

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

SALINE AUGAFA, *Applicant*

vs.

WAL-MART, INC; ACE AMERICAN INSURANCE COMPANY, *Defendants*

**Adjudication Numbers: ADJ11344274, ADJ11500538
San Diego District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge (WCJ) Findings, Award, and Order¹ of March 8, 2022. The WCJ found that, "while employed on July 5, 2017 and during the period April 1, 2004 through August 15, 2018 ... applicant sustained [industrial] injury ... to her left thumb, left elbow, left wrist, lumbar spine, and left knee." However, there is no specific finding regarding which body parts correspond to which date of injury. The decision contains a finding that "The parties stipulate to the PD rating of Dr. David Kupfer at 33% and Dr. Thompson at 23%," however there is no finding regarding the permanent disability caused by each injury. The decision contains an Award of 23% permanent disability, but there is no underlying finding, and it is unclear from the decision which injury caused permanent disability. Additionally, the Award purports to award attorney fees, but there is no finding setting an amount of fees.

Through our review of the pleading and the evidentiary record, it appears that the WCJ was attempting to find that applicant sustained a specific injury to the left thumb in case ADJ11344274 that did not cause permanent disability, and a cumulative injury in case ADJ11500538 to the left elbow, left wrist, lumbar spine, and left knee that caused permanent disability of 23% after apportionment.

Applicant contends that the WCJ erred in awarding permanent disability of 23% after apportionment, arguing that the WCJ should have followed the permanent disability findings of

¹ Despite being captioned "Findings, Award, and Order," there is no Order.

primary treating physician David M. Kupfer, M.D. rather than the findings of panel qualified medical evaluator Blake Thompson, M.D. Applicant also contends that, even if Dr. Thompson's impairment analysis is utilized, that Dr. Thompson did not adequately explain the basis behind apportionment of the lumbar spine and the left knee permanent impairments. We have received an Answer from the defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We affirm the reliance on Dr. Thompson's permanent impairment findings. The relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 639 [35 Cal.Comp.Cases 16].) The WCJ is empowered to choose among conflicting medical reports and rely on those deemed most persuasive. (*Jones v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 476, 479 [33 Cal.Comp.Cases 221].) There is nothing in the record compelling enough for us to reject the WCJ's determination that the opinions of Dr. Thompson were more persuasive than the opinions of Dr. Kupfer. However, because Dr. Thompson did not sufficiently explain his apportionment findings, we find applicant entitled to an unapportioned award of permanent disability based on Dr. Thompson's impairment ratings. We thus grant reconsideration, and issue a new decision reflecting that applicant's cumulative injury in case ADJ11500538 caused permanent disability of 25%.

In his October 13, 2020 report, Dr. Thompson wrote as follows with regard to apportionment:

With regard to the left knee, the injury to the left knee can be considered to be relatively trivial with altered gait due to low back pain. I would not consider that a mild limp from low back pain would cause significant injury or residuals in the left knee unless the patient had some underlying predisposition. The patient does have mild degenerative changes on x-rays taken today. Therefore, it is my opinion that the altered gait most likely aggravated an underlying left knee condition. In this manner the underlying and previously asymptomatic degenerative changes which contribute to a small amount of the patient's current condition, and is my opinion that the effects of the industrial injury would contribute a larger amount. Therefore, in my opinion, it is reasonable to apportion a small amount of approximately 25% to the left knee residuals to underlying preexisting condition and the remaining 75% to the effects of the compensatory altered gait.

With regard to the low back, the patient does have underlying degenerative changes and it is noted that the patient has lower lumbar facet osteoarthritis.

However, the patient indicates that she was not having any previous low back problems prior to the industrial injury. Considering the cumulative trauma nature of her job, this medically probably aggravated the underlying apparently asymptomatic degenerative changes. Absent the degenerative changes, the patient's lumbar condition medically likely would not be as severe as it currently is. However, I would apportion the large majority of 90% of the lumbar condition to the industrial injury and a small amount of approximately 10% to the contribution of underlying condition given she was previously asymptomatic and has no history of lumbar issues.

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

[A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]

Moreover, in the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]

For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo*, 70 Cal.Comp.Cases at p. 621.)

Here, Dr. Thompson did not adequately explain how the degenerative pathology was causing applicant's current work impairment. Additionally, Dr. Thompson did not explain why these degenerative changes did not develop during applicant's long cumulative injury period, while employed a Wal-Mart.

Accordingly, we will grant reconsideration, rescind the WCJ's decision, and issue a new decision reflecting that applicant's cumulative injury caused 25% permanent disability. In his February 25, 2021 report, Dr. Thompson explained that applicant's elbow and back disability should be added together and this sum should be combined with applicant's left knee disability. Permanent disability was thus calculated as follows:

Left Elbow: 16.03.02.00 3 [1.4] - 4 360G 5 - 6

Lumbar spine: 15.03.01.00 8 [1.4] - 11 360G - 13 -15

Left knee: 17.05.06.00 2 [1.4] - 3 - 360G - 4 -5

6 + 15 = 21, 21c 5 = 25 PD

We find applicant's counsel entitled to a fee of 15% of the permanent disability indemnity awarded.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings, Award and Order of March 8, 2022 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board the Findings, Award and Order of March 8, 2022 is **RESCINDED** and that the following is **SUBSTITUTED** therefor:

JOINT FINDINGS OF FACT

CASE ADJ11344274

1. Applicant Saline Augufa, age 49 at the time of injury, while employed on July 5, 2017 in case ADJ11344274, as a stocker (occupational group 360) at San Diego, California by Wal-Mart, Inc. sustained injury arising out of and in the course of employment to the left thumb.

2. The applicant is entitled to all further medical care to cure or relieve from the effects of the injury to the left thumb in case ADJ11344274.

3. The applicant has been adequately compensated for any periods of temporary disability indemnity through June 15, 2021 in case ADJ11344274.

4. The injury in case ADJ11344274 did not cause compensable permanent disability.

CASE ADJ11500538

5. Applicant Saline Augufa, age 50 at the time of injury, while employed during a cumulative period ending on August 15, 2018 in case ADJ11500538, as a stocker (occupational group 360) at San Diego, California by Wal-Mart, Inc. sustained injury arising out of and in the course of employment to the left elbow, left wrist, lumbar spine, and left knee.

6. The applicant is entitled to all further medical care to cure or relieve from the effects of the injury to the left elbow, left wrist, lumbar spine, and left knee in case ADJ11500538.

7. The applicant has been adequately compensated for any periods of temporary disability indemnity through June 15, 2021 in case ADJ11500538.

8. At the time of injury in case ADJ11500538, the employee's average weekly earnings were \$486 per week, warranting an indemnity rate of \$290 per week for permanent partial disability.

9. The injury in case ADJ11500538 caused permanent disability of 25%, with no legal basis for apportionment, payable at the rate of \$290 per week for 100.75 weeks, commencing July 11, 2020, in the total amount of \$29,217.50, less credit for all permanent disability advances already paid, and less an attorney's fee of \$4,328.63, payable to Pierre Vaughn, whose lien is hereby allowed.

10. Applicant's attorney has performed services entitling him to a reasonable attorney's fee of \$4,328.63, payable from accrued permanent disability indemnity due to the applicant in case ADJ11500538.

AWARD

AWARD IS MADE in favor of SALINE AUGUST against ACE AMERICAN INSURANCE COMPANY of:

CASE ADJ11344274

(a) All medical treatment reasonably required to cure from the effects of the July 5, 2017 injury to the left thumb in case ADJ11344274.

CASE ADJ11500538

(b) All medical treatment reasonably necessary to cure or relieve from the effects of the cumulative injury in case ADJ11500453.

(c) Permanent disability indemnity at the rate of \$290 per week commencing on July 11, 2020 payable for 100.75 weeks, less credit for all permanent disability advances already paid, and less an attorney's fee of \$4,328.63, payable to Pierre Vaughn, whose lien is hereby allowed.

(d) Interest at the legal rate from the filing and making of this Award.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 31, 2022

SERVICE MADE ON THE ABOVE DATE ON THE PERSONS LISTED BELOW AT THEIR ADDRESSES SHOWN ON THE CURRENT OFFICIAL ADDRESS RECORD.

**SALINE AUGAFA
PIERRE VAUGHN
MULLEN & FILIPPI**

DW/oo

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date. *abs*