

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

LORNA SUTHERLAND, *Applicant*

vs.

**GOLD TRAIL UNION SCHOOL DISTRICT, permissibly self-insured,
administered by SCHOOLS INSURANCE AUTHORITY, *Defendants***

Adjudication Numbers: ADJ12140821 ADJ14587162

Sacramento District Office

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

Applicant and Defendant each seek reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on March 23, 2023, wherein the WCJ found in pertinent part that applicant's disability should be rated using "dual occupational variants, 250 and 322" and that 75% of applicant's disability was caused by her industrial injury and 25% would be apportioned to prior non-industrial factors.¹

Applicant contends that the Findings do not include findings as to permanent disability and attorney fees, and that defendant did not meet its burden of proof regarding apportionment.

Defendant contends that the Findings do not include a finding of permanent disability and that applicant's disability should be apportioned 50% industrial and 50% non-industrial.

We received the WCJ's Report and Recommendation on Applicant's and Defendant's Petitions for Reconsideration (Report) recommending that applicant's Petition for Reconsideration (Petition), and defendant's Petition be denied. We did not receive an Answer from defendant; Applicant's counsel states that applicant's Petition is also an Answer to defendant's Petition.

We have considered the allegations in the Petitions and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration,

¹ We note that applicant's Petition includes case number ADJ14587162 in the caption. However, at the request of applicant, that case was dismissed without prejudice at the January 24, 2023, trial and will not be addressed herein. (See (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 24, 2023, p. 2.)

rescind the Findings and return the matter to the WCJ for further proceedings consistent with this opinion, and to issue a new decision from which any aggrieved person may timely seek reconsideration.

BACKGROUND

Applicant claimed injury to her right shoulder on January 7, 2019, while employed by defendant as a bus driver and cafeteria worker.

Agreed medical examiner (AME) Stephen P. Abelow, M.D., evaluated applicant on October 28, 2019. Dr. Abelow examined applicant, took a history, and reviewed the medical record. The diagnoses were: “Contusion, sprain and strain of right shoulder with rotator cuff tear and rotator cuff arthropathy” and “Painful paresthesias [abnormal touch sensation] of the right upper extremity.” (Joint Exh.1, Stephen Abelow, M.D., October 28, 2019, p. 12.) Regarding apportionment of applicant’s right shoulder disability, Dr. Abelow stated:

It is my opinion, with reasonable medical probability, that 75% of the permanent disability to the right shoulder is due to the industrial injury 1/7/19. It is my opinion, with reasonable medical probability, that 25% of the permanent disability to the right shoulder is due to prior problems with the right shoulder requiring arthroscopy, removal of the bone spur that was pressing on the rotator cuff, and the natural progression of that problem. The MRI of the right shoulder, 1/22/19, showed significant degenerative changes of the acromioclavicular and glenohumeral joint as well as fatty infiltration of the supraspinatus and infraspinatus muscle bellies, indicating a chronic rotator cuff problem.
(Joint Exh. 1, p. 16.)

After reviewing additional medical records, in his January 31, 2021, supplemental report Dr. Abelow concluded:

It is my opinion, with reasonable medical probability, that 50% of the permanent disability to the right shoulder is due to the industrial injury of 1/7/19. It is my opinion, with reasonable medical probability, 50% of the permanent disability to the right shoulder is due to prior problems with the right shoulder requiring arthroscopy, subacromial decompression, and rotator cuff repair 8/15/06 and the natural progression of that problem. The degenerative changes of the acromioclavicular joint, glenohumeral joint, and fatty infiltration of the supraspinatus and infraspinatus muscle bellies indicate a chronic rotator cuff problem. The right elbow loss of range of motion is part and parcel to the right shoulder impingement problem/biceps problem/osteoarthritis problem.
(Joint Exh. 2, Stephen P. Abelow, M.D., January 31, 2021, p. 3.)

Dr. Abelow reiterated his opinions regarding apportionment in his April 22, 2021, report, stating that:

My impressions and conclusions of my report dated 1/31/21 remain unchanged. It is my opinion, with reasonable medical probability, that 50% of the permanent disability to the right shoulder is due to prior problems with the right shoulder requiring arthroscopy, subacromial decompression, and rotator cuff repair 8/15/06 prior to working for the Gold Trail Union School District in 2007. It is my opinion, with reasonable medical probability, that 50% of the permanent disability to the right shoulder is due to industrial injury of 1/7/19. This is after serious reconsideration of all causes of Ms. Sutherland's permanent impairment to her right shoulder.

(Joint Exh. 3, Stephen P. Abelow, M.D., April 22, 2021, p. 3.)

The parties proceeded to trial on January 24, 2023. The issues submitted for decision were “Whether apportionment by AME Stephen Abelow, M.D., is valid” and “The occupational variant to be used to adjust permanent disability.” (MOH/SOE, p. 2.)

DISCUSSION

In order to constitute substantial evidence concerning the issue of apportionment, the medical opinion must disclose the reporting physician’s familiarity with the concepts of apportionment and must identify 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. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Also, the physician must explain the nature of the non-industrial factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned by the physician. For example, if a physician states 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 (*Id.* at 621.)

Here, in his initial report Dr. Abelow stated his opinion that “75% of the permanent disability to the right shoulder is due to the industrial injury ... [and] that 25% of the permanent disability to the right shoulder is due to prior problems with the right shoulder requiring arthroscopy, removal of the bone spur that was pressing on the rotator cuff, and the natural progression of that problem.” (Joint Exh. 1, p. 16.) In his subsequent reports Dr. Abelow stated

that 50% of applicant's right shoulder disability was "due to prior problems with the right shoulder requiring arthroscopy, subacromial decompression, and rotator cuff repair 8/15/06 prior to working for the Gold Trail Union School District" and 50% of applicant's right shoulder disability was caused by her January 7, 2019 injury. (Joint Exh. 2, p. 3; Joint Exh 3, p. 3.)

Having reviewed Dr. Abelow's reports and deposition testimony, we see that Dr. Abelow did not explain the basis for the change in his opinion regarding apportionment of applicant's right shoulder disability, but more importantly, in none of his reports did he explain how and why the pre-existing factors were causing permanent disability at the time of the evaluation, nor how and why those factors were responsible for 50% of applicant's right shoulder disability. (*Escobedo v. Marshalls, supra.*) Thus, his reports are not substantial evidence and they cannot be the basis for the decision regarding applicant's disability. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].)

The Appeals Board has the discretionary authority to develop the record when it does not contain substantial evidence pertaining to a threshold issue, or when it is necessary in order to fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) When the medical record requires further development, the record should first be supplemented by physicians who have already reported in the case. (See *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Under the circumstances of this matter, upon return to the WCJ, it is appropriate that the parties request AME Dr. Abelow to submit a supplemental report clarifying his opinion regarding apportionment of applicant's right shoulder disability, as discussed above.

It is also important to note that in determining the percentages of permanent disability caused by an industrial injury, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity. (Lab. Code, § 4660, subd. (a).) "It has been determined that where the duties of the employee embrace the duties of two forms of occupation, the rating should be for the occupation which carries the higher percentage." (*Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 505 [37

Cal.Comp.Cases 393, 399]; *National Kinney v. Workers' Comp. Appeals Bd. (Casillas)* (1980) 113 Cal.App.3d 203, [45 Cal.Comp.Cases 1266].) Therefore, applicant's permanent disability should be rated using the single occupational variant that results in the higher disability rating.

Accordingly, we grant reconsideration, rescind the Findings and return the matter to the WCJ for further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's and defendant's Petitions for Reconsideration of the Findings of Fact issued by the WCJ on March 23, 2023, are **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the March 23, 2023, Findings of Fact is **RESCINDED**, and the matter is **RETURNED** to the WCJ to conduct further proceedings consistent with this opinion and to issue a new decision from which any aggrieved person may timely seek reconsideration.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 9, 2023

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

**LORNA SUTHERLAND
SMOLICH & SMOLICH
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP**

TLH/mc

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