

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

M. SUSAN GROVER, *Applicant*

vs.

**TEAM SAN JOSE;
ALASKA NATIONAL INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ11387717
San Jose 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/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 8, 2024

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

**M. SUSAN GROVER
JC DUNN LAW APC
CHOU LAW GROUP, LLP**

JMR/ara

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1. Applicant's Occupation: Usher
Applicant's current Age: 91
Date of Injury: 04/22/2018
Parts of Body Injured: Cervical spine, bilateral shoulders, and left ankle.

2. Identity of Petitioner: Defendant filed the Petition.
Timeliness: The petition was timely filed on 01/12/2024.
Verification: The Petition was properly verified.

3. Date of Issuance of Order: 12/22/2023

4. **Petitioner's contentions:** Petitioner contends that 1) the WCAB has acted without or in excess of its jurisdiction; 2) the evidence does not justify the findings of fact; and 3) the findings of fact does not support the order, decision or award. Specifically, Petitioner contends that the undersigned erred in finding impairment with no apportionment.

Applicant has filed an Answer.

II.
FACTS

On 4/22/2018, applicant, Susan Grover, sustained injury arising out of and arising in the course of employment to the cervical spine, bilateral shoulders, left rib, and left ankle when she slipped and fell, landing on her left side. The parties agreed to use Joel Renbaum, M.D., as the Agreed Medical Evaluator. Dr. Renbaum issued two reports.

In his 4/15/2019 report, Dr. Renbaum reviewed applicant's 12/18/2018 deposition transcript and 9.25 inches of medical records, dating from 1991 through April 2018. The records reviewed included the 7/16/1991 AME report of Dr. John Colman, M.D., which was the basis for the 25.3% Award for the back and bilateral knees. He found applicant permanent and stationary with the following impairment to the cervical spine, right shoulder, left shoulder and left ankle:

Cervical spine: 6% WPI (DRE, Category II)
Right shoulder: 5% WPI (9% UEI)
Left shoulder: 13% WPI (22% UEI)
Left ankle: 3% WPI

He opined that 100% of the cervical spine and bilateral shoulder impairment was due to the 4/22/2018 industrial injury. For the left ankle, Dr. Renbaum apportioned 50% of the impairment

to pre-existing non-industrial medical conditions and 50% to the 4/22/2018 injury. However, there was no discussion as to how and why the pre-existing non-industrial medical conditions were responsible for 50% of the left ankle impairment. (Joint Exhibit 4)

In his 7/01/2019 report, Dr. Renbaum reviewed additional records and noted that applicant had received a prior Award for a 12/23/1985¹ work injury, which included her bilateral shoulders. He mentioned applicant had had an MRI scan at that time that showed a partial tearing in the left shoulder. However, he had not seen the actual MRI report. Although he had previously reviewed Dr. Colman's 7/16/1991 report and found no apportionment to the prior Award, he now apportioned 10% to pre-existing problems with the left shoulder. (Joint Exhibit 5) The parties ultimately settled by way of Stipulations with Request for Award of 33% permanent disability based on the AME reports. (Joint Exhibits 1 and 2) Thereafter, applicant filed a timely Petition to Reopen for New and Further Disability alleging her condition had deteriorated.

On 3/28/2023, applicant was re-evaluated by Dr. Renbaum, who issued his report the same day. Dr. Renbaum was provided additional medical records and reviewed applicant's deposition transcript. He again discussed applicant's 1986 injury when she was pushed down an escalator, injuring her neck, back, shoulders and knees. He noted applicant's current complaints of constant ongoing pain in both shoulders, and constant and persistent neck and left ankle pain. Dr. Renbaum found applicant permanent and stationary with the following impairment to the cervical spine, right shoulder, left shoulder and left ankle:

Cervical Spine: 6% WPI (DRE Category II)
Left shoulder: 25% WPI (42% UEI)
Right shoulder: 19% WPI (32% UEI)
Left ankle: 3% WPI

With respect to apportionment, he opined that 100% of the cervical spine impairment was due to the 4/22/2018 injury, and found no change to his prior 50% apportionment to pre-existing problems and 50% due to the 4/22/2018 injury for the left ankle. As to the bilateral shoulders, he opined,

As to the patient's bilateral shoulders, upon review of all available material, including the most recent x-rays and MRI reports, it is now my opinion that it is appropriate to apportion 50% of the patient's left and right shoulder levels of impairment to the industrial injury of April 22, 2018 and 50% to previous shoulder problems, her injury in 1986 for which she received an award and, most importantly, her underlying marked osteoarthritic changes in the shoulders.

(Joint Exhibit 3)

¹ Dr. Renbaum references both, a 12/23/1985 injury and a 12/23/1986 injury. However, the correct date of injury for the prior Award is 12/23/1986 (ADJ2239286).

On 10/18/2023, the parties proceeded to trial. Following applicant's testimony, the matter was submitted for decision. Dr. Renbaum's 3/28/2023 report rates as follows:

Cervical spine: 15.01.01.00 - 6 - [1.4] 8 - 240E - 7 - 10%
Left shoulder: 16.02.01.00 - 25 - [1.4] 35 - 240D - 30 - 38%
Right shoulder: 16.02.01.00 - 19 - [1.4] 27 - 240D - 23 - 30%
Left ankle: 17.07.04.00 - 3 - [1.4] 4 - 240E - 4 - 6%
38 C 30 C 10 C 6 = 63% (\$60,040.00)

The undersigned found Dr. Renbaum's 3/28/2023 apportionment opinion conclusory and not substantial evidence on apportionment and awarded applicant an unapportioned permanent disability award of 63%, payable at the permanent disability rate of \$160.00 per week, for 375.25 weeks, for a total sum of \$60,040.00 less credit of \$24,320.00, which is the monetary value of the prior 33% Award, and less attorney's fees.

Defendant filed a timely Petition for Reconsideration.

III. **DISCUSSION**

In the Petition for Reconsideration, defendant argues Dr. Renbaum's reporting is substantial medical evidence on the issue of apportionment. In this regard, defendant indicated Dr. Renbaum had reviewed applicant's medical records, going as far back as 1991, which documented applicant's various prior injuries and treatment; nearly 1,500 pages from Dr. Noriega; and records documenting injuries to the bilateral knees from 1998 and to the back from December 1986. Defendant noted a 2007 MRI report of the left knee and complaints of bilateral knee pain through 2/11/2014, complaints of bilateral knee pain and right and left shoulder pain in 2014, and a diagnosis of rotator cuff tear of the left shoulder and a need for MRI of the right shoulder. Defendant also noted applicant's prior Stipulated Award of 25.3% for the back and bilateral knees for the 12/23/1986 injury.

In his 3/28/2023 report, Dr. Renbaum reviewed his prior reporting, in which he initially found 100% of the cervical and shoulder impairment were caused by the 4/22/2018 injury, and 50% of the left ankle impairment was due to the 4/22/2018 injury and 50% to pre-existing conditions. He noted that upon review of additional records, he had amended his apportionment opinion indicating 10% of the left shoulder impairment was due to pre-existing problems. Dr. Renbaum indicated he had reviewed 1,105 medical records and applicant's 2/15/2023 deposition transcript. It is noted that these additional records were from dates 4/24/2018 through 12/06/2022. On page 23, Dr. Renbaum indicated that based on review of the additional records, it was now his opinion that 50% of the left and right shoulder impairment is due to the instant injury and 50% is due to previous shoulder problems, her injury in 1986 for which she received an award and, most importantly, her underlying marked osteoarthritic changes in the shoulders. (Joint Exhibit 3)

Defendant argues that in Dr. Renbaum's prior 2019 reporting, he did not have all of the recent x-rays and MRI reports of applicant's bilateral shoulders that were in his possession at the time of the March 2023 evaluation, which was likely the reason for his current apportionment opinion.

However, Dr. Renbaum did not explain why review of the recent records now support a different apportionment determination. For example, Dr. Renbaum did not explain the nature of applicant's significant degenerative changes nor how and why they are responsible for applicant's current impairment, especially in light of applicant's left shoulder surgery which resulted in displaced and fractured screws. Further, Dr. Renbaum did not properly explain how and why the prior 1986 injury for which applicant received an Award for the back and bilateral knees, overlaps with applicant's current cervical, bilateral shoulders, and left ankle disability.

As stated in *Escobedo*, the mere fact that a report addresses the issue of causation of permanent disability and makes an apportionment determination does not necessarily render the report one upon which the WCAB may rely. This is because it is well established that any decision of the WCAB must be supported by substantial evidence.² Thus, to be substantial evidence on the issue of apportionment, 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. 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. As the Board explained, if a physician opines that 50% of an employee's disability is caused by degenerative changes, as Dr. Renbaum has done in this instance, the physician must explain the nature of the degenerative changes, how and why they are causing permanent disability, and how and why they are responsible for approximately 50% of the disability.³

While Dr. Renbaum summarized applicant's extensive medical history, he did not explain the nature of applicant's marked osteoarthritic changes in the shoulders, particularly considering applicant has undergone left shoulder surgery and has displaced and fractured screws as a result. Nor has Dr. Renbaum explained how and why the osteoarthritic changes are causing permanent disability and how and why they are responsible for 50% of the disability. Defendant asserts that it is "common knowledge" that diagnostic studies, such as x-rays and MRI's, show degenerative changes and tears, and that Dr. Renbaum specifically commented on these diagnostic studies when he addressed apportionment for osteoarthritis. While doctor Renbaum summarized applicant's extensive medical records, he did not specifically discuss the findings when he addressed apportionment. Defendant further argues that the more remote or unrelated the prior injury, the more a doctor would have to explain apportionment findings, and the more significant and documented the prior issues, the less they need to be explained as they are clear and undisputed. Established case law on apportionment makes no such distinction.

Further, as explained in the Opinion, Dr. Renbaum's 50% non-industrial apportionment includes the 1986 injury for which applicant received a 25.3% Award for her back and bilateral knees. However, Dr. Renbaum did not discuss how the prior back and bilateral knee disability overlaps with applicant's current cervical, bilateral shoulder and left ankle disability. For Labor Code section 4664 apportionment to apply, the employer must prove the extent of the overlap, if any,

² *Escobedo v. Marshalls, CNA Ins. Co.*, 70 Cal. Comp. Cases 604, 620 (Cal. Workers' Comp. App. Bd. April 19, 2005)

³ *Escobedo v. Marshalls* (supra, at p. 621)

between the prior disability and the current disability.⁴ Here, Dr. Renbaum has not discussed the extent of the overlap between the prior awarded disability with applicant's current disability, which would have been rated under two different permanent disability schedules.

Finally, defendant asserts that, because Dr. Renbaum is an Agreed Medical Evaluator, the parties are bound by his opinions. However, whether an evaluator is an AME or a QME, their opinions must still be based on substantial medical evidence. In this instance, the undersigned found Dr. Renbaum's opinion conclusory and not substantial evidence on apportionment. Defendant bears the burden of proving apportionment. As discussed above, Dr. Renbaum's opinion, without detailed discussion of the how and why as required by *Escobedo*⁵, is not substantial evidence of apportionment. As such, the undersigned found applicant is entitled to an unapportioned award.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

DATE: 01/24/2024

**NORMA L. ACOSTA
WORKERS' COMPENSATION JUDGE**

⁴ *Kopping v. WCAB* (2006) 71 CCC 1229.

⁵ *Escobedo v. Marshalls* (supra).