

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

LUIS AMARO, *Applicant*

vs.

**COUNTY OF VENTURA SHERIFF'S OFFICE, permissibly self-insured,
administered by YORK RISK SERVICES GROUP/SEDGWICK CLAIMS
MANAGEMENT SERVICES, *Defendants***

Adjudication Number: ADJ11784473

Oxnard District Office

**OPINION AND DECISION
AFTER
RECONSIDERATION**

We previously granted applicant's Petition for Reconsideration (Petition) to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the Findings and Award and Orders (F&A) issued by the workers' compensation administrative law judge (WCJ) on August 31, 2021, wherein the WCJ found in pertinent part that applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to his back and psyche while employed by defendant during the period from December 28, 2008, through September 20, 2018, and that the injury caused 23% permanent disability after apportionment. The WCJ ordered the June 25, 2020, report from primary treating physician (PTP) Edwin Haronian, M.D., (App. Exh. 21) admitted into evidence; and he found that the report was not substantial evidence as to the issue of apportionment.

Applicant contends that the trial record does not contain substantial evidence that supports the Finding of apportionment (Finding of Fact #4) and that his cumulative injury caused 45% permanent disability.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be denied. We received an Answer from defendant.

¹ As noted, we previously granted the Petition to allow further study of the factual and legal issues. Commissioner Lowe, who was previously a panelist in this matter, no longer serves on the Appeals Board. Another panel member has been assigned in her place.

We have considered the allegations in the Petition and the Answer and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will affirm the F&A except that we will amend the F&A to find that the injury caused 45% permanent disability (Finding of Fact #3); that there is no apportionment of applicant's orthopedic disability (Finding of Fact #4); that defendant did not meet its burden of proof regarding apportionment (Finding of Fact #5); and that a reasonable attorney fee is \$10,266.00 (Finding of Fact #7). Based thereon the Award and the Order of Commutation will be amended.

BACKGROUND

Applicant claimed injury to his back and psyche while employed by defendant as a cook during the period from December 28, 2008, through September 20, 2018.

Orthopedic qualified medical examiner (QME) Jerold M. Sherman, M.D., evaluated applicant on February 27, 2019. Dr. Sherman examined applicant, took a history, and reviewed the medical record of treatment applicant received during the period from September 27, 2018, through December 17, 2018. (See Def. Exh. A, Jerold M. Sherman, M.D., February 27, 2019, Review of Medical Records, pp. 1 -2 [EAMS pp. 9 – 10].) The doctor assigned 5% whole person impairment (WPI) for applicant's lumbar spine condition, and regarding apportionment, he stated:

Apportionment is indicated in this instance in the 3% of his 5% impairment is secondary to non-industrial causes and 2% due to aggravation which could reasonably be consistent with his described work activity.
(Def. Exh. A, p. 5.)

On March 6, 2019, orthopedic PTP Edwin Haronian, M.D. performed his initial evaluation of applicant. (App. Exh. 15, Edwin Haronian, M.D., March 27, 2019.) Applicant underwent a course of treatment by Dr. Haronian and in his March 12, 2020, permanent and stationary report, Dr. Haronian diagnosed applicant as having lumbar spine spondylolisthesis (forward slippage of a vertebra) of L-5 on S-1 with spondylolysis (stress fracture of vertebra) and lumbar spine radiculopathy. (App. Exh. 1, Edwin Haronian, M.D., March 12, 2020, p. 6.) Regarding the issue of apportionment, Dr. Haronian stated:

Based on the available information and with reasonable medical probability, the patient does indicate that he sustained a slip and fall accident sometime in 2010 along with the continuous trauma injury both to the lumbar spine. Based on the above, I would apportion 50% to the slip and fall accident, 50% to the continuous trauma injury.
(App. Exh. 1, p. 7.)

Dr. Haronian was provided a transcript of applicant's February 20, 2019, deposition. Based on his review of that transcript, he explained the change in his prior opinion regarding apportionment as follows:

Following review of the provided deposition and revisiting the patient's provided history at the time of his initial examination on March 6, 2019, I am led [sic] to reconsider my opinion regarding apportionment provided in my March 12, 2020, permanent and stationary report. It is now apparent the patient recovered following the earlier work injury in approximately 2010 and essentially performed his usual and customary duties for approximately two years before he experienced recurrent back pain. During this time, the patient had reported that his occupational duties required prolonged standing and walking and regular bending stooping and squatting as well as lifting and carrying up to 40 pounds. Given these factors, it is with reasonable medical probability that the patient's recurrent low back pain after two years of apparently being symptom free was industrially caused by the patient's cumulative trauma. Given this, my March 12, 2020, permanent and stationary report is amended regarding the issue of apportionment. Based on the factors discussed, the patient's lumbar spine impairment and disability was caused 100% by the work-related cumulative trauma to September 20, 2018, with no basis for apportionment to other factors. My opinions [sic] regarding other issues of impairment and disability remain unchanged from those provided in my March 12, 2020, permanent and stationary report.

(App. Exh. 21, Edwin Haronian, M.D., June 25, 2020, p. 5.)

The parties proceeded to trial on February 9, 2021. The issues submitted for decision included parts of body injured and orthopedic permanent disability/apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), February 9, 2021, p. 2.) The WCJ issued a decision on April 9, 2021, and issued an Order Rescinding Findings and Award on April 22, 2021. At the July 15, 2021, Status Conference the issue of whether the June 25, 2020, report from Dr. Haronian would be admitted into evidence was added to the issues originally submitted and the matter was again submitted for decision. (Minutes of Hearing, July 15, 2021.)

DISCUSSION

In order for a medical report to constitute substantial evidence pertaining to the issue of apportionment, the reporting physician 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; and the physician must explain the nature of the other 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. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board *en banc*).

Here, in his February 27, 2019, report, as quoted above, QME Dr. Sherman stated his conclusion that 3% of applicant's 5% impairment was non-industrial and 2% of the 5% impairment was "consistent with his described work activity." (Def. Exh. A, p. 5.) Dr. Sherman did not in any way, address the factors necessary to accurately determine apportionment of applicant's disability. (*Escobedo v. Marshalls, supra.*) Also, in his March 12, 2020, report, PTP Dr. Haronian, stated that he would apportion 50% of applicant's disability to the 2010 slip and fall accident, and 50% to the cumulative industrial injury. (App. Exh. 1, p. 7.) Although Dr. Haronian stated his conclusion as to apportionment, he did not provide any explanation and/or analysis supporting his conclusion. (*Escobedo v. Marshalls, supra.*) Additionally, it appears that neither doctor was provided any medical records pertaining to applicant's 2010 slip and fall injury. As such, the doctors were not given an accurate factual history relevant to whether applicant had any pre-existing disability caused by the 2010 injury. Thus, neither the report from Dr. Sherman nor the report from Dr. Haronian constitute substantial evidence regarding the issue of apportionment.

We note it may be argued that Dr. Haronian's June 25, 2020, report is evidence that applicant's "...lumbar spine impairment and disability was caused 100% by the work-related cumulative trauma to September 20, 2018, with no basis for apportionment to other factors." (App. Exh. 21, p. 5.) However, it is important that the report be considered in the context of the fact that, as discussed above, the previous reports from Drs. Sherman and Haronian are not substantial evidence upon which a finding of apportionment may be made.²

It is well established that any award, order, or decision of the Appeals Board must be supported by substantial evidence. (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]; *Universal City Studios, Inc. v. Workers' Compensation Appeals Bd. (Lewis)* (1979) 99 Cal.App.3d 647 [44 Cal.Comp.Cases 1133].)

"The burden of proof rests upon the party or lien claimant holding the affirmative of the issue." (Lab. Code, § 5705.) The employer has the burden of proof to establish apportionment of permanent disability to non-industrial factors or previous industrial injuries with substantial

² Review of Dr. Sherman's August 25, 2020, supplemental report indicates that the report does not address the issue of apportionment. (Def. Exh. B, Jerold M. Sherman, M.D., August 25, 2020.)

evidence. (Lab. Code § 3202.5; *Kopping v. Workers' Comp. Appeals Bd. (Kopping)* (2006) 142 Cal.App.4th 1099, 1114-1115 [71 Cal.Comp.Cases 1229].) Here, defendant carries the burden of proof on apportionment, and as discussed above, the trial record does not contain substantial evidence addressing that issue. Therefore, defendant did not meet its burden of proof.

We agree with the WCJ that as to the issue of whole person impairment/permanent disability, the reports from PTP Dr. Haronian are “more persuasive” than those of QME Dr. Sherman and based thereon applicant’s “overall orthopedic permanent disability” is rated at 45%. (Opinion on Decision p. 2; Finding of Fact #4.) Thus, under these circumstances, it is appropriate that applicant be awarded 45% permanent disability.

Accordingly, we affirm the F&A except that we amend the F&A to find that the injury caused 45% permanent disability; that there is no apportionment of applicant’s orthopedic disability; that defendant did not meet its burden of proof regarding apportionment; and that a reasonable attorney fee is \$10,266.00. Based thereon the Award and the Order of Commutation are amended.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the August 31, 2021, Findings and Award and Orders, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. Applicant suffered 45% permanent disability producing weekly indemnity of \$290.00 for a period of 236 weeks commencing January 13, 2020, in a total sum of \$68,440.00 less advances previously paid and less the attorney fee allowed herein against that sum.
4. There is no apportionment of the 45% orthopedic permanent disability caused by the cumulative injury at issue herein.
5. Defendant did not meet its burden of proof regarding apportionment.
7. It is found that a reasonable attorney fee is \$10,266.00 to be subtracted from permanent disability, to be commuted from the far end of the award.

AWARD

* * *

- a. Permanent disability in a total sum of \$68,440.00 pursuant to Finding of Fact No. 3, above;
- c. An attorney fee in the amount of \$10,266.00 pursuant to Finding of Fact No. 7, above.

ORDER OF COMMUTATION

IT IS ORDERED that the sum of \$10,266.00 be commuted from the final weekly payments of permanent disability in order to pay attorney fees awarded herein.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

s/ CRAIG SNELLINGS, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 12, 2023

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

LUIS AMARO
ROSE, KLEIN & MARIAS LLP
HAYFORD, FELCHLIN, VALENCIA & MCWHORTER, 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*