

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

**CECILIA HARSHMAN, *Applicant***

**vs.**

**STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS AND  
REHABILITATION, legally uninsured, admin. by STATE COMPENSATION  
INSURANCE FUND, *Defendant***

**Adjudication Number: ADJ10360370  
Oakland District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Defendant State of California, Department of Corrections and Rehabilitation, legally uninsured, seeks reconsideration of the September 8, 2021 Findings and Award. In that decision, the workers' compensation administrative law judge (WCJ) found that applicant Cecilia Harshman sustained 100% permanent disability as a result of an admitted January 9, 2014 industrial injury to her neck, bilateral shoulders, foot/toe, right side rib, in the form of GERD and diabetes, and also to her psyche and sleep, while employed as an academic teacher at San Quentin Prison. Applicant was awarded lifetime permanent disability indemnity at the rate of \$1,074.64 per week, subject to cost of living adjustments, less attorney fees, and further medical treatment.

Defendant contends the WCJ erred in finding applicant entitled to an award of 100% permanent disability, arguing that the medical record supports apportionment of applicant's diabetic condition and constitutes substantial medical evidence to justify apportioning applicant's award of permanent disability. Defendant further argues that evidence that applicant did not have prior disability due to her diabetes is not relevant under current apportionment standards.

We have received applicant's Answer. 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. For the reasons discussed below, we affirm the WCJ's determination and deny defendant's Petition for Reconsideration.

## **FACTS**

Applicant sustained an admitted industrial injury on January 9, 2014, when she slipped and fell at work. In addition to multiple orthopedic injuries she sustained in her fall, applicant also aggravated a pre-existing diabetic condition.

According to the medical evidence, applicant was diagnosed with diabetes mellitus in 2013, which was controlled through the oral medication Metformin. Subsequent to her industrial injury, due to physical deconditioning tied to her orthopedic complaints, applicant's diabetes worsened significantly, with Dr. Adam Duhan, the panel Qualified Medical Evaluator (QME) in internal medicine, noting it was under very poor control. (Jt. Ex. 104. 7/27/17 Report of Dr. Duhan, p. 55, 58.)<sup>1</sup>

Applicant subsequently required the amputation of her right fourth and fifth toes in January of 2018. Dr. Duhan found the amputation industrial, due to acute right foot osteomyelitis. "I do believe it is medically probable that the diabetic foot ulcer, development of osteomyelitis requiring the amputation was secondary to her diabetes and diabetic neuropathy." (Jt. Ex. 104. 6/21/18 Dr. Duhan Re-evaluation Report, p. 36.) Dr. Duhan diagnosed applicant with Insulin-dependent diabetes type 2, and diabetic amyotrophy on an industrial basis. "This deterioration is caused by her diabetes, which has already been determined to have been exacerbated by her workplace injury, and so her diabetic amyotrophy is partially industrial." (Jt. Ex. 104. 6/21/18 Dr. Duhan Re-evaluation Report, p. 31.)

After her amputation surgery, applicant moved into an assisted living facility where she is "mostly bedbound." She wears adult diapers and requires assistance with dressing, grooming, eating and toileting. (Jt. Ex. 104. 6/21/18, p. 2-3.) Applicant was found to be wheelchair dependent due to her toe amputations and the diabetes aggravated by her industrial injury. (Jt. Ex. 104. 6/21/18, p. 32.)

Dr. Duhan initially apportioned 75% of the cause of the aggravation of her diabetes to the deconditioning resulting from her orthopedic pain.

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<sup>1</sup> Dr. Duhan prepared five reports, which are all listed as Joint Exhibit 104.

Diabetes mellitus: Apportionment 75% industrial related due to significant worsening of her diabetes from orthopedic pain (cervical spine, right shoulder, right arm) causing significant deconditioning, and a probable weight loss, with evidence that her diabetes had significantly worsened since her 1/9/14 injury. I suggest that 25% of her diabetes disability is due to nonindustrial pain causing deconditioning, pre-existing diabetes, natural history of the disease, possible compliance issues.

(Jt. Ex. 104. 7/27/17 Report, p. 60.)

He subsequently revised this apportionment determination, stating that

After review of my previous reports and the new medical records I would now change my apportionment to 40 (forty)% industrial secondary to deconditioning/sedentary state caused by her orthopedic industrial injuries and 60 (sixty)% secondary to non-industrial, pre-existing diabetes, natural progression of the disease, and pre-existing nonindustrial orthopedic injuries causing deconditioning.

(Jt. Ex. 104. 6/21/18, p. 34.)

He further discussed apportionment in a supplemental report, in response to a series of questions asking whether she would be wheelchair bound along with other work restrictions, but for her industrial injury and its compensable consequences. Dr. Duhan stated: "As I opined in my 6/21/18 report, 40% of the applicant's diabetes conditions are a result of her slip and fall on 1/9/14. It is likely that some of her diabetes would have progressed with her increasing age regardless, but it certainly was exacerbated by her deconditioning, secondary to her industrial injury." (Jt. Ex. 104. 9/5/18 Supplemental Report, p. 2.) He further indicated that applicant's industrial injury exacerbated her diabetes, leading to the medical consequences that ultimately left her wheelchair bound.

With medical probability Ms. Harshman's pre-existing diabetes mellitus was significantly adversely affected by her slip and fall on 1/9/14. Her injuries and deconditioned state resulting from her injuries, led to exacerbation of her diabetes. With medical probability, this resultant poor control of her diabetes significantly contributed towards development of her diabetic amyotrophy and progression of her diabetic peripheral sensory neuropathy.

These 3 factors (poorly controlled diabetes, diabetic amyotrophy, diabetic sensory neuropathy) resulted in severe weakness of her right lower extremity, sensory loss of her foot, and development of her "diabetic foot" requiring amputation. Furthermore, with medical probability, applicant's industrial injury of 1/9/14 has led to compensable consequences of her diabetes mellitus (40%

industrial causation) which has resulted in her being wheelchair bound and all her other work restrictions.  
(Jt. Ex. 104. 9/5/18 Supplemental Report, p. 2.)

Dr. Duhan agreed that but for her industrial injury, applicant would not be in her current condition, as her pre-existing diabetes “was not at a level which interfered with her work at the time of her industrial injury,” noting that “for many people diabetes is not inconsistent with a full time profession.”

Dr. Duhan gave impairment ratings for the separate diagnoses of diabetic neuropathy and partial amputation, but ultimately provided an 80% whole person impairment rating, applying “table 17-5 Lower Limb Impairment Due to Gait Derangement: Severe-wheelchair dependent whole person impairment 80%,” due to gait derangement caused by diabetic neuropathy and her amputation. (Jt. Ex. 104. 6/21/18, p. 38.) He concluded that applicant is totally and permanently disabled. (Jt. Ex. 104. 6/21/18, p. 40.)

In his final supplemental report, Dr. Duhan reviewed additional medical records and indicated that applicant continued to suffer severe neuropathy, including motor/sensory polyneuropathy (MSPN), “a slowly progressive and irreversible disease,” due to her out of control diabetes that left her wheelchair bound. He found applicant reached permanent and stationary status for her neuropathy, and reiterated his impairment ratings. Dr. Duhan requested additional records, including documentation of her “glycemic control,” though he stated that he did not think the records would likely change his ratings. (Jt. Ex. 104. 4-6-19 Dr. Duhan Supplemental Report, p. 7-8.)

An additional QME evaluation of applicant’s internal injuries was performed by Dr. Suresh Mahawar on September 19, 2019. Dr. Mahawar was selected to act as QME due to the death of Dr. Duhan. His report includes his physical evaluation of applicant and a review of 185 medical records between 2008 and 2019. (Jt. Ex. 101. 9/19/19 Dr. Mahawar QME Report.)

Addressing applicant’s diabetes, Dr. Mahawar noted her diagnosis in 2013, and the subsequent worsening after her 2014 industrial injury, requiring the use of insulin and the toe amputations. He opined that applicant’s diabetes was a non-industrial naturally occurring medical condition that was worsened due to the stress and multiple musculoskeletal injuries from her 2014 industrial injury.

Dr. Mahawar found applicant had no work restrictions due to her internal injuries, but remained disabled due to her orthopedic injuries. He agreed with Dr. Duhan’s 80% WPI rating on

the basis that she is wheelchair dependent, which Dr. Mahawar attributed to the development of diabetic amyotrophy causing “profound weakness of both lower extremities rendering her wheelchair dependent.” (Jt. Ex. 101, p. 66.)

Addressing the causation of her diabetes, Dr. Mahawar noted that applicant had been diagnosed in 2013, and that it had worsened after her industrial injury, and her right fourth and fifth toes required amputation due to the development of gangrene. He indicated that her diabetes worsened “due to stress, related to multiple musculoskeletal injuries. The diabetes occurs naturally due to unknown cause and due to heredity. Therefore, her diabetes is partially related to her industrial injury of January 9, 2014 and predominantly related to her non-industrial naturally occurring condition.” (Jt. Ex. 101, p. 64.)

With regard to apportionment of her diabetic condition, Dr. Mahawar stated:

It is my medical opinion based on reasonable degree of probability that her diabetes is 50% apportionable to her industrial injury of January 9, 2014, as her diabetes worsened after this injury requiring partial amputation of fourth toe and total amputation of fifth toe and she has been diagnosed with diabetic retinopathy and 50% to non-industrial naturally occurring medical condition irrespective of injury of January 9, 2014. Note: The diabetic neuropathy and diabetic retinopathy occur over the period of several decades and could not be related to her industrial injury of January 9, 2014. It is also true that her diabetes was worsened after her initial injury of January 9, 2014 and her right foot got infected and required complete amputation of right fifth toe and partial amputation of right fourth toe.

(Jt. Ex. 101, p. 67.)

Applicant’s orthopedic injuries were evaluated by Dr. Victoria Barber, who issued her final report following her March 21, 2018 evaluation.<sup>2</sup> (Jt. Ex. 103. 3/21/18 Dr. Barber QME Report.) In the interval since her previous examination, applicant’s toes were amputated and Dr. Barber indicated that if her diabetes was considered of industrial causation, the amputation was a compensable consequence. Despite finding applicant was not yet permanent and stationary, Dr. Barber provided impairment ratings for her amputation “presuming appropriate healing as dictated through AMA Guides.” (Jt. Ex. 103, p. 4.) Dr. Barber assigned 80% WPI for applicant’s amputation resulting in her wheelchair dependence, and provided an 8% WPI impairment rating

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<sup>2</sup> The Minutes of Hearing lists all four of Dr. Barber’s reports as Joint Exhibit 103. However, only her 3/21/18 report is found in EAMS.

for applicant's cervical spine, a 9% WPI for the right shoulder, a 2% WPI for the left shoulder, and 6% WPI for the impairment from her rib injury. (Jt. Ex. 103, p. 14-15.)

Dr. Barber offered no opinion on apportionment of disability related to applicant's toe amputation, deferring to Dr. Duhan, but found 25% non-industrial apportionment for applicant's cervical spine impairment "as a result of underlying degenerative changes which, in this examiners opinion, elevated the functional impact of the fall." All other orthopedic disability was found to be 100% industrial. (Jt. Ex. 103, p. 16.)

At trial on September 8, 2021, applicant testified that her symptoms have worsened since her QME examinations. She is now bedridden, living in an assisted nursing facility. She cannot perform all of her ADLs. She testified that she cannot care for herself, and cannot walk or dress herself. She requires the assistance of two to three people to lift her into her wheelchair. She has trouble concentrating which prevents her from reading.

On this record, the WCJ found applicant was permanently totally disabled based upon the rating of her wheelchair dependence alone, which rated a 80% whole person impairment and 100% under the rating schedule, before consideration of apportionment.

The WCJ concluded that applicant was entitled to an unapportioned award, finding the apportionment determinations of Dr. Duhan and Dr. Mahawar did not constitute substantial medical evidence. The WCJ found Dr. Mahawar "merely issued conclusions," did not provide an independent analysis of apportionment, and indicated he agreed with Dr. Duhan, though his apportionment differed from Dr. Mahawar. The WCJ also found Dr. Duhan's apportionment determination lacked sufficient reasoning for his non-industrial apportionment, which he had increased from 25% to 60%.

## **DISCUSSION**

The issue presented by defendant's petition is whether the WCJ erred in failing to follow the apportionment determinations of Dr. Duhan and Dr. Mahawar because the WCJ found they did not constitute substantial medical evidence to support apportionment of applicant's disability resulting from the aggravating effect her industrial orthopedic injuries had on the development of her diabetes. Defendant argues that the apportionment determinations of Dr. Duhan and Dr. Mahawar do constitute substantial medical evidence and must be followed.

Labor Code section 4663(a) provides, “Apportionment of permanent disability shall be based on causation.” Labor Code section 4664(a) provides, “The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment.” The defendant has the burden of proof on the issue of apportionment. (*Escobedo v Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc).)

In *Escobedo*, the Appeals Board held that for a medical opinion on apportionment to constitute substantial evidence, the 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*, 70 Cal.Comp.Cases at 621-622. accord: *Andersen v. Workers’ Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1381–1382 [72 Cal.Comp.Cases 389]; *E.L. Yeager Construction v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 927–928 [71 Cal.Comp.Cases 1687]; *Marsh v. Workers’ Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 917, fn. 7 [70 Cal.Comp.Cases 787].)

To constitute substantial evidence on 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.

“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*, 70 Cal.Comp.Cases at 621-622.)

Further, to constitute legal apportionment, the physician must not apportion to the factors that caused the industrial injury, but specifically to the cause of the current level of disability. “Thus, the percentage to which an applicant’s *injury* is causally related to his or her employment

is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." (*Escobedo*, 70 Cal.Comp.Cases at 611. Emphasis in original.)

Defendant cites to Dr. Mahawar's finding that the worsening of applicant's diabetic condition was caused by industrial and non-industrial factors, and argues that this supports his apportionment findings. In this regard, defendant cites to Dr. Mahawar's discussion on page 64 of his report, where Dr. Mahawar discusses the cause of applicant's injury, not the cause of her disability.

In arguing that Dr. Mahawar's apportionment finding meets the requirements set out in *Escobedo*, defendant quotes Dr. Mahawar's discussion that applicant's diabetic neuropathy and diabetic retinopathy develops over a period of several decades, and therefore could not have been caused by her industrial injury. This discussion, however, provides no analysis of how applicant's pre-existing diabetes was responsible for a specific percentage of disability, relying upon the fact of her pre-existing condition.

Similarly, Dr. Duhan's apportionment determination failed to provide sufficient analysis for how pre-existing factors were responsible for a percentage of applicant's permanent disability from her diabetes. He initially found 75% of her disability was caused by her injury, with 25% attributed to her pre-existing non-industrial diabetes. He later reduced his apportionment to 40% industrial, due to her deconditioning and sedentary state. He failed to explain his rationale for his change of opinion.

Again, the basis for Dr. Duhan's apportionment determination are the factors he cites to analyze the cause of the aggravation of applicant's diabetes, i.e., the cause of her injury, rather than to the cause of her disability. For these reasons, the WCJ properly concluded that defendant failed to meet its burden to establish apportionment of applicant's permanent disability, and awarded applicant the full amount of permanent disability arising from her wheelchair dependence.

Accordingly, we will affirm the WCJ's determination and will deny defendant's Petition for Reconsideration.



For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the September 8, 2021 Findings and Award is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

I CONCUR,

**/s/ DEIDRA E. LOWE, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**November 22, 2021**

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

**CECILIA HARSHMAN  
LAW OFFICE OF RYAN D. SUTHERLAND  
STATE COMPENSATION INSURANCE FUND**

**SV/pc**

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