WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CRAIG CLAVER, *Applicant*

vs.

STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS, legally uninsured, adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ11990093
Redding District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 16, 2021

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

CRAIG CLAVER
RILEY LAW OFFICES, INC.
STATE COMPENSATION INSURANCE FUND

PAG/ara

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I. INTRODUCTION

DATE OF INJURY:	1/22/19 and during the period from 7/11/13 to 1/22/19
DATE OF BIRTH:	[ ]
OCCUPATION:	Teacher, Occupational Group No. 214
PARTS OF BODY INJURED:	Right hip, right knee, right ankle and left knee
IDENTITY OF PETITIONER:	Defendant, State of California, Department of Corrections.
TIMELINESS:	The Petition for Reconsideration was timely filed
VERIFICATION:	The petition was properly verified
DATE OF AWARD:	5/28/21
PETITIONER'S CONTENTIONS:	Petitioner contends that the reporting of the IME is substantial evidence on the issue of apportionment, and that the decision of this judge was not supported by substantial evidence. Petitioner further contends that if the IME's opinions are found not to be substantial evidence, due process requires the Board to rescind the decision and order development of the record.

II. FACTS

Applicant alleged an industrial injury to his right ankle, right knee, right hip and left knee. The IME, Dr. Gerard Dericks, first found an industrial injury arising from the specific injury of 1/22/19 to the right hip, knee and ankle, and that the left knee symptoms were a compensable consequence of this specific injury (page 13, Joint Exhibit C), but in his report of 10/27/20 (Joint Exhibit A), he modified that opinion on page 10 to conclude that, *"...based on a reasonable degree of medical probability, that 50 percent of the bilateral knee, right hip and right ankle permanent disability is related to the 1.22.19 injury, and compensatory consequences of that injury, and 50 percent is related to the prior right ankle and left knee surgeries and pre-existing degeneration."*

The case was tried on 3/30/21, and on 5/28/21, a Findings of Fact, Award and Order issued. Defendant filed their timely Petition for Reconsideration from this determination.

III. DISCUSSION

The question presented by the opinions of IME Dericks is whether those opinions on apportionment are substantial evidence. Defendant in their Petition for Reconsideration argues that they are.

The law is clear as to the determination of substantiality. An expert's opinion must set forth the reasoning behind the opinion, not merely his or her conclusions. **Granado v. WCAB (1970) 69 Cal. 2d 399, 407.**

An opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence.

In **People v. Bassett (1968) 69 Cal. 2d 122, 141,144**, it is stated that the chief value of an expert's testimony rests on the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion.

More specifically, in **Escobedo v. Marshalls (2005) 70 CCC 604 (en banc)**, this requirement is discussed in detail as it is relevant to the question of apportionment. In order to make the requirements clear, the board, sitting *en banc*, gave an example as follows:

"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."

Therefore, the doctor must identify sources of causation, both industrial and non-industrial.

In our case, Dr. Dericks identified the 1/22/19 specific injury as the source of 50% of the disability to both knees, right hip and right ankle, and the compensatory consequences of that injury.

The IME then went on to identify 50% of the disability for these four body parts as arising out of "prior right ankle and left knee surgeries and pre-existing degeneration."

However, the board in Escobedo requires the doctor to do more. In harmony with the requirements discussed in **Granado** and **Bassett**, supra, it is necessary for the doctor to *set forth reasoning in support of his conclusions.*

The physician must explain how and why the disability is causally related to the industrial injury, and how and why the injury is responsible for the disability assigned by the evaluator.

The board in Escobedo stated that *"...if a physician opines that 50% of the 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."*

This is the missing part in this case, and it is by definition the most important part.

Pursuant to the example given by the Board in Escobedo, and as quoted above, the doctor must do more than identify the pre-existing pathology. The doctor must explain the why and how of how that pathology resulted in disability, and explain why and how that pre-existing pathology causes the percentage of disability assigned.

Here, although the doctor did state in Joint Exhibit C (his report of 11/7/19, page 13) that the 1/22/19 injury caused an aggravation of the pre-existing degeneration in the right hip, knee and ankle, he also found that the left knee injury was a compensatory consequence of the injury to the other body parts, and not as a result of pre-existing degeneration.

In fact, in this same discussion of causation and apportionment on page 13 of Joint Exhibit C, the doctor attributes 100% of the disability to all four body parts to the specific injury of 1/22/19.

Looking forward, the doctor modified this opinion in his report of 10/27/20 (Joint Exhibit A, page 10) to state that based on a review of additional medical records, he now apportioned 50% of the disability to all four body parts to the specific industrial injury, and the remaining 50% to the prior right ankle and left knee surgeries, and pre-existing degeneration.

However, he does not analyze how the surgeries and the degeneration caused the disability, or how this pathology caused the specific number of 50%.

Although the doctor did mention the idea in his prior report (Joint Exhibit C, page 13) that the specific cause an aggravation of the underlying non-industrial degeneration, his opinion significantly changed in the next report (Joint Exhibit A, page 10), where he changed his opinion on causation and apportionment to a 50/50 split. He further, without much explanation, changed his reasoning for this new opinion by noting that the non-industrial causes of 50% of the disability derived out of right ankle and left knee surgeries, and pre- existing degeneration.

The doctor did not explain how and why the two surgeries mentioned caused disability.

The doctor did not explain how and why the pre-existing non-industrial degeneration caused the disability. It is not a response to this to refer back to the language discussed above on page 13 of Joint Exhibit C, because the doctor, other than mentioning review of additional medical records, does not explain why he made this significant change to his opinion on apportionment and causation, or how those additional records affected this change in opinion.

The doctor does not explain why 50% of the total disability, for all four injured body parts, should be apportioned equally between them, or why when combined together they reach 50% of the total disability.

Considering these opinions as a whole, one can readily see the problem. Although the doctor did mention in Joint Exhibit C that the specific injury acted on the non-industrial degeneration to create disability, he initially apportioned all the disability, 100%, to the specific and none to anything else.

When this opinion changed significantly in Joint Exhibit A, an explanation was needed, but unfortunately not given.

This is the lack of analysis that is missing, but that is required by the opinions set forth in **Escobedo** and **Granado**, supra.

Therefore, this is not a problem of isolating one part of the evidence and ignoring the rest of it. It is not a problem of the IME's opinions being inconsistent between Exhibits A and C. Rather, the series of opinions, and how they have changed over time, must be considered as a whole, with due regard to the changes the opinions have made as the information available and the applicant's condition has changed.

This is not an issue of whether there exists factors which might support apportionment to non-industrial conditions. That must be shown and explained by the IME, which did not happen here to the standard set out in **Escobedo**.

Finally, the question of proving apportionment is the defendant's burden to bear. **Escobedo v. Marshalls (2005) 70 CCC 604, 613-614**. As defendant properly recognizes in their appeal, the question of the existence of legal apportionment requires medical evidence that is substantial evidence to support it.

Conversely, it is not the duty of the judge to establish apportionment.

Which brings us to defendant's argument that under **McDuffie v. Los Angeles County Metropolitan Transit (2002) 67 CCC 138**, the board has a duty to develop the record if it is found that the medical evidence is not substantial on this issue. Defendant contends that a failure to do this would be a denial of due process.

However, this is not a case where the defendant did not have an opportunity to properly prepare the record, nor is it a case where a critical piece of evidence is missing. Defendant's petition does not point to any piece of evidence that was missing but that must be considered. Rather, it is a case where the doctor's analysis, after review of the record and two separate full evaluations of the applicant did not meet the standard set forth by the Board in Escobedo. It is a problem of insufficient analysis rather than missing evidence. That was an issue that defendant petitioner had ample opportunity to recognize and correct. There was no request to develop the record and the mandatory settlement conference, or at trial. Although the defendant did initially object to the applicant's DOR, which set in motion the course of events leading to the trial and decision, that objection did not contain any notice of a need to develop the record, and this argument is only now being made for the first time after trial and decision.

Under these circumstances, there was no denial of due process, rather, defendant simply did not recognize the faults in the IME's opinion, and left them uncorrected, even though there was ample opportunity to do so, until after the decision after trial was received. As it is defendant's burden to prove apportionment, and this is simply a matter of not meeting that burden with the necessary substantial medical evidence.

IV. RECOMMENDATION

It is respectfully recommended that, for the reasons discussed above, the Petition for Reconsideration be denied in its entirety.

DATE: 6/23/2021

Curt Swanson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE