**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**ROBERT WHITMAN, *Applicant***

**vs.**

**LOS ANGELES COUNTY, PERMISSIBLY SELF-INSURED, ADMINISTERED BY SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ10212890 (MF); ADJ10213416; ADJ9415451; ADJ11001646 (DISMISSED); ADJ11905618**
**Van Nuys District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the July 29, 2022 Joint Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant was entitled to an unapportioned award of permanent disability.

Defendant contends that the WCJ erred in excluding the medical apportionment identified by the Agreed Medical Examiner (AME) under Labor Code section 4663, as well as legal apportionment to a prior award of disability under Labor Code section 4664.[1]

We have received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration.

Defendant asserts that AME Dr. Luciano identified apportionment under section 4663 which the WCJ disregarded. (Petition for Reconsideration (Petition), at 5:15.) However, the WCJ's

[1] All further statutory references are to the Labor Code unless otherwise stated.

Report observed that the AME's apportionment analysis was not sustainable "because the apportionment percentages stated in his reports and deposition testimony are not supported by an explanation of the mechanism of apportionment and why each approximate percentage was chosen as opposed to a higher or lower percentage." (Report, at p. 3.) As we explained in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 605:

> [I]n 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.] Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, *and it must set forth reasoning in support of its conclusions*. (*Escobedo, supra*, at 621, emphasis added.)

Here, AME Dr. Luciano asserts that his apportionment analyses are within the realm of medical probability. (Ex. 3, Report of AME Michael Luciano, M.D., dated July 21, 2020, at p. 35.) However, Dr. Luciano offers no explanation of the *reasoning* in support of the analysis, other than to note the existence of prior industrial injuries. (*Ibid.*) Accordingly, we agree with the WCJ that the defendant has not met its burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (Lab. Code § 5705; *Escobedo*, *supra,* at 613.)

Defendant further avers the WCJ erred in not "fully crediting" applicant's 2009 Award of 17% disability pursuant to section 4664. (Petition, at 7:14.) Defendant contends that Dr. Luciano "refers to this Stipulation [sic] Award in his apportionment determination in his reports, which, again, represents substantial evidence of apportionment." (Petition, at 7:23.)

Section 4664(b) provides that "[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." (Lab. Code § 4664(b).) In *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229], the Court of Appeals held that in order to establish apportionment to a prior award, "first, the employer must prove the existence of the prior permanent disability award. Then, having established by this proof that the

permanent disability on which that award was based still exists, the employer must prove the extent of the overlap, if any, between the prior disability and the current disability." (*Id*. at 1115.)

Here, defendant has not offered the prior award of disability into evidence, nor has it requested judicial notice of the award. (Evid. Code § 450 et seq.) Additionally, defendant has not identified the medical basis for the prior award, and as a result, has not established how the prior award overlaps with applicant's present disability. (*Kopping, supra*, 142 Cal.App.4th 1099, 1115; see also *State Compensation Ins. Fund v. Industrial Acc. Com. (Hutchinson)* (1963) 59 Cal.2d 45 [28 Cal.Comp.Cases 20] [overlap is not proven merely by showing that the second injury was to the same body part because the issue of overlap requires a consideration of the factors of disability or work limitations resulting from the two injuries, not merely the body part injured].)

Accordingly, we concur with the WCJ that the defendant has not met its burden of establishing apportionment under either sections 4663 or 4664. We will deny reconsideration, accordingly.

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/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**October 21, 2022**

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

**ROBERT WHITMAN**
**STRAUSSNER SHERMAN**
**LEWIS, BRISBOIS, BISGAARD & SMITH**

**SAR/abs**

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

Defendant County of Los Angeles, permissibly self-insured, has filed a timely, verified petition for reconsideration of the Joint Findings and Award dated July 29, 2022, which found that applicant Robert Whitman's injuries of June 22, 2015, January 28, 2012, and July 29, 2010, and cumulative trauma during the period of April 8, 1988 through October 8, 2015, while employed by defendant as a Fire Captain, Occupational Group Number 490, at Los Angeles, California, jointly caused permanent disability of 92%, based on the medical expert opinions of Dr. Michael Luciano in orthopedics, Dr. Edward O'Neill in occupational medicine, Dr. Marta Recasens in ophthalmology, and Dr. Raffi Mesrobian in otolaryngology regarding Whole Person Impairment (WPI) under the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides), but disregarding the opinions of Dr. Luciano regarding apportionment, which were found not substantial under the standards set forth in the Appeals Board's en bane opinion in *Escobedo v. Marsha/ls* (2005) 70 Cal. Comp. Cases 604.

Defendant's petition contends that the undersigned acted in excess of his powers, and that the evidence or findings of fact do not support the order, decision, or award. Specifically, the petition contends that Dr. Luciano's apportionment opinions constitute substantial medical evidence, and that accordingly it was impermissible error not to apply that portion of Dr. Luciano's opinions in furtherance of California Labor Code section 4663, and that it was also error not to subtract a prior 17% stipulated award in case number ADJ9362961, to which Dr. Luciano referred in his reports, under Labor Code section 4664. Defendant further argues that to the extent Dr. Luciano's opinions do not constitute substantial medical evidence, the record should be developed.

Applicant has filed an answer to the petition, countering that Dr. Luciano's opinions on apportionment do not constitute substantial evidence, and that the record should not be developed on the issue of apportionment because defendant failed to meet its burden of proof at trial.

## II FACTS

In Case Number ADJ10212980, which was designated as the Master File (MF) in the order of consolidation at trial on May 10, 2022, the parties stipulated that Robert Whitman, while

employed during the period of April 8, 1988 through October 8, 2015, at which point he was 57 years of age, as a Fire Captain, Occupational Group Number 490, at Los Angeles, California, by Los Angeles County, permissibly self-insured, sustained injury arising out of and in the course of employment to his lumbar spine, bilateral knees, hips, shoulders, hearing loss, skin, vision, and hernia (MOH/SOE 5/10/2022, p. 2, lines 5-7 and 12-17).

In Case Number ADJ10213416, the parties stipulated that Robert Whitman, while employed on January 28, 2012, at age 54, as a Fire Captain, Occupational Group Number 490, at Los Angeles, California, by Los Angeles County, permissibly self-insured, sustained injury arising out of and in the course of employment to his right knee (MOH/SOE 5/10/2022, p. 3, lines 4-8).

In Case Number ADJ9415451, the parties stipulated that Robert Whitman, while employed on July 29, 2010, at age 52, as a Fire Captain, Occupational Group Number 490, at Los Angeles, California, by Los Angeles County, permissibly self-insured, sustained injury arising out of and in the course of employment to his left knee (MOH/SOE 5/10/2022, p. 3, lines 17-21).

In Case Number ADJ11905618, the parties stipulated that Robert Whitman, while employed on June 22, 2015, at age 57, as a Fire Captain, Occupational Group Number 490, at Los Angeles, California, by Los Angeles County, permissibly self-insured, sustained injury arising out of and in the course of employment to his right knee (MOH/SOE 5/ l 0/2022, p. 4, lines 10-14).

Case Number ADJ11001646 was ordered dismissed, without prejudice, at the trial hearing held on May 10, 2022 (MOH/SOE 5/10/2022, p. 4, lines 5-8).

In case numbers ADJ10212890, ADJ10213416, and ADJ9415451, the parties stipulated that applicant Robert Whitman's earnings were maximum for purposes of indemnity rates at the time of each injury (MOH/SOE 5/10/2022, p. 2, lines 17-19; p. 3, lines 9-10 and 22-23). Accordingly, it was found that applicant's earnings are maximum at the time of injury in each of these cases, as well as in ADJ11905618, which is in the same year as the end of the cumulative trauma in ADJ10212890.

Based on the medical expert opinions of Dr. Michael Luciano in orthopedics, Dr. Edward O'Neill in occupational medicine, Dr. Marta Recasens in ophthalmology, and Dr. Raffi Mesrobian in otolaryngology, it was found that applicant Robert Whitman's injuries jointly caused permanent disability of 92%, entitling applicant to 785.25 weeks of disability indemnity payable at the rate of $290.00 per week in the total sum of $227,722.50, followed by a life pension commencing at the initial weekly rate of $247.38 per week and increasing each January 1 thereafter by a

percentage commensurate with any increase in the State Average Weekly Wage (SA WW) during the year prior, less credit for sums advanced, and less an attorney fee of $35,378.80, which is to be commuted from the side of the permanent disability and life pension award per the calculations of the Disability Evaluation Unit (DEU) and paid to applicant's counsel of record, Straussner Sherman.

Specifically, these physicians' assessments of Whole Person Impairment (WPI) percentages using the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) were adjusted under Labor Code section 4660.1 and the current rating schedule to determine percentages of permanent disability for each industrially affected body part or condition as follows:

06.05.00.00-2-[xl.4]3-490H-5-6% PD, hernia
08.01.00.00-9-[x1.4]13-4901-20-25% PD, skin
11.01.01.00-2-[xl.4]3-4901-5-6% PD, tinnitus
12.03 .00.00-2-[x1.4]3-4901-5-6% PD, vision
13 .08.00.00-1-[x 1.4]1-4901-2-3% PD, left hip
13.08.00.00-1-[x1.4]1-4901-2-3% PD, right hip
15.03.0l.00-8-[xl.4]11-4901-16-20% PD, lumbar spine
16.02.02.00-5-[xl.4]7-4901-11-14% PD, left shoulder
16.02.02.00-1-[xl.4]1-4901-2-3% PD, right shoulder
17.05 .06.00-11-[x1.4]15-4901-21-26% PD, left knee
17.05. I 0.08-32-[xl .4]45-4901-54-59% PD, right knee

Dr. Luciano's non-industrial apportionment, and apportionment between injuries, was not applied to these percentages of permanent disability, because the apportionment percentages stated in his reports and deposition testimony are not supported by an explanation of the mechanism of apportionment and why each approximate percentage was chosen as opposed to a higher or lower percentage.

The permanent disability percentages for each industrially affected body part or condition were combined on the Combined Values Chart (CVC) as directed by the current rating schedule, with the exception of the knees, which were added as directed by Dr. Luciano at pp. 22-23 of his deposition of December 7, 2021 (Joint 1). Adding 59% (right knee) and 26% (left knee) produces the sum of 85%, to which 25%, 20%, 14%, 6%, 6%, 6%, 3%, 3%, and 3% were combined on the CVC. Because of the compressive effect of the formula of the CVC[2], the percentages of permanent

[2] a+b(l-a)

disability of the left hip, right hip, and left shoulder are irrelevant to the end result of 92% combined permanent disability.

Additionally, it was found that the presumption of Labor Code section 3212 and preclusion from apportionment in section 4663(e) apply to the hernia injury, because applicant was an employee of a county fire department, and the other conditions of section 3212 are met. Based on the medical expert opinions of all physicians in evidence, it was also found that applicant will require further medical treatment to cure or relieve from the effects of the injuries, and each of them, and that he may be entitled to reimbursement of self-procured medical treatment, subject to proof, in an exact amount to be adjusted by and between the parties, with the WCAB retaining jurisdiction in the event of a dispute.

The issue of entitlement to a Supplemental Job Displacement Benefit (SJDB) voucher was raised in case number ADJ10212980 only (MOH/SOE 5/10/2022, p. 3, line 2). Based on the presence of permanent partial disability and the absence of evidence of a return-to-work offer that meets the requirements of Labor Code section 4658.7, it was found that applicant is entitled to an SJDB voucher under Labor Code section 4658.7 for the cumulative trauma injury in ADJ10212980.

Based on the criteria for determining reasonable attorney fees found in California Code of Regulations, title 8, section 10844, it was found that the reasonable value of the services and disbursements of applicant's attorney is $35,378.80, or 15% of the value of the award as calculated by the DEU, which sum is to be commuted from the side of the award of permanent disability and life pension and paid to Straussner Sherman, the law firm that is applicant’s counsel of record.

Defendant County of Los Angeles, through its counsel of record herein, filed a timely, verified petition for reconsideration of the findings and award of 92% permanent disability, raising only the issue of apportionment under Labor Code sections 4663 and 4664, contending that defendant had met its burden of proof on this issue and if not, requesting that the record be developed. Applicant filed an answer to the petition, contending that defendant had not met its burden to prove apportionment, and requesting that the record not be developed as it was incumbent on defendant to use interrogatories or deposition testimony to procure substantial evidence on this issue before setting it for trial.

## III.
## DISCUSSION

As a preliminary note, although defendant did not expressly raise the issue of apportionment at trial (see MOH/SOE 5/10/2022, pp. 2-4), it is part and parcel of permanent disability, and the provisions of Labor Code sections 4663 and 4664 cannot be waived. Accordingly, the issue is not deemed waived and should be considered fully.

As explained in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 71 Cal. Comp. Cases 1687 and *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it rhust be based on pe1tinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions:

> 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, supra*, 70 Cal. Comp. Cases 604 at 621.

Dr. Luciano's apportionment opinions unfortunately do not meet the requirements of Escobedo. He provided apportionment percentages and identified the injury or cause to which he attributed each percentage, but there was no explanation of how each factor or injury was causing disability, and why the percentage of apportionment selected was the correct percentage. Accordingly, the opinions of Dr. Luciano were found not to constitute substantial medical evidence on the issue of apportionment under Labor Code section 4663, and those unsubstantial opinions were not applied to reduce the percentages of permanent disability or to divide them into separate awards.

The same is true with respect to the issue of apportionment of the prior stipulated award under Labor Code section 4664. Although that section does create a conclusive presumption

regarding the existence of permanent disability previously awarded, it is defendants' burden to prove overlap between the awarded disability and the permanent disability in a subsequent award. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) Dr. Luciano does not offer any explanation how or why the previous award of 17% permanent disability of the left shoulder in case number ADJ9362961 overlaps with the 14% permanent disability to that body part found in the instant cases. Accordingly, defendants have not met their burden of proof on that issue and it is not assumed that the prior award overlaps with the present one.

As applicant has pointed out in his answer, defendant could have obtained a supplemental report from Dr. Luciano addressing how and why he found certain percentages of apportionment, and addressing the issue of overlap with the prior stipulated award in a different case. Alternatively, defendant could have cross-examined Dr. Luciano on these subjects. There is no reason to presume that the requirements of *Escobedo* and *Kopping* were not known to defendant before setting trial in this matter. Accordingly, there does not appear to be good cause to delay applicant's benefits any further while exploring the possibility that Dr. Luciano is able to justify his unsubstantiated opinions regarding apportionment.

## IV.
## RECOMMENDATION

It is respectfully recommended that the petition be denied.

DATE: 9/6/2022

**CLINT FEDDERSEN**
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE