Filed 8/23/13 Southern Cal. Edison v. WCAB (Martinez) CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

SOUTHERN CALIFORNIA EDISON, Petitioner, v. WORKERS' COMPENSATION APPEALS BOARD and ELSIE MARTINEZ, Respondents.	B245118 (WCAB Nos. ADJ 7278184 and ADJ 124368)

PROCEEDINGS to review a decision of the Workers' Compensation Appeals Board. Robert F. Spoeri, Workers' Compensation Administrative Law Judge. Annulled and remanded with directions.

Bagby, Gajdos & Zachary and Dann Boyd for Petitioner Southern California Edison.

Law Offices of Saul Allweiss and Michael A. Marks as Amicus Curiae by California Workers' Compensation Institute in support of Petitioner Southern California Edison.

John F. Krattli, County Counsel, Ralph L. Rosato, Assistant County Counsel, Derrick Au, Principal County Counsel and Jeffrey L. Scott, Senior Deputy County Counsel as Amicus Curiae by County of Los Angeles in support of Petitioner Southern California Edison.

Shaw, Jacobsmeyer, Crain & Claffey and Richard M. Jacobsmeyer as Amicus Curiae by California Chamber of Commerce in support of Petitioner Southern California Edison.

Goldschmid, Silver & Spindel and Lawrence Silver for Respondent Elsie Martinez.

Law Offices of Robert Willyard and Robert E. Willyard as Amicus Curiae by California Applicants' Attorneys Association in support of Respondent Elsie Martinez.

No appearance for Respondent Workers' Compensation Appeals Board.

Respondent Elsie Martinez was employed by petitioner Southern California Edison (SCE) until May 21, 2004, when she allegedly became unable to work. The parties stipulated that she had suffered two industrial injuries which gave rise to two separate workers' compensation claims: (1) a specific injury to her neck, right shoulder, right wrist, right hand and psyche, which occurred on June 15, 2001, giving rise to the specific injury claim; and (2) a cumulative trauma injury, which arose over the entire period of Martinez's employment (February 1998 through May 21, 2004), and caused injury to her lumbar spine, cervical spine, both shoulders, both wrists, both hands and psyche, giving rise to the cumulative trauma or CT claim. After a hearing, the workers' compensation administrative law judge

(WCJ) found that with respect to the specific injury claim, orthopedic and psychiatric impairments entitled Martinez to a 29% permanent disability rating, after apportionment between the specific injury and other causes. With respect to the CT claim, the WCJ found that Martinez's fibromyalgia entitled her to a 100% permanent disability rating and, based on this conclusion, did not apportion any of her permanent total disability to the specific injury or to nonindustrial causes. The WCJ purported to base his decision on the CT claim on the opinion of independent medical evaluator Seymour Levine, M.D., a rheumatologist, who erroneously believed that Martinez had not suffered a specific injury in 2001. The workers' compensation appeals board (WCAB) denied SCE's petition for reconsideration of the CT claim and adopted the WCJ's decision.

The issues raised by SCE and amicus in this petition for review of the WCAB's decision can be summarized as follows: (1) whether the WCJ misinterpreted Dr. Levine's opinion in concluding that Martinez was 100% permanently disabled from fibromyalgia alone, without regard to her orthopedic and psychiatric disorders; (2) whether the WCJ erred in relying on Dr. Levine's report for the finding that no apportionment was required, given the doctor's mistaken belief that Martinez had not suffered a specific injury in June 2001; (3) whether Dr. Levine derived the whole person impairment rating he attributed to the fibromyalgia from the four corners of the current edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (5th ed. 2001) (the AMA Guides or the Guides);[1] (4) whether Dr. Levine's opinion supported the

---

[1] As explained in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 (*Milpitas*), the AMA Guides, first published in 1971, "provide 'a standardized, objective approach to evaluating medical impairments' [citation]," and "set[] forth measurement criteria that certified rating physicians and chiropractors can use to ascertain and rate the medical impairment suffered by injured

(Fn. continued on next page.)

finding that Martinez was unable to work; and (5) whether the WCJ erred in increasing the award to account for estimated annual inflation before calculating the attorney fee fund. We conclude that the WCJ erred in his interpretation of and reliance on Dr. Levine's opinion to support that Martinez was 100% permanently disabled from fibromyalgia. Accordingly, we annul the WCAB's decision on the CT claim and remand for further proceedings, including recalculation of attorney fees. For the WCJ's guidance, we express our views with respect to the application of the AMA Guides and the determination of attorney fees.

FACTUAL AND PROCEDURAL BACKGROUND

During her employment with SCE, Martinez was a systems computer programmer. Her work involved repetitive use of her upper extremities. Martinez first asserted a claim for disability on June 27, 2001. This claim was based on suffering a specific injury on June 15, 2001. Three years later, Martinez submitted a second claim, contending that she had suffered cumulative trauma between February 1998 and May 21, 2004, the entire period of her employment. Prior to the hearing on the two claims, the parties stipulated that Martinez had suffered injury to her neck, right shoulder, right wrist, right hand and psyche in connection with the specific injury and injury to her lumbar spine, cervical spine, both shoulders, both wrists, both hands and psyche in connection with the CT claim.

---

workers. [Citation.]" (*Milpitas, supra,* at p. 819.) The AMA Guides as a whole "embod[y] the premise that injuries and illnesses cause deficits in the functioning of organs or body parts, and these deficits can be quantitatively assessed during an impairment evaluation." (AMA Guides, p. 568.) The impairment ratings provided in the AMA Guides are "'designed to reflect functional limitations,'" that is, they "'reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding* work.' [Citation.]" (*Milpitas, supra,* 187 Cal.App.4th at p. 819, fn. omitted.)

Agreed medical examiner (AME) Phillip Kanter, M.D. and AME David Friedman, M.D., prepared reports expressing opinions concerning the orthopedic and psychological injuries suffered by Martinez as a result of the specific injury and the cumulative trauma. Dr. Kanter, an orthopedist, concluded that Martinez had suffered injuries to her cervical spine, lumbosacral spine, right shoulder, left shoulder, right hand/wrist and left hand/wrist. He found that these injuries interfered with her ability to sleep, as well as other activities of daily living. He gave a 20% whole person impairment rating based on these orthopedic injuries.[2] He apportioned between the specific claim, the CT claim, and nonindustrial causes as follows: cervical spine - 60%/30%/10%; lumbosacral spine - 0%/90%/10%; right shoulder - 60%/30%/10%; left shoulder - 0%/90%/10%; right wrist/hand - 66.7%/33.3%/0%; left wrist/hand - 0%/100%/0%.

Dr. Friedman, a psychiatrist, found Martinez to be suffering from various psychological maladies, including a depressive disorder and insomnia. He assessed her whole person impairment at 20% from the psychological disorders. He stated that her disability should be apportioned between the specific claim and the CT claim in accordance with the figures and formula adopted by Dr. Kanter. He found none of the psychological injuries he diagnosed attributable to non-industrial causes.

---

[2] Individual impairment ratings "are combined and converted to a ['whole person impairment' (WPI)] rating, which reflects the impact of the injury on the 'overall ability to perform activities of daily living, excluding work.' [Citation.]" (*Milpitas, supra,* 187 Cal.App.4th at p. 820, fns. omitted.) The whole person impairment rating is one of the statutory components that comprise the applicant's percentage disability rating (Labor Code, § 4660, subds. (a), (b); *Milpitas, supra,* at p. 819), the others being occupation, age, and diminished future earning capacity. (§ 4660, subd. (a).) (Undesignated statutory references are to the Labor Code.)

The parties disputed whether Martinez also suffered from fibromyalgia, her treating physician having concluded she did and petitioner's rheumatologist having concluded she did not. This led the WCJ to appoint Dr. Levine. Dr. Levine agreed with the treating physician that Martinez indeed suffered from fibromyalgia.[3] He based this diagnosis on findings of tenderness in the soft tissue at the requisite 18 points of her body and her daytime sleepiness and fatigue, both of which were well above normal. He reviewed her medical history and found that the records "clearly demonstrate that she sustained repetitive strain injuries/overuse syndrome involving the cervical spine and bilateral upper extremities, predominantly right-sided on a cumulative traumatic work-related basis" which resulted in "a Chronic Regional Myofascial Pain Syndrome involving the musculature of the cervical spine and the musculature of the bilateral shoulder girdles, more pronounced on the right than on the left" and "a Chronic Regional Myofascial Pain Syndrome involving the musculature of the lumbosacral spine." These syndromes were "generated by a chronic lumbosacral strain syndrome in this patient due to repetitive strain injuries/overuse on a cumulative traumatic work-related basis." With time, Martinez "noted widespread pain throughout her body resulting in the diagnosis of fibromyalgia." Put another way, Dr. Levine reported, "the chronic pain syndrome started out as a Chronic Regional Myofascial Pain Syndrome

---

[3] As described by Dr. Levine, fibromyalgia is a disorder causing widespread pain "located above and below the waist, on both sides of the body, and involving some portion of the axial skeleton [the bones running along the central axis of the body, including the skull, vertebrae and rib cage] . . . present for at least three months." Since the pain involved is subjective and self-reported, the diagnosis is confirmed by demonstrated tenderness in at least 11 of 18 "classical tender points" located on the right and left sides of the body: the suboccipital muscles, the low anterior cervical muscles, the trapezius muscles; the supraspinatus muscles, the second costochandral joints, the lateral epicondyles of the elbows, the upper outer quadrants of the gluteus muscles, greater trochanters, and the medial aspects of the knees.

involving the musculature of the cervical spine and musculature of the bilateral shoulder girdles" joined by "similar chronic regional myofascial pain in the musculature of the lumbosacral spine," which then evolved into full-blown fibromyalgia.[4] Dr. Levine also expressed an opinion with respect to the impact of the fibromyalgia on Martinez's psychological health, stating: "The orthopedic injuries resulted in chronic regional myofascial pain which evolved into the widespread pain syndrome of fibromyalgia," and the fibromyalgia led to "psychiatric/psychological injuries secondary to her chronic pain."

Dr. Levine went on to report that the pain from fibromyalgia can lead to a suite of secondary symptoms or disorders, including non-restorative sleep, chronic fatigue, depression, anxiety, headaches, temporomandibular joint problems, cognitive dysfunction, irritable bowel syndrome, decreased libido, vertiginous symptoms, and hypersensitivity to environmental stimuli. Dr. Levine found Martinez to be suffering all of these secondary symptoms.

Having been instructed to relate Martinez's level of impairment to the AMA Guides, Dr. Levine acknowledged that the Guides do not rate fibromyalgia.[5] He

---

[4] Dr. Levine classified the repetitive strain injuries to Martinez's cervical spine, both shoulders and elbows, and both hands and wrists, including mild right-side carpal tunnel, as Diagnosis 1. He classified as Diagnosis 2, the chronic regional myofascial pain syndrome involving the musculature of her cervical spine and both shoulders, right side more than left. He classified as Diagnosis 3, the chronic lumbosacral spine strain syndrome resulting in chronic mysofascial pain syndrome affecting the musculature of the lumbosacral spine. His Diagnosis 4 was "[f]ibromyalgia which emerged in this patient secondary to diagnoses #1 through #3."

[5] When the workers' compensation system underwent comprehensive reform in 2004, section 4660 was amended to provide: "For purposes of this section, the 'nature of the physical injury or disfigurement' [a component of the overall disability rating] shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the [AMA Guides]." The revised workers' compensation law is to be applied to all cases that were not yet final at the time

(Fn. continued on next page.)

concluded, however, that it was possible to arrive at a whole person impairment (WPI) rating for fibromyalgia from the Guides by "dissecting out the major symptoms in a given patient that interfere with activities of daily living." He focused on Martinez's sleep and arousal disorder, sexual disorder, irritable bowel syndrome and headaches, all of which receive specific impairment ratings in the Guides. The Guides indicate that for a sleep and arousal disorder an impairment rating of between 10% and 20% would be appropriate; Dr. Levine rated Martinez at 20% for this disorder.[6] The Guides indicate that for irritable bowel syndrome, an impairment rating of between 0% to 9% would be appropriate. Dr. Levine found the rating to be 5% for Martinez based on this syndrome. The Guides provide a 1% to 9% impairment rating for decrease in libido. Dr. Levine found Martinez's impairment to be at the upper level of 9%. Dr. Levine then concluded an additional 3% was warranted based on Chapter 18 of the AMA Guides, which "allows an additional impairment of up to 3% to be given to an individual if that individual has pain related impairment that increases the burden of illness slightly." Dr. Levine used the AMA Guides' combined values chart to calculate that Martinez had a total WPI of 50% from the "fibromyalgia syndrome," taking into account "her sleep and arousal disorder, her behavioral or emotional disorder, her chronic pain, the sexual dysfunction, and the irritable bowel syndrome."[7]

---

of its effective date. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (2006) 145 Cal.App.4th 922, 927.)

[6] Dr. Levine subsequently found that half of the sleep/arousal disorder derived from nonindustrial causes, reducing this rating to 10%.

[7] Dr. Levine believed that the emotional/behavioral disorder gave rise to an impairment rating of 25%, but acknowledged that the actual rating would have to come from the psychiatric expert, Dr. Friedman, to whom he deferred. Dr. Levine also found that certain of Martinez's secondary symptoms did not give rise to a significant level of impairment, including the disequilibrium and temporomandibular joint complaints.
(Fn. continued on next page.)

Unlike the orthopedist and psychiatrist, Dr. Levine did not apportion between the specific injury claim and the CT claim. He explained in his report: "The cover letter points out that this patient has filed a claim for a specific incident that was said to have occurred on June 15, 2001. I asked the patient about this specific incident. She told me that there was not a specific injury that occurred on that date. It was on that date that she reported her medical problems." As a result of his belief that Martinez had suffered no specific injury in June 2001, Dr. Levine stated in addressing the issues of causation and apportionment: "[T]he injurious exposure in this patient's case, in my opinion, is one period of cumulative trauma for the dates of February 1998 through May 21, 2004. In my opinion, fibromyalgia emerged in this patient entirely on an industrial basis. In terms of causation, 100% of this patient's fibromyalgia syndrome is industrial and 0% is non-industrial. In terms of apportionment, any permanent disability or whole person impairment in this patient would be apportioned 100% on an industrial basis and 0% on a non-industrial basis, all due to the period of cumulative trauma that I outlined above."[8]

With respect to Martinez's level of disability, Dr. Levine observed that most patients with fibromyalgia are able to work. However, due to the "combination of orthopedic, psychiatric, and rheumatologic factors," he believed Martinez to be "100% permanently and totally disabled" and incapable of returning to the open labor market. He explained that Martinez "experiences widespread pain on a daily basis accompanied by chronic fatigue," in addition to "significant emotional

---

Disregarding the emotional/behavioral aspect of Dr. Levine's opinion and reducing the sleep disorder impairment rating by 50% due to apportionment to nonindustrial causes, this essentially left an impairment rating of 27% based on rheumatological factors alone.

[8] As previously noted, Dr. Levine subsequently concluded that there should be some apportionment to nonindustrial causes, and apportioned 50% of the sleep and arousal disorder to the cumulative trauma and 50% to nonindustrial causes.

complaints" and "agoraphobia." The combination of "widespread pain, chronic fatigue, and emotional complaints" rendered Martinez "an unreliable and unpredictable employee who could not be expected to show up on a regular basis at work."

The WCJ found Martinez entitled to a 29% disability rating as a result of the specific injury and a 100% disability rating with respect to the CT claim. The WCJ found no overlap between the two claims and did not apportion, allowing Martinez to be deemed more than 100% disabled. SCE sought reconsideration, raising a number of issues, including whether the WCJ erred in failing to apportion; whether a 100% permanent disability rating could be based on a condition (fibromyalgia) that was not the subject of the AMA Guides; and whether Dr. Levine's report supported a finding of permanent total disability.

The WCJ prepared a report and recommendation on the petition for reconsideration. With respect to apportionment, it stated that the WCJ's decision that apportionment was not necessary followed from Dr. Levine's opinion that Martinez was 100% disabled due to a rheumatological injury and that the rheumatological injury was 100% apportionable to the CT claim. "The [a]ward in the CT [c]laim was for a rheumatological injury; it was a separate body part evaluated by a specialist in a separate field for a separate date of injury." With respect to allegedly basing the findings of impairment and total disability on a condition not specifically delineated in the AMA Guides, the report and recommendation pointed out that the Guides "discuss pain in Chapter 18, chronic fatigue causing sleep problems and daytime alertness problems in Chapter 13 . . . , and emotional complaints in Chapter 14," providing impairment ranges for those conditions. With respect to whether Dr. Levine's report supported a finding of permanent total disability, the report and recommendation stated that "the reports

of Dr. Levine. . . clearly indicated that the applicant was not capable of working in the open labor market and had a total [diminished future earnings capacity]" and that Dr. Levine "explained the reasons for his diagnosis of fibromyalgia and its connection to the CT claim of the applicant[,] . . . [stating in his report] that most patients with fibromyalgia are able to work, but that the applicant in this case could not, based on her widespread pain, chronic fatigue, [and] emotional complaints . . . ." The WCAB approved and adopted the WCJ's decision without issuing an opinion of its own. SCE petitioned for review.

DISCUSSION

1. *Standard of Review*

The WCAB's factual findings must support its decision or award, and the decision or award must be reasonable and supported by substantial evidence. (See § 5952, subds. (c)-(e).) In considering a petition for writ of review, we determine whether substantial evidence supports the factual findings. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd*. (1993) 16 Cal.App.4th 227, 233.) Although we may not reweigh evidence or decide disputed facts, "this court is not bound to accept the WCAB's factual findings if determined to be unreasonable, illogical, improbable or inequitable when viewed in light of the overall statutory scheme" (*id*. at p. 233), or "where they do not withstand scrutiny when considered in light of the entire record . . . ." (*Bracken v. Workers' Comp. Appeals Bd.* (1989) 214 Cal.App.3d 246, 254.)

2. *No Evidence Supports the WCJ's Finding that Fibromyalgia Was the Sole Cause of Martinez's Disability.*

(a) *Background*

Section 4664, as amended in 2004, provides that "the employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." Further, "[i]f the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury" and "[t]he accumulation of all permanent disability awards issued with respect to any one region of the body in favor of one individual employee shall not exceed 100 percent over the employee's lifetime unless the employee's injury or illness is conclusively presumed to be total in character pursuant to Section 4662."[9]

The 2004 legislation represented "a diametrical change in the law with respect to apportionment . . . ." (*E.L. Yeager Construction v. Workers' Comp.*

---

[9] Section 4662 provides: "Any of the following permanent disabilities shall be conclusively presumed to be total in character: [¶] (a) Loss of both eyes or the sight thereof. [¶] (b) Loss of both hands or the use thereof. [¶] (c) An injury resulting in a practically total paralysis. [¶] (d) An injury to the brain resulting in incurable mental incapacity or insanity. In all other cases, permanent total disability shall be determined in accordance with the fact." Amicus California Applicants' Attorneys Association argues that any permanent total disability falls within this exception and therefore requires no apportionment. Because we annul the decision and award issued in connection with the CT claim, including the finding of permanent total disability, and remand for further proceedings, we need not resolve this issue. We note, however, that section 4664 states that "injury or illness . . . *conclusively presumed* to be total in character" falls within the exception to apportionment. (Italics added.) Section 4662 states that only the four listed disabilities are "conclusively presumed to be total in character." All other permanent total disabilities are "determined in accordance with the fact," not based on a conclusive presumption.

Appeals Bd., *supra*, 145 Cal.App.4th at p. 926.) Prior to 2004, "apportionment was concerned with the disability, not its cause or pathology.'" (*Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 912.) "Apportionment based on causation was prohibited." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1326.) Because the statutes focused on disability, not causation, "an employer could be liable to the full extent an industrial injury accelerates, aggravates, or 'lights up' a nondisabling preexisting disease, condition, or physical impairment." (*Marsh*, *supra*, at p. 912.) "This rule left employers liable for any portion of a disability that would not have occurred but for the current industrial cause; if the disability arose in part from an interaction between an industrial cause and a nonindustrial cause, but the nonindustrial cause would not alone have given rise to a disability, no apportionment was to be allowed." (*Brodie*, *supra*, at p. 1326.) "[S]o long as the industrial cause was a but-for proximate cause of the disability, the employer would be liable for the entire disability, without apportionment." (*Ibid*.) "[T]he new approach to apportionment is to look at the current disability and parcel out its causative sources -- nonindustrial, prior industrial, current industrial -- and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries . . . ." (*Id*. at p. 1328.) "An employer is now only 'liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.'" (*Marsh*, *supra*, at p. 912.)

"[T]he WCAB must now 'conclusively presume[]' that where an injured employee has received a prior permanent disability award, that level of disability exists at the time of any subsequent injury. [Citation.] Multiple permanent disability awards with respect to a single body region may no longer exceed 100 percent over the employee's lifetime unless the employee is deemed totally

disabled [under section 4664, subdivision (c)]. To aid the WCAB in apportioning liability, medical reports addressing permanent disability must specify 'what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.'" (*Marsh*, *supra*, 130 Cal.App.4th at p. 912, fn. 5.)

When a prior disability finding has been made, the employer bears the burden of proving an overlap between the prior permanent disability and the current permanent disability. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114-1115.) Once the evidence establishes an overlap, the presumption arises and conclusively establishes that the permanent disability resulting from the previous industrial injury still exists at the time of the subsequent injury. (*Ibid*.) In *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, where the WCJ adjudicated a specific neck injury and cumulative neck injury in the same proceeding, the court explained that even though the statute speaks in terms of a "prior award," apportionment is required where successive injuries become permanent at the same time: "[A]pportionment is required for each distinct industrial injury causing a permanent disability, regardless of the temporal occurrence of permanent disability or the injuries themselves. . . . [T]he only relevant inquiry is whether separate and distinct industrial injuries have been sustained. If so, 'then each injury must stand on its own.'" (*Id*. at p. 1559, fn. omitted.) "[T]he plain language of [the current] statutory scheme requires apportionment to each cause of a permanent disability, including each distinct industrial injury." (*Id.* at p. 1549; accord, *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (2011) 201 Cal.App.4th 443, 453 [successive

injuries to same body part that become permanent and stationary at same time can no longer be rated as single injury, but must be rated separately, unless physicians cannot parcel out the causation of disability].)

(b) *Martinez Was Disabled by a Combination of Factors.*

The evidence presented here strongly suggests that one or more of Martinez's disabilities caused by the cumulative trauma overlap with those attributable to the specific injury. The parties stipulated that Martinez suffered injury to her neck, right shoulder, right wrist, right hand and psyche in connection with both the specific injury and the CT claim. Dr. Kanter attributed two-thirds of Martinez's right wrist and hand injury and 60% of her cervical spine (neck) and right shoulder injury to the specific claim, as well as apportioning 10% of the cervical spine, lumbosacral spine, right shoulder and left shoulder injury to nonindustrial causes.[10] Although Dr. Levine did not apportion between the specific injury and the cumulative trauma because he did not appreciate that a specific injury had occurred, his report and findings also support the existence of an overlap. He rated Martinez's impairment based on the sleep disorder at 20%, and apportioned 50% of that to nonindustrial causes. The evidence of medical impairments, while not dispositive of the question whether the disabilities overlapped, is certainly probative. Moreover, Dr. Levine's finding that Martinez suffered a sleep and arousal disorder leading to chronic fatigue overlapped the findings of Dr. Kanter, who stated that the orthopedic injuries interfered with

---

[10] Without giving a precise figure, Dr. Friedman agreed that there should be a similar apportionment of Martinez's psychological injury. The WCJ instructed the rater to assess permanent disability for the specific injury claim based on apportioning 22% of the psychological injury to that claim.

Martinez's ability to sleep, and Dr. Friedman, who had also found Martinez to be suffering from insomnia, attributing this sleep disorder to the orthopedic injuries and concluding that this and her other psychological impairments should be apportioned in line with the orthopedic injuries.

The WCJ ignored the evidence of overlap and created an artificial construct to support the finding that apportionment was not required, concluding that fibromyalgia, standing alone, caused Martinez to suffer 100% disability. To reach this erroneous conclusion, the WCJ either misinterpreted or ignored Dr. Levine's report, which stated that Martinez was "100% permanently and totally disabled" and "not capable of returning to the open labor market," but only as the result of "*the combination of orthopedic, psychiatric, and rheumatologic factors . . . .*"[11] (Italics added.) Thus, it is clear that it is the combination of these factors, and not fibromyalgia, standing alone, that disabled Martinez 100%.

---

[11] Martinez argues in her brief that the finding was supported by Dr. Levine's deposition testimony, in which he stated that that he believed Martinez had a total diminished future earning capacity and was totally and permanently disabled "based on reasonable [m]edical probability . . . as someone [he] evaluated in terms of [his] specialty of medicine . . . ." This ambiguous statement does not convince us that Dr. Levine believed Martinez was 100% disabled apart from her orthopedic and psychological conditions. Assuming it could be so interpreted, it is not expert testimony on which the WCJ could reasonably rely, as Dr. Levine did not explain how a 27% whole person impairment from rheumatological disorders could lead to 100% disability rating, or otherwise clarify the change of opinion from his report. "[I]n relying on the opinion of a particular physician in making its determination, the Board may not isolate a fragmentary portion of the physician's report or testimony and disregard other portions that contradict or nullify the portion relied on; the Board must give fair consideration to all of that physician's findings." (*Bracken v. Workers' Comp. Appeals Bd., supra,* 214 Cal.App.3d at p. 255.) In any event, the WCJ did not purport to rely on this deposition testimony, but clearly stated in the report and recommendation that he relied on the statement in Dr. Levine's report that Martinez could not work "based on her widespread pain, chronic fatigue, [and] emotional complaints . . . ."

Significantly, Dr. Levine's report attributed Martinez's development of fibromyalgia to her orthopedic injuries. Had he been instructed to assume that the parties had stipulated that a specific injury occurred on June 15, 2001, giving rise to multiple orthopedic injuries and impairment ratings totaling 40%, he may well have apportioned the fibromyalgia and the specific ratable disorders he found to have arisen in its wake between the two distinct injuries.

In sum, the WCJ's decision to allow Martinez an unapportioned award for the CT claim rests on a misinterpretation of Dr. Levine's opinion about the causes of Martinez's 100% disability and a failure to acknowledge that Dr. Levine's view that there was no specific injury was wrong, a circumstance that removed overlap and apportionment from his medical reporting. Accordingly, the findings of fact and the award on the CT claim must be annulled and the matter remanded for further proceedings. Upon remand, the WCJ must determine whether there is an overlap between the disabilities caused by the CT claim and the specific claim, and, if there is, to apportion the award on the CT claim between the cumulative trauma, the specific injury, and nonindustrial causes. To assist the WCJ on reconsideration, we provide guidance on certain points raised in the parties' briefs.

3. *Dr. Levine's Specific Impairment Ratings Were Not Outside the "Four Corners" of the AMA Guides*.

As noted, the 2004 comprehensive reform to the workers' compensation laws included a provision requiring the "incorporat[ion of] the descriptions and measurements of physical impairments and the corresponding percentages of impairments" of the AMA Guides when determining the "'nature of the physical injury or disfigurement,'" one of the fundamental components of the disability percentage rating. (§4660, subd. (b)(1). In *Milpitas*, the court examined whether

"section 4660, following the 2004 revisions, permits deviation from a strict application of the descriptions, measurements, and percentages contained in the Guides for purposes of determining the impairment resulting from an employee's workplace injury." (*Milpitas, supra,* 187 Cal.App.4th at p. 820.) The court concluded that "the word 'incorporate'" did not mean "'apply exclusively.'" (*Id.* at p. 822.) Accordingly, the court could not "read into the statute a conclusive presumption that the descriptions, measurements, and percentages set forth in each chapter [of the Guides] are invariably accurate when applied to a particular case." (*Ibid.*) By using the word incorporate, "the Legislature recognized that not every injury can be accurately described by the classifications designated [by the Guides] for the particular body part involved. Had the Legislature wished to require every complex situation to be forced into preset measurement criteria, it would have used different terminology to compel strict adherence to those criteria for every condition." (*Ibid.*) Moreover, the court observed, the Guides recognize that they "cannot anticipate and describe every impairment that may be experienced by injured employees" and "repeatedly caution that notwithstanding [the] 'framework for evaluating new or complex conditions,' the 'range, evolution, and discovery of new medical conditions' preclude ratings for every possible impairment.'" (*Milpitas, supra,* at p. 823, quoting the AMA Guides, § 1.5, p. 11.) In particular, the Guides "cannot rate syndromes that are 'poorly understood and are manifested only by subjective symptoms.'" (*Ibid.*) Accordingly, the court affirmed the WCAB's determination that an applicant's WPI derived from the AMA Guides could be challenged "through the presentation of evidence that a different chapter, table, or method contained in the Guides more accurately describes the impairment," and that "a physician could 'utilize any chapter, table, or method in the AMA Guides that most accurately reflects the injured employee's impairment,'

but was not permitted to 'go outside the four corners of the AMA Guides.'" (*Milpitas,* at p. 818.)

Milpitas explains that the AMA Guides are not straightjackets for medical evaluators, the workers' compensation system or the courts, but rather provide guidelines for the exercise of professional skill and judgment which may result, in a given case, in ratings that depart from those found in the AMA Guides. Dr. Levine approached his determination of the impairments caused by Martinez's diagnosis of fibromyalgia in the spirit intended by *Milpitas*. Recognizing that the AMA Guides express a guarded skepticism about the disorder and provide no system for rating it directly, he broke it down into its components -- including sleep and arousal disorder, irritable bowel syndrome, and decrease in libido -- and evaluated each in accordance with the Guides. Thus, Dr. Levine brought his analysis within the four corners of the AMA Guides by tethering his diagnosis of fibromyalgia to impairments recognized by the AMA Guides.

While qualified as a rheumatologist to assign ratings for Martinez's impairments attributable to fibromyalgia, his assignment of a rating to Martinez's behavioral and emotional disorders fell outside his area of medical expertise. Dr. Friedman was the agreed medical examiner for psychological injuries and had evaluated Martinez for these injuries. Accordingly, on remand, the WCJ should focus on the specific physical conditions rated by Dr. Levine and rely on Dr. Friedman for assessment of Martinez's psychological condition.

4. *Dr. Levine's Report Did Not Support the 100% DFEC Finding*.

Among the components of the disability rating is the applicant's diminished future earning capacity (DFEC). (§ 4660, subd. (a).) The determination of DFEC is addressed by section 4660, subdivision (b)(2) which, as revised in 2004,

provides: "For purposes of this section an employee's diminished future earning capacity shall be a numeric formula based on empirical data and findings that aggregate the average percentage of long-term loss of income resulting from each type of injury for similarly situated employees. The administrative director shall formulate the adjusted rating schedule based on empirical data and findings from the Evaluation of California's Permanent Disability Rating Schedule Interim Report (December 2003), prepared by the RAND Institute for Civil Justice and upon data from additional empirical studies."[12] SCE, joined by amicus County of Los Angeles, contends that the WCJ erred in relying on Dr. Levine's opinion to find that Martinez suffered a total loss of earnings capacity rather than relying on the 2005 PDRS, and asserts that only a qualified vocational expert has the necessary expertise to support a finding of total disability or total DFEC.

Our assessment of Dr. Levine's report necessarily implicates his conclusion regarding ability to work and diminished future earning capacity. As discussed, Dr. Levine's ratings were based on an erroneous assumption of a single cumulative trauma, and included consideration of conditions outside his medical expertise. His ultimate conclusion that Martinez was incapable of working was based in part on her agoraphobia, a psychological disorder which no medical expert linked to her industrial injuries, other psychological conditions more appropriately addressed by Dr. Friedman, and orthopedic conditions more appropriately addressed by Dr. Kanter. (See *Genlyte Group, LLC v. Workers' Comp. Appeals Bd.* (2008) 158 Cal.App.4th 705, 723 [medical expert opinion that is beyond the physician's

---

[12] As directed, the administrative director formulated an adjusted rating schedule based on the requisite empirical data and published a new Permanent Disability Rating Schedule (PDRS) effective January 1, 2005. (See *Milpitas, supra,* 187 Cal.App.4th at p. 818.)

expertise is not substantial evidence].) Dr. Levine's ratings of impairment within his rheumatological expertise totaled only 27%, raising no inference of total disability or total DFEC.[13] Indeed, he acknowledged that most patients with fibromyalgia are able to work. Without resolving whether a physician may ever be qualified to opine that an employee is wholly unable to compete in the labor market, we conclude that on the record below, Dr. Levine's report does not provide substantial evidence to support that conclusion. (Cf. *ACME Steel v. Workers' Comp. Appeals Bd.* (July 16, 2013, A137915) __Cal.App.4th __[2013 Cal.App.LEXIS 638] [claimant rebutted rating schedule by offering vocational expert testimony showing 100% loss of earning capacity].)

5. *Future Disability Payments Should Not Be Inflated Prior to Calculating Attorney Fees*.

The WCJ instructed the rater to inflate the award at the annual rate of 4.6%. This produced a commuted award of future disability payments of $2,005,089 which, in turn, yielded attorney fees of $347,210.15, i.e., 15% of the inflated award. Given that Martinez's weekly benefit was $910, this means that $339.89 will be deducted from each weekly payment in order to create the fund for attorney's fees. As SCE correctly points out, the result is that 37.4% of the actual award will go to attorney fees.

---

[13] We note that decreased libido, which would appear to have little or no connection with the ability to function in the workplace, accounted for 9% of that total. Moreover, although the sum of the components of the rheumatological injuries is 27 percent whole person impairment, Dr. Levine went on to rate the fibromyalgia at a 50 percent whole person impairment. There should be an explanation for a whole person impairment that exceeds the sum of the component parts of the rheumatological injuries.

This unacceptable situation was created by the WCJ's decision to inflate the award at the assumed annual rate of 4.6% to take account of the annual increase in the cost of living (COLA). We find no justification for inflating the award at a flat, unvarying rate of 4.6%. Neither inflation nor the cost of living, nor average wages, increase from year to year at the unvarying rate of 4.6%. Moreover, all of these factors (COLA, inflation, average wages) are more properly the subject of expert testimony, and there was no testimony, expert or otherwise, to support the 4.6% figure. In addition, section 5101, which governs how workers' compensation awards are to be commuted, requires discounting to present value at 3%. Inflating the recovery nullifies the whole exercise of discounting to present value.[14] The result is an award that is excessive and produces an award of attorney fees exceeding one-third of the recovery.

---

[14] "Under the present value approach, the court determines the total sum of future payments based on the plaintiff's projected life expectancy and then applies a discount rate to reduce that sum to its value in today's dollars. . . . [[¶]] California courts are familiar with this approach because it is routinely applied outside the MICRA [Medical Injury Compensation Reform Act of 1975] context to determine personal injury awards involving loss of future earnings, payment of future medical expenses and other future damages. . . . [T]he present value approach . . . , theoretically at least, . . . measures the true economic value of the judgment to the recipient. [Citations.]" (*Nguyen v. Los Angeles County Harbor/UCLA Medical Center* (1995) 40 Cal.App.4th 1433, 1450.)

DISPOSITION

The decision and award of the WCAB is annulled and the case is remanded for further proceedings consistent with this opinion.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.