**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**ELI ANAYA, *Applicant***

**vs.**

**STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS, legally uninsured, adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ10483000**
**Van Nuys District Office**

# OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in this case.[1] This is our Opinion and Decision After Reconsideration.

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 28, 2020. By the F&A, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his lumbar spine, cervical spine, gastrointestinal system and left shoulder. The injury was found to have caused 58% permanent disability with non-industrial apportionment only for the disability to the gastrointestinal system.

Defendant contends that the reporting of the primary treating physician (PTP) is not substantial evidence and applicant failed to carry his burden of proving the approximate percentage of permanent disability directly caused by the industrial injury. Defendant also contends that the reporting of the qualified medical evaluator (QME) is substantial evidence and should be followed regarding causation, permanent disability and apportionment.

We received an answer from applicant. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that defendant's Petition be denied.

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[1] Commissioner Lowe was previously on the panel in this matter and is no longer a member of the Appeals Board. Another panelist has been assigned in her place.

We have considered the allegations of defendant's Petition for Reconsideration, applicant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will affirm the F&A.

## FACTUAL BACKGROUND

Applicant claims injury through November 30, 2014 to the lumbar spine, left shoulder, cervical spine, left leg and gastrointestinal system while employed as a special agent by the State of California Department of Corrections. Defendant accepts compensability for the lumbar spine and left shoulder, but disputes the other body parts pled. (Minutes of Hearing, August 4, 2020, p. 2.)

Edwin Haronian, M.D. provided treatment to applicant as his PTP. In his initial 2017 evaluation, the history of injury was summarized by Dr. Haronian:

> The patient states approximately in 2014, during the course of his employment, he began to develop pain to his neck, left shoulder, and lower back, which he attributes to his work duties, entailing: working with the fugitive task force, doing investigations, serving warrants, conducting search warrants for wanted fugitives wanted for murder, robbery, and rape, computer work for investigations, data entry, and writing reports, hours of surveillance while in a car, involved in altercations with combative suspects, kicking doors when conducting search warrants, chasing after suspects, running or jumping over walls, and long hours of wearing tactical equipment weighing over 60 pounds.
>
> The precise activities required entailed alternating with sitting, driving, sitting in a car, standing, walking, and running, as well as constant fine maneuvering of his hands and fingers, and repetitive bending, stooping, squatting, kneeling, twisting, turning, forceful pushing and pulling, forceful gripping and grasping, reaching to all levels, torqueing, lifting and carrying up to 150+ pounds when lifting a body off the ground, ascending and descending stairs, ladders, and attics.
>
> He continued working and his pain progressively worsened.
>
> He injured his left shoulder twice at work, approximately in 2008 or 2010. He recalls one instance he was wearing his full gear and as he reached the door an individual kicked the door and this hit his left shoulder. He received treatment in the form of office visits, pain medication and anti-inflammatory agents, x-rays and MRI studies to his left shoulder were done, and he received off and on physical therapy for about two months after each incident. He returned to full

> duty work with ongoing pain in the left shoulder. He was not taken off work nor given work restrictions for these two injuries.
>
> He continued working with ongoing pain in the left shoulder, neck, and lower back.
>
> On December 1, 2014, he retired.
>
> (Applicant's Exhibit No. 13, Report of primary treating physician, Edwin Haronian, M.D., June 12, 2017, pp. 1-2.)

Dr. Haronian's discussion section in his initial report stated in relevant part:

> The patient is presenting complaining of neck pain which radiates into the bilateral extremities with pain, paresthesia and numbness. He is complaining of left shoulder pain with slightly decreased range of motion and strength. His primary complaint is of back pain which radiates into the left lower extremity with pain, paresthesia, and numbness interfering with activities of daily living and his ability to conduct home exercise.
> …
> It is our opinion it is well within the bounds of medical probability that the patient's symptomatology has arisen as a result of the work duties as listed above.
>
> (*Id.* at p. 11.)

Dr. Haronian considered applicant's condition to have reached maximum medical improvement as of February 18, 2019. (Applicant's Exhibit No. 1, Permanent and Stationary report of primary treating physician, Edwin Haronian, M.D., February 18, 2019, p. 8.) Dr. Haronian's diagnoses included cervical spine radiculopathy, lumbar spine radiculopathy, lumbar grade I spondylolisthesis at L5-S1 and left shoulder impingement. (*Id.*) He reiterated his conclusion that applicant had sustained injury to the cervical spine, lumbar spine and left shoulder from "continuous trauma activities that occurred at work." (*Id.* at p. 9.) Dr. Haronian obtained x-rays of applicant's lumbar spine, which "revealed greater than 5 mm of translation of L5 on S1." (*Id.* at p. 8.) The cervical spine was given an 8% whole person impairment (WPI) rating per DRE Cervical Category II. (*Id.* at p. 9.) The lumbar spine was assigned a 20% WPI rating per DRE Lumbar Category IV "due to alteration in motion segment integrity due to the grade I spondylolisthesis with greater than 5 mm of translation of LS on S1 noted on the radiographic examination." (*Id.* at p. 10.) The left shoulder was given a 6% WPI rating based on range of

motion. (*Id.*) Dr. Haronian opined as follows regarding apportionment:

> Based on the available information and with reasonable medical probability, the patient has not sustained preexisting disability impairment, or pathology. As such, 100% of the patient's disability is the direct effect of the industrial injury.

(*Id.* at p. 9.)

Alex Etemad, M.D. evaluated applicant as the orthopedic QME. In his initial evaluation in November 2016, Dr. Etemad diagnosed applicant with a left shoulder impingement and lumbar strain. (Court's Exhibit X5, Report of PQME Alex Etemad, M.D., November 11, 2016, p. 23.) Dr. Etemad opined that applicant had sustained a left shoulder injury from "continuous trauma" from 2009 "until termination of his employment in 2014." (*Id.* at p. 24.) With respect to the lumbar spine, Dr. Etemad noted "evidence of preexisting congenital or developmental spondylolisthesis at L5-S1." (*Id.*) He concluded that applicant had not sustained an industrial injury to the lumbar spine. (*Id.*) Dr. Etemad provided a 1% WPI rating for the left shoulder due to pain. (*Id.* at p. 25) Disability was apportioned "5% to the natural progression of previous medical conditions and 95% to the industrial injury as filed." (*Id.*)

Dr. Etemad in a supplemental report changed his causation opinion regarding the low back and found "a continuous trauma injury to the lumbar spine." (Court's Exhibit X3, Report of PQME Alex Etemad, M.D., August 24, 2018, p. 27.) He assigned a 6% WPI rating to the lumbar spine using DRE Category II. (*Id.* at p. 28.) Dr. Etemad opined as follows regarding apportionment:

> He is telling me that he did not have any problems with his shoulder until that incidence of accident where the door was jammed against his shoulder. He continued to work for several years after that accident and repeated daily work brought on episodes of occasional aches and pains of left shoulder. Therefore, it is my opinion that the left shoulder has both elements of single incident injury as well as continuous trauma. I have given the breakdown of apportionment for the left shoulder in this report under the apportionment paragraph. For the left shoulder, pretty much, approximately half and half are divided between continuous trauma and the incident of injury to the left shoulder. As far as the low back, I continued to maintain my opinion that majority of low back impairment is apportioned out to pre-existing congenital and/or developmental damage that lumbar spine had sustained predating many years prior to this employment.
> …

> Based upon the information presently available to me, there is a valid basis for apportionment of the patient's impairment for the left shoulder. In my opinion the impairment should be apportioned as 40% from the continuous trauma, 5% from natural progression of previous medical conditions, and 55% from the current incident of September 4, 2015.
>
> Based upon the information presently available to me, there is a valid basis for apportionment of the patient's impairment of lumbar spine. In my opinion the impairment should be apportioned as 45% from continuous trauma and 55% from natural progression of previous medical conditions.
>
> (*Id.* at pp. 28-29.)

In a subsequent report, Dr. Etemad clarified the date of injury as incorrectly stated in his previous August 24, 2018 report:

> The correct date of injury is cumulative trauma injury from November 2013 up to November 2014 which is the final year of this patient's employment with the employer.
>
> (Court's Exhibit X2, Report of PQME Alex Etemad, M.D., May 1, 2019, p. 35.)

Dr. Etemad otherwise made no changes to his previous conclusions. His apportionment opinion for the left shoulder was revised to reflect this date:

> In my opinion the impairment should be apportioned as 40% from the continuous trauma, 5% from natural progression of previous medical conditions, and 45% from the current incident of November 30, 2013 through November 30, 2014.
>
> (*Id.* at p. 36.)

Dr. Etemad was deposed on September 18, 2019, during which he was provided with additional medical records to review regarding the left shoulder. The deposition transcript contains the following exchanges as relevant herein:

> Q. So let me ask you now, Doctor, because until now the picture is not clear to me. You have apportioned disability to 55 percent, 5 percent and 45 percent, which brings to us 100 percent now. So, you know, are you saying that the 55 percent permanent disability can be attributed to the April 12, 2012 injury?

A. No. I'm saying that with all the information, including the new evidence that I saw today, I would say 55 percent to continuous trauma and 45 percent to February 2009 and April 2012 injuries.

MR. ROBERTS: So 45 percent to prior –

THE WITNESS: Injuries.

MR. ROBERTS: -- injuries? Okay.

BY MR. KATALBAS:

Q. When you say --

A. And 5 percent natural progression, his age and so forth.

MR. ROBERTS: So 40 percent to the priors and 5 percent --

THE WITNESS: 45 to priors -- let me see. I'm sorry. I'm getting confused here. One second.

Yes. Yes. Yeah, going to my report, 40 percent to prior, 5 percent to natural progression, and 55 percent to the --

MR. ROBERTS: 55 percent.

THE WITNESS: 55 percent to the continuous trauma.

And, again, the date of continuous trauma, I've gotten different dates.
…
Q. Yes. Doctor, let's be clear. Now, pinpoint to me the different injuries that you found and how do we apportion all of the disabilities to the different injuries.

A. One injury is February -- to the left shoulder is February 2009.

Q. Uh-huh.

A. Another injury to the left shoulder is April 2012.

Q. Uh-huh.

A. And the two of them together qualify for 40 percent apportionment.
…
Q. Okay. Okay. So now we are done with the left shoulder apportionment.

And is this apportionment based on all of the medical records that you reviewed?

A. Yes, including the new document I saw today.

Q. And is this based on reasonable medical probability?

A. Yes, sir.

Q. Okay. And on the second paragraph of the apportionment determination of your May 1, 2019 report, you apportioned the lumbar spine disability to 45 percent from continuous trauma and 55 percent from natural progression of his medical condition, because I think he had like a -- how did you -- how did you say it, Doctor?

A. I said, in simple terms, birth defect.

Q. Yes, okay, I remember that.

So, you know, this 45 percent that you ascribe continuous trauma, where does this combined with? Does it combine to the 55 percent disability that you ascribe to the left shoulder?

A. Yes. So left shoulder, whatever impairment I gave, 55 percent of it is from continuous trauma. And low back, whatever impairment I gave, 45 percent of it is from continuous trauma.

Q. Okay.

A. So for left shoulder, majority. For lumbar, minority, in simple terms.

Q. And you said that you cannot apportion between the 2009 and 2012 disability; is that correct?

A. I mean, if I am put on the spot and if I am forced, I can render an opinion.

Q. And what would be that opinion, Doctor?

A. My opinion would be -- I would prefer specifically interviewing the patient on the medical records and seeing what his input is. But without having that here – I've already seen him three times and nobody told me to ask those questions -- I would say more from 2012 than 2009. I'd say maybe 15 percent 2009, 25 percent 2012. That adds up to 40 percent.

Q. And this is based on what you said on the review of all the medical records you have and what the applicant had told you; is that correct?

> A. Yeah. It's many years ago. I can't rely on human being's memory. So he told me what he could recall. He couldn't even recall those years and dates.
>
> So I'm going, yeah, by medical record by those doctors. You know, many factors come in. Maybe the doctor who saw him in 2009 is a doctor that's not detail oriented, and he did a very cursory exam. Maybe the doctor who saw him in 2012 was a very thorough doctor. But there's nothing I can do about it. I'm just looking at the detail of the report and going by that.
>
> Q. And is it your opinion that this is based on reasonable medical probability, Doctor?
>
> A. Yes. I'm basing it on evidence, but objective evidence. And the quality of evidence rely on the doctors who provided it.
>
> (Court's Exhibit X1, Deposition of PQME Alex Etemad, M.D., September 18, 2019, pp. 27-28, 31-33.)

Benjamin Simon, M.D. evaluated applicant's gastrointestinal system as the internal medicine QME. He diagnosed applicant with abdominal pain with a history of gastroesophageal reflux disease, hiatal hernia and Helicobacter pylori infection. (Court's Exhibit Y2, Report of PQME Benjamin Simon, M.D., January 5, 2017, p. 7.) Dr. Simon opined that applicant's use of nonsteroidal anti-inflammatory drugs to treat his orthopedic injuries exacerbated his gastrointestinal symptoms. (*Id.*) He provided a 3% WPI rating for symptoms of upper digestive tract disease. (*Id.* at p. 8.) Apportionment was 20% industrial and 80% non-industrial. (*Id.* at p. 9.)

The matter proceeded to trial over two days. The issues at trial included parts of the body injured, permanent disability and apportionment. (Minutes of Hearing, August 4, 2020, p. 2.)

The WCJ issued the F&A as outlined above. Applicant's 58% permanent disability rating was based on the reporting of the PTP Dr. Haronian and the internal medicine QME Dr. Simon. The WCJ found no basis for apportionment of permanent disability for the orthopedic parts per Dr. Haronian's reporting.

## DISCUSSION

### I.

Labor Code section 5909 provides that a petition for reconsideration is deemed denied

unless the Appeals Board acts on the petition within 60 days of filing. (Lab. Code, § 5909.)[2] However, "it is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493].) In *Shipley*, the Appeals Board denied applicant's petition for reconsideration because the Appeals Board had not acted on the petition within the statutory time limits of section 5909. The Appeals Board did not act on applicant's petition because it had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Shipley*, *supra*, 7 Cal.App.4th at p. 1108.) Defendant's Petition was timely filed on January 8, 2021. Our failure to act was due to a procedural error and our time to act on defendant's Petition was tolled.

**II.**

The employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd.* (*Clark*) (2015) 61 Cal.4th 291, 297-298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a); 3202.5.) The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable." (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) Applicant must only show that industrial causation was "not zero" to show sufficient contribution from work exposure. (*Clark*, *supra*, 61 Cal.4th at p. 303.)

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence ". . . 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

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

conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Defendant argues that Dr. Haronian's opinion regarding causation for the cervical spine is not substantial evidence and the WCJ should have followed the QME's opinion with respect to this body part. Defendant contends that Dr. Haronian did not explain the mechanism of injury for the cervical spine.

It is well-established that the relevant and considered opinion of one physician may constitute substantial evidence, even if inconsistent with other medical opinions. (*Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) The WCJ was permitted to follow the PTP's opinion as more persuasive than the QME's opinion regarding causation for the cervical spine. Contrary to defendant's contention otherwise, Dr. Haronian provided a detailed description of the applicant's injurious work activities (infra, p. 2), and explained that applicant's neck condition resulted from "continuous trauma activities that occurred at work." This conclusion is reasonable based on the evidentiary record and work activities that applicant performed. (See Lab. Code, § 3208.1(b) [a cumulative trauma injury occurs from "repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment"].) The WCJ therefore properly relied on the reporting of Dr. Haronian regarding causation and the evidence supports a finding of injury AOE/COE to the cervical spine.

**III.**

Employers are responsible to injured workers for permanent disability resulting from an industrial injury. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1269 [76 Cal.Comp.Cases 624].) "A permanent disability is the irreversible residual of a work-related injury that causes impairment in earning capacity, impairment in the normal use of a member or a handicap in the open labor market." (*Id.* at p. 1270, citing *Brodie v. Workers' Comp. Appeals Bd.*

(2007) 40 Cal.4th 1313, 1320.) The employee bears the burden of proving the approximate percentage of permanent disability directly caused by the industrial injury by a preponderance of the evidence. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 612; Lab. Code, §§ 3202.5, 5705.)

Applicant's injury occurred after January 1, 2013 and therefore his permanent disability must be determined pursuant to section 4660.1. (Lab. Code, § 4660.1.) The WCJ relied on the reporting of Dr. Haronian to rate applicant's permanent disability for the lumbar spine, cervical spine and left shoulder. Defendant contends that Dr. Haronian's impairment rating for the lumbar spine is not substantial evidence because it was purportedly improper for him to apply DRE Lumbar Category IV.

As discussed above, decisions by the Appeals Board must be supported by substantial evidence. Dr. Haronian provided a 20% WPI rating for the lumbar spine per DRE Lumbar Category IV "due to alteration in motion segment integrity due to the grade I spondylolisthesis with greater than 5 mm of translation of LS on S1 noted on the radiographic examination." Table 15-3 of the AMA Guides permits a 20-23% WPI rating for an injury within DRE Lumbar Category IV and contains the following criteria for this level of impairment:

> Loss of motion segment integrity defined from flexion and extension radiographs as at least 4.5 mm of translation of one vertebra on another or angular motion greater than 15° at L1-2, L2-3, and L3-4, greater than 20° at L4-5, and greater than 25° at L5-S1 (Figure 15-3); may have complete or near complete loss of motion of a motion segment due to developmental fusion, or successful or unsuccessful attempt at surgical arthrodesis
>
> ***or***
>
> fractures: (1) greater than 50% compression of one vertebral body without residual neurologic compromise
>
> (American Medical Association Guides to the Evaluation of Permanent Impairment (5th ed. 2001), p. 384 ("AMA Guides").)

X-rays of applicant's lumbar spine revealed greater than 5 mm of translation of L5 on S1. Since Table 15-3 permits use of DRE Lumbar Category IV for "[l]oss of motion segment integrity defined from flexion and extension radiographs as at least 4.5 mm of translation of one vertebra on another," Dr. Haronian's rating based on the amount of translation of L5 on S1 is consistent with the criteria for Category IV.

Defendant emphasizes in its Petition the following language in the AMA Guides:

> The DRE method recommends that physicians document physiologic and structural impairments relating to injuries or diseases other than common developmental findings, such as …spondylolisthesis, found in 3% of adults…As previously noted, the presence of these abnormalities on imaging studies does not necessarily mean the individual has an impairment due to an injury.
>
> (AMA Guides, p. 383.)

Defendant suggests that this language precludes rating applicant's lumbar spine impairment using DRE Lumbar Category IV because he has spondylolisthesis. The Guides merely cautions that the presence of this type of abnormality may not mean the impairment is due to an injury, but it does not prohibit attributing impairment to an injury where an employee has spondylolisthesis. Defendant's contention that Dr. Haronian may not use DRE Lumbar Category IV to rate applicant's impairment is consequently unpersuasive.

**IV.**

While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, the employer holds the burden of proof to show apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo, supra*, 70 Cal.Comp.Cases at p. 613, *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) To meet this burden, the employer "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 620.)

"Apportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) Physicians are required to address apportionment when evaluating permanent impairment. (Lab. Code, § 4663(b)-(c).) Section 4663(c) provides in pertinent part as follows:

> In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other

> factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
>
> (Lab. Code, § 4663(c).)

Section 4664(a) separately states that 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." (Lab. Code, § 4664(a).)

"Apportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay*, *supra*, 96 Cal.App.3d at p. 564.) Thus, the WCJ has the authority to determine the appropriate amount of apportionment, if any. As discussed above, decisions by the Appeals Board must be supported by substantial evidence. Therefore, the WCJ must determine if the medical opinions regarding apportionment constitute substantial evidence. (See *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

As outlined in *Escobedo*:

> [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.
>
> (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621, citations omitted.)

The Court of Appeal has similarly held in relevant part:

> It is certain the mere fact that a report addresses the issue of causation of the permanent disability, and makes an apportionment determination by finding the approximate relative percentages of industrial and nonindustrial causation does not necessarily render the report one upon which the Board may rely.
>
> (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].)

Defendant suggests that applicant bears the burden of proof on apportionment. As outlined above, it is defendant's burden to prove apportionment of permanent disability "to other factors" besides the industrial injury. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 607.) The QME Dr. Etemad apportioned applicant's disability for the left shoulder and lumbar spine to other factors besides his cumulative trauma injury. However, Dr. Etemad's apportionment opinions ranged widely in his reporting. Initially, Dr. Etemad apportioned the left shoulder disability "5% to the natural progression of previous medical conditions and 95% to the industrial injury." In his subsequent August 24, 2018 report, Dr. Etemad changed apportionment for the left shoulder "to be 40% from the continuous trauma, 5% from natural progression of previous medical conditions, and 55% from the current incident of September 4, 2015," with the low back disability split "45% from continuous trauma and 55% from natural progression of previous medical conditions." There is no explanation of which "previous medical conditions" this encompasses for either body part. In his last report dated May 1, 2019, apportionment for the left shoulder was "40% from the continuous trauma, 5% from natural progression of previous medical conditions, and 45% from the current incident of November 30, 2013 through November 30, 2014," which only adds up to 90% of causation.

During his deposition, Dr. Etemad again changed his apportionment opinion for the left shoulder after review of additional medical records, ultimately settling on 55% to continuous trauma, 15% to a 2009 injury, 25% to a 2012 injury and 5% to "natural progression." Although a physician may change their opinions based on new evidence, Dr. Etemad's final discussion of apportionment did not include an explanation of how and why there should be apportionment of disability to other factors besides the cumulative trauma injury. His confirmation that his opinion was to a "reasonable medical probability" does not render his opinions substantial evidence upon which a finding of apportionment may be made. As discussed above, the mere fact that a physician makes an apportionment determination does not render their conclusions an opinion which may be relied upon. We thus agree with the WCJ that there is not substantial evidence in the record to support apportionment of permanent disability for the orthopedic parts.

In conclusion, we will affirm the F&A.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board of the Findings and Award issued by the WCJ on December 28, 2020 is **AFFIRMED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

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

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

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

**SEPTEMBER 12, 2022**

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

**ELI ANAYA**
**STATE COMPENSATION INSURANCE FUND**
**STRAUSSNER SHERMAN**

**AI/*pc***

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