

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

KATHERINE SMITH, *Applicant*

vs.

**UC DAVIS MEDICAL CENTER, permissibly self-insured;
adjusted by SEDGWICK CMS, *Defendant***

**Adjudication Number: ADJ13622922
Sacramento District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.

In the Findings and Award of January 21, 2022, the Workers' Compensation Administrative Law Judge ("WCJ") found that applicant, while employed as a phlebotomist on September 2, 2018, sustained injury arising out of and in the course of employment to her left knee. The WCJ also found that applicant became permanent and stationary ("P&S") on April 15, 2021, that applicant's left knee injury resulted in permanent disability of four percent, without apportionment, and that there is a need for future medical care of the left knee.

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant contends that the WCJ erred in relying upon the medical opinion of Dr. Bathgate, the Panel Qualified Medical Evaluator ("PQME") in orthopedics, because Dr. Bathgate's opinion is speculative and based upon an inaccurate medical history and examination, and that a new physician should be appointed for further development of the medical record.

Defendant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the

reasons stated below and in the WCJ's Report, which we adopt and incorporate to the extent set forth in the attachment to this opinion, we will affirm the Findings and Award of January 21, 2022.

PERMANENT AND STATIONARY DATE

Applicant contends that she is not permanent and stationary because "her future medical care would subject her to have a total knee replacement." (Petition for Reconsideration, p. 4:1-5.) We reject the contention because it is based upon speculation. Although the WCJ found that applicant is entitled to further medical treatment, Dr. Bathgate testified in her deposition that it is "possible" that applicant may need total left knee replacement "in the future." (Joint Exhibit BB, Bathgate deposition of August 24, 2021, p. 27.) There is no medical evidence that a total left knee replacement was recommended for applicant at the time of trial. Applicant testified at trial that in November 2020 she saw Dr. Meehan, who did not recommend a knee replacement then, but applicant should return in a year. Although applicant testified that she would have this surgery if it was recommended, applicant did not return to Dr. Meehan after a year (November 2021) because "it slipped her mind." (Summary of Evidence, 12/15/21, p. 7:1-17.) Thus, it appears that applicant attached no urgency to having left knee replacement surgery. Accordingly, we conclude that the WCJ did not err in finding applicant permanent and stationary as of the date of Dr. Bathgate's medical evaluation of April 15, 2021. (Joint exhibit AA.)

CAUSE OF INJURY VERSUS PERMANENT DISABILITY; APPORTIONMENT

On page five of her petition, applicant complains that Dr. Bathgate's medical opinion is insubstantial because the doctor did not review medical records predating the industrial injury of September 2, 2018, and because the doctor erroneously attributed the industrial injury to arthritis related to applicant's pre-existing obesity. It appears applicant is alleging that Dr. Bathgate relied upon an incorrect legal theory by disregarding the principle that the existence of a contributing factor in an industrial injury does not necessarily equate to a finding that the contributing factor likewise is causing permanent disability; the analysis of these two issues may be different. (*Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision] ("*Reyes*"), citing *Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com. (Gideon)* (1953) 41 Cal.2d 676 (18 Cal.Comp.Cases 286) [employee's head injury resulting from fall caused by non-industrial seizure found compensable].)

We are not persuaded that Dr. Bathgate disregarded the *Reyes* principle. Dr. Bathgate did not conclude that applicant's left knee injury of September 2, 2018 was caused by obesity-related

arthritis; the doctor concluded that the mechanism of applicant's slip-and-fall is what caused her left knee injury. To the extent applicant relies on the *Reyes* principle to contend that Dr. Bathgate erred in apportioning twenty percent of the applicant's permanent left knee impairment to non-industrial obesity, we find that applicant's reliance is misplaced. This is because the WCJ rejected Dr. Bathgate's apportionment under Labor Code section 4663; the WCJ issued an un-apportioned award of permanent disability. Besides the fact that *Reyes* is off point concerning the issue of apportionment, we also note that applicant is not aggrieved because as just noted the WCJ did not adopt Dr. Bathgate's apportionment opinion; the WCJ apportioned all of applicant's permanent disability to the industrial injury. (See Lab. Code, §§ 5900, 5903.)

PERMANENT IMPAIRMENT

Applicant contends that in evaluating permanent impairment, Dr. Bathgate failed to consider whether applicant's second knee surgery was successful. However, Dr. Bathgate addressed this issue on page seventeen of her deposition. The doctor testified that although she did not ask applicant whether the second surgery was successful, applicant was back at work after taking only six weeks off, and her treating physicians were not recommending further surgery. (Joint exhibit BB, Bathgate deposition of August 24, 2021, p. 17.) Applicant also alleges that in evaluating permanent impairment, Dr. Bathgate failed to consider whether "applicant currently has torn ligaments, or currently [needs] a total knee replacement," and that this alleged failure shows "the lack of adherence to AMA Guides 5th Edition rating criteria, as well as a lack of reasonable medical probability...in forming her opinions on rating whole person impairment...and analysis." (Petition for Reconsideration, p. 7.)

This allegation is unpersuasive because applicant does not refer to evidence that she suffers from "torn ligaments." In addition, we already explained above that there was no definitive medical recommendation for left knee replacement surgery at the time of trial; it had slipped applicant's mind to re-visit Dr. Meehan for a possible recommendation. Under these circumstances, applicant fails to persuade us that Dr. Bathgate should have considered the *possibility* of *future* left knee replacement surgery in evaluating permanent impairment. (See *Heggin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 (36 Cal.Comp.Cases 93) [medical opinions based on speculation are not substantial evidence].)

Finally, applicant alleges that Dr. Bathgate's evaluation of permanent impairment is inaccurate because the doctor performed applicant's medical evaluation remotely, by video; the

doctor did not take an in-person, physical measurement of the range of motion of applicant's left knee using the appropriate medical instrument. Applicant further alleges that Dr. Bathgate failed to consider applicant's altered gait.

These allegations are unpersuasive. As the WCJ explains in her Report, Dr. Bathgate testified in her deposition that she performed the range of motion measurements by viewing applicant on video. However, Dr. Bathgate twice repeated in her deposition testimony that her measurement of range of motion by telemedicine was accurate, and that the doctor's report should be considered complete with this way of measuring the range of motion. (Joint Exhibit BB, pp. 7-9.) Moreover, in finding that applicant's left knee injury caused permanent disability of four percent, the WCJ did not rely upon Dr. Bathgate's range of motion measurement by video. Rather, the WCJ relied upon Dr. Bathgate's evaluation of permanent impairment due to applicant's surgery consisting of partial left knee lateral meniscectomy. (Joint exhibit AA, Bathgate report dated April 15, 2021, pp. 17-18.) We also note that Dr. Bathgate did not disregard applicant's altered gait; the doctor acknowledged in her deposition that she observed applicant's "slight limp" on video. Following this testimony, however, there was a long discourse about Dr. Bathgate's evaluation of permanent impairment. Again, it was not based upon applicant's slight limp but upon the partial lateral meniscectomy surgery that was performed on applicant, and the persistence of her patella-femoral pain. (Joint Exhibit BB, Bathgate deposition at pp. 22-27; Joint exhibit AA, Bathgate report dated 4/15/21, pp. 17-18, referencing Tables 17-3, 17-31 & 17-33 of the AMA Guides.)

Here we pause to note that in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808, 824 [75 Cal.Comp.Cases 837] ("*Almaraz-Guzman*"), the Court of Appeal stated that application of the AMA Guides to rate impairment must take into account the instructions on their use, which prescribe the exercise of clinical judgment in the impairment evaluation even beyond the descriptions, tables, and percentages provided for each of the listed conditions. Thus, an evaluation of permanent impairment that relies upon a physician's clinical judgement, and that goes beyond a "strict rating" under the descriptions, tables, and percentages provided for each of the conditions expressly categorized in the AMA Guides, is known as an "*Almaraz-Guzman*" rating of permanent impairment. The goal of formulating a valid impairment rating under *Almaraz-Guzman* is to approximate the rating that accurately reflects the injured employee's actual impairment, which may or may not be the highest rating depending on the facts

of the case at hand. (*City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360, 1364-1365 [79 Cal.Comp.Cases 1].)

In this case, Dr. Bathgate testified on page twenty-six of her deposition that the permanent impairment of applicant's left knee "was accurately described using the strict AMA Guides" (Tables 17-3, 17-31 & 17-33 noted above), and that the doctor considered *Almaraz-Guzman* but found the principle unnecessary to achieve an accurate impairment rating. Applicant's allegations that Dr. Bathgate ignored applicant's slight limp and inaccurately measured her range of motion do nothing to undermine Dr. Bathgate's unwavering opinion that a strict rating under the AMA Guides accurately reflects applicant's permanent impairment in this case.

Since we agree with the WCJ that Dr. Bathgate's report and deposition are substantial evidence, there is no need to appoint a new physician, as contended by applicant. In closing, we also note that applicant's allegation that Dr. Bathgate's medical report is insubstantial and therefore inadmissible is legally incorrect. The fact that a medical report may be insubstantial evidence does not make it inadmissible; nor does the fact that a medical report may be substantial make it admissible.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of January 21, 2022 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 22, 2024

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

**KATHERINE SMITH
GOLDBERG & LOREN
LAW OFFICE OF TIMOTHY HUBER**

JTL/ara

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

I

<u>Date of Injury:</u>	September 2, 2018
<u>Age on DOI:</u>	45 years old
<u>Occupation:</u>	Phlebotomist
<u>Parts of Body Injured:</u>	Left knee
<u>Identity of Petitioners:</u>	Applicant
<u>Timeliness:</u>	Petition was timely
<u>Verification:</u>	Petition was verified
<u>Date of Order:</u>	January 21, 2022
<u>Petitioners Contentions:</u>	Applicant contends the findings of fact do not support the order, decision, or award. Specifically, Applicant contends the findings of QME Dr. Beth Bathgate do not constitute substantial medical evidence. Applicant contends she is entitled to more permanent disability and a different medical-legal evaluator. Applicant disputes the apportionment although she received an award without apportionment.

II

FACTS

Applicant sustained an industrial injury to the left knee on September 2, 2018 while employed as a phlebotomist by UC Davis Medical Center. The parties agreed there is a need for future medical care for the left knee. The parties agreed the findings of QME Dr. Bathgate rate as follows: 17.05.10.04 – 3 [1.4] 4 – 220E – 4 – 4, although apportionment was in dispute. After trial, a findings and Award issued finding Applicant became permanent and stationary on April 15, 2021 and is entitled to permanent disability of 4% without apportionment. A reasonable attorney fee was found of 15% of the permanent disability. Applicant filed a Petition for Reconsideration.

III

DISCUSSION

Applicant claims she is not permanent and stationary based on subjective complaints and the need for surgery. Defendant claims a permanent and stationary date of April 15, 2021 based on the QME report of Dr. Bathgate.

In his report dated April 11, 2019, the primary treating physician Dr. Tran discharged Applicant as cured with no need for future medical care, no impairment, and no work restrictions. Dr. Tran indicated the left hip x-ray showed pre-existing condition which may explain the waxing and waning of left hip pain. Dr. Tran found the continued left hip pain and left knee pain were not because of the industrial injury. (Defendant Exhibit B)

Applicant had a QME evaluation by orthopedic surgeon Dr. Beth Bathgate on April 15, 2021. Dr. Bathgate diagnosed Applicant with a resolved left hip strain and a left knee strain with meniscus tear status post-surgery and osteoarthritis. Dr. Bathgate indicated that Applicant had surgery on September 30, 2020 which included a lateral meniscus resection and a left lateral retinaculum release. Applicant received a corticosteroid injection to the knee. Applicant reported going to UC Davis and being told she would need a total knee replacement in the future. Applicant was temporarily totally disabled for six weeks following surgery and then returned to full duties on a fulltime basis without restrictions. Dr. Bathgate opined Applicant had reached maximum medical improvement at that time. Dr. Bathgate found impairment to the left knee of 3% WPI based on a partial left knee lateral meniscectomy. Dr. Bathgate opined it is likely Applicant's weight contributed to the persistent pain and additional fraying. Dr. Bathgate apportioned 20% to nonindustrial factors considering Applicant's obesity, objective findings, and mechanism of injury. (Joint Exhibit AA)

Dr. Bathgate provided deposition testimony on August 24, 2021 during which she testified in pertinent part as follows: Applicant was really heavy and after a certain body mass index the risk of osteoarthritis goes up. Applicant had a body mass index of 41.7 after the injury when she had the gastric bypass. A body mass index of over 40 is considered severely obese. Dr. Bathgate opined that it was normal to have continued knee pain considering the amount of arthritis Applicant had as well as the meniscus injury and her job duties which include a lot of walking. Dr. Bathgate indicated that Applicant saw surgeon Dr. Lee for a cortisone injection and then saw a surgeon for a total knee replacement where she was told to come back in a year. Dr. Bathgate indicated there is no surgery at this point. Dr. Bathgate indicated Applicant might need a total knee replacement in the future but the general rule is to wait until the patient is 55 or 60. Dr. Bathgate further indicated that Applicant's arthritis probably is not bad enough for a total knee replacement. Dr. Bathgate indicated that not everyone with arthritis ends up having a total knee replacement. Dr. Bathgate opined if Applicant needed more surgery now, then Applicant would not be permanent and stationary when she had the surgery. Dr. Bathgate indicated the 20% apportionment is based on degenerative changes as shown in the MRI of August 13, 2020 and the operative report of September 30, 2020. Dr. Bathgate explained it takes a really long time for that degree of change to develop. (Joint Exhibit BB)

The basis for apportionment must be clear; the medical-legal report must "describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion." *Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 621 (en banc). This means that the medical-legal report must explain the nature of the non-industrial factor, and how and why the non-industrial factor is responsible for part of the disability. *Id.* at 622. Dr. Bathgate failed to explain how and why nonindustrial factors including obesity are connected to the partial left knee lateral meniscectomy.

The findings of Dr. Bathgate rate as follows:

Left knee 17.05.10.04 - 3 - [1.4] 4 - 220E - 4 - 4%

The factors of permanent disability are based upon the QME report and deposition testimony of Dr. Bathgate. The record supports a finding of a permanent and stationary date of April 15, 2021 and permanent disability of 4% without apportionment. This is equivalent to 12 weeks of indemnity payable at the rate of \$290 per week, in the total sum of \$3,480, less disability advances, if any, and less 15% payable to Goldberg Loren for a reasonable attorney fee.

In the Petition for Reconsideration, Applicant raises issues regarding the fact that the QME evaluation was performed by telemedicine. [...] Applicant questions the ability of Dr. Bathgate to determine range of motion via telemedicine. In her report, Dr. Bathgate indicates Applicant was given a warmup period and then Dr. Bathgate observed Applicant performing range of motion activities over video conference. Dr. Bathgate signed the report and declared under penalty of perjury that she personally performed the evaluation by two-way video communication. (Joint Exhibit AA) Applicant contends there were two evaluations and only one report. During her deposition, Dr. Bathgate testified that there was an original appointment where Applicant was sitting in a car in the parking lot of a grocery store so the physical part of the evaluation was rescheduled for April 29, 2021. Dr. Bathgate testified that she did the range of motion measurements by viewing Applicant on the video. Dr. Bathgate explained that she has [much] experience doing this and is very accurate. Dr. Bathgate testified she did not mind doing an in-person evaluation, if requested, but opined that the report was complete. (Joint Exhibit BB) Furthermore, the impairment is based on partial left knee lateral meniscectomy rather than range of motion. (Joint Exhibit AA) Applicant disputes the apportionment found by Dr. Bathgate but Applicant received an award of permanent disability without apportionment.

IV
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that Applicant's Petition for Reconsideration be denied.

DATE: February 18, 2022

Ariel Aldrich
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE