregation or apportionment.

Specifically, subsection (c)(1) of Section 4664 recognizes an exception for apportionment when PTD under section 4662 cases is shown. (See also *Kopping, supra*). It mandates a "conclusive presumption" for Section 4662 PTD awards precluding any apportionment. (*Id.*). This "presumption" is one that affects the burden of proof, and it is not rebuttable as a matter of law. (*Id.*). This presumption therefore precludes invocation of any medical impairment analysis for such awards. The language of Section 4662 supports this view.

Section 4662 begins stating "[A]ny of the following permanent disabilities shall be conclusively presumed total in nature...." It then gives some examples. Likely recognizing that any list of PTD examples is not finite, it states: "[i]n all other cases, permanent total disability shall be determined in accordance with the fact." Given this language, once a PTD determination is made by a judge based on the facts of a particular case, it necessarily *becomes* a conclusive presumption not subject to segregation. To read Section 4662 otherwise would only render it's plain language meaningless.

And this makes sense when one remembers that a Section 4662 PTD award is not subject to the constraints of an AMA impairment analysis, but rather, founded upon a total loss of earnings capacity analysis. (See, e.g., *Coca-Cola Enterprises, Inc./Coca Cola Bottling Co. v. WCAB (Jaramillo)*(2012 writ den.) 77 Cal. Comp. Cases445; and *Kaiser found. Hosp. v. Workers' Comp. Appeals Bd. (Dragomir-Treamoureaux)*(2006 Writ Den.) 71 Cal. Comp. Cases 538).

In this connection, a total loss of earnings capacity finding could not fairly be segregated from a prior injury where the PPD of a prior injury was grounded in an AMA impairment analysis but the PTD injury/award is not. One cannot find an apple seed in an orange.

Conceptually, the definition of permanent disability evinces a policy against apportionment of Section 4662 PTD awards as well:

> P*ermanent disability payments* are *intended* to *compensate* workers for both physical loss and the loss of some *or all of their future earning capacity.* (*Brodie, supra*).

Given our Supreme Court's stated intention, just as it makes no sense to put gas in a car that's already been totally wrecked, it makes no sense to take compensation away from an injured worker who can never work again; in both cases, there is a total loss due to one accident which cannot be fixed. In both cases there is a total loss of use. The total loss should be compensated accordingly. (See *LeBoef v. Workers' Comp. Appeals Bd.*, *supra*; *Coca-Cola Enterprises, Inc./Coca Cola Bottling Co., supra*; *Zurich North American Insurance Co. v. Workers' Comp . Appeals Bd. (Baldridge)* (2011 Writ. Den.) 76 Cal. Comp. Cases 280; *Kaiser found. Hosp. v. Workers' Comp. Appeals Bd. (Dragomir-Treamoureaux), supra.*

Whether it's the statutes, the legal definitions, or just common sense, no matter how you look at it, as long as you do, Section 4662 trumps Sections 4660, 4663, and 4664. There can be no question that harmonizing Section 4662 with Sections 4660, 4663, and 4664 preclude any apportionment for PTD awards based on the facts

grounded in a total loss of earning capacity. To the extent there is any question or ambiguity in determining our legislature's intent, CAAA submits that the policy of Section 3202 and workers' compensation system is to require employers to protect persons injured in the course of their employment, ***not to shift the burden to the taxpayers—which would be the natural consequence of Petitioner's position***.

VII.

CONCLUSION

Based on the above, Respondent requests that the WCAB's decision be affirmed. In this connection, respondent requests that this Court clarify to the California Workers' Compensation Community that, as a matter of law, permanent total disability awards under Labor Code Section 4662 are not apportionable.

DATED:

Respectfully Submitted,
Law Office of Robert E.Willyard, APLC

By: _____
Robert E. Willyard, Esq.
CAAA Amicus Curiae Committee
California Applicant's Attorney Association

CERTIFICATE OF COMPLIANCE

(California Rules of Court, Rules 8.204 and 8.520)

I, Robert E. Willyard, certify that the foregoing brief complies with the paper type, format requirements and the length limitation as set forth in Rules 8.204(b) and (c) and 8.520(c) of the California Rules of Court. The brief is printed on white, recycled paper of at least 20 pound weight. The text of the brief is proportionately spaced, has a conventional typeface of 13 points or more and, according to Microsoft Word 2010, the word-processing software used to compose the document, this brief, exclusive of the Certificate of Interested Entities or Persons, the Table of Contents, the Table of Authorities, and this Certificate of Compliance, contains 2,562 words. This number is less than the 14,000 word limit set forth in Rules 8.204(c) and 8.520(c).

DATED:

Respectfully Submitted,
Law Office of Robert E. Willyard, APLC

By: _____
Robert E. Willyard
CAAA Amicus Curiae Committee
California Applicants' Attorney Association

VERIFICATION

Case No. B245118

I, Robert E. Willyard, declare as follows:

I am an attorney at law duly admitted and licensed to practice law before all Courts in the State of California and the attorney representing the California Applicants' Attorneys Association with respect to the above-captioned matter. I have read the foregoing APPLICATION OF CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANT AND RESPONDENT ELSIE MARTINEZ and know its contents. The facts alleged are true to my own knowledge except as to those matters stated on information and belief, and as to those matters I believe them to be true.

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

Executed this day of May, 2013, at Anaheim, California

Robert E. Willyard

PROOF OF SERVICE

State of California

County of Orange

I am a citizen of the United States and a resident of the County aforesaid. I am over the age of 18 years and not a party to the within action. My business address is 2940 East La Palma Ave, Suite A, Anaheim, Ca 92806.

On May ___, 2013, I served the within

APPLICATION OF CALIFORNIA APPLICANTS' ATTORNEYS ASSOCIATION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPLICANT AND RESPONDENT ELSIE MARTINEZ

On the named parties in said action by placing a true copy thereof, enclosed in a sealed envelope, with postage thereon fully prepaid, into the United States mail at Orange County, addressed as follows:

Workers' Compensation Appeals Board
Reconsideration Unit
Office of The Commissioners
P.O.Box 429459
San Francisco, Ca 94142-9459

Workers' Compensation Appeals Board
4720 Lincoln Boulevard, 2nd Floor
Marina Del Rey, Ca 90292

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Shaw, Jacobsmeyer, Crain & Craffey
475-14th Street, Suite 500
Oakland, Ca 94612
Richard M. Jacobsmeyer, Esq.

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

Executed May , 2013, at Anaheim, California.

Raquel Liceaga