

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

LORNA SUTHERLAND, *Applicant*

vs.

**GOLD TRAIL UNION SCHOOL DISTRICT, permissibly self-insured,
administered by SCHOOLS INSURANCE AUTHORITY, *Defendants***

Adjudication Numbers: ADJ12140821 ADJ14587162

Sacramento District Office

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Defendant seeks reconsideration of the Findings of Fact (Findings) issued by the workers' compensation administrative law judge (WCJ) on January 25, 2024, wherein the WCJ found in pertinent part that the proper occupational group for rating applicant's permanent disability is 322, that the reports from orthopedic agreed medical examiner (AME) Stephen P. Abelow, M.D., are not substantial evidence regarding the issue of apportionment of applicant's right shoulder disability, and that defendant did not meet its burden of proof as to that issue.

Defendant contends that the reports from AME Dr. Abelow and qualified medical examiner (QME) Robert Henrichsen, M.D., are substantial evidence that 50% of applicant's right shoulder permanent disability should be apportioned to pre-existing non-industrial pathology.

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

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated in our June 9, 2023 Opinion and Order Granting Petition For Reconsideration and Decision After Reconsideration (Opinion) which we adopt and incorporate by this reference thereto, and for the reasons discussed below, we will grant reconsideration, rescind the Findings, and substitute a new Findings of Fact and Award, finding in part that applicant's permanent disability is properly rated using occupational group

number 322; that defendant did not meet its burden of proof on the issue of apportionment; and that applicant's injury caused 42% permanent partial disability; permanent disability indemnity and attorney fees will be awarded based thereon.

BACKGROUND

Applicant claimed injury to her right shoulder on January 7, 2019, while employed by defendant as a bus driver and cafeteria worker.

AME Dr. Abelow evaluated applicant on October 28, 2019. He concluded that 75% of applicant's right shoulder disability was the result of her January 7, 2019 industrial injury and 25% of her disability was caused by her prior right shoulder injury and surgery. (Joint Exh.1, Stephen Abelow, M.D., October 28, 2019, p. 16.) After reviewing additional medical records, in his January 31, 2021, supplemental report Dr. Abelow concluded that:

It is my opinion, with reasonable medical probability, that 50% of the permanent disability to the right shoulder is due to the industrial injury of 1/7/19. It is my opinion, with reasonable medical probability, 50% of the permanent disability to the right shoulder is due to prior problems with the right shoulder requiring arthroscopy, subacromial decompression, and rotator cuff repair 8/15/06 and the natural progression of that problem.

(Joint Exh. 2, Stephen P. Abelow, M.D., January 31, 2021, pp. 2 – 3.)

Dr. Abelow reiterated his opinions regarding apportionment in his April 22, 2021, report. (See Joint Exh. 3, Stephen P. Abelow, M.D., April 22, 2021, p. 3.) The parties proceeded to trial on January 24, 2023. The issues submitted for decision were "Whether apportionment by AME Stephen Abelow, M.D., is valid" and "The occupational variant to be used to adjust permanent disability." (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 24, 2023, p. 2.) On March 23, 2023, the WCJ issued a Findings of Fact which included a Finding that 75% of applicant's permanent disability was caused by her January 7, 2019 injury and 25% was due to prior non-industrial factors. Both parties filed Petitions for Reconsideration. By our June 9, 2023 Opinion, the Appeals Board rescinded the March 23, 2023 Findings of Fact and returned the matter to the WCJ to develop the record regarding apportionment of applicant's right shoulder disability.

Dr. Abelow submitted a supplemental report wherein he stated:

It does appear that the industrial injury of 1/7/19 may have been an exacerbation or aggravation of her underlying rotator cuff disease. ¶ Considering that occupational injury really does not cause rotator cuff disease and the injury of 1/7/19 slip-and-fall would not cause the underlying degeneration of the rotator

cuff, it is my opinion, with reasonable medical probability, that approximately 50% of the permanent disability to the right shoulder is due to industrial injury 1/7/19. It is my opinion, with reasonable medical probability, that approximately 50% of the permanent disability to the right shoulder is due to underlying right shoulder rotator cuff disease, underlying right shoulder degeneration exquisitely demonstrated in the MRI and right shoulder surgery of 8/15/06, and the natural progression of that problem. ¶ Evidence-based science would suggest that Ms. Sutherland's rotator cuff disease was not caused by the industrial injury to the right shoulder on 1/7/19.

(Joint Exh. 10, Stephen P. Abelow, M.D., August 9, 2023, pp. 4 – 5.)

At the November 29, 2023 trial the parties stipulated that 322 was the appropriate Occupational Group number. The August 9, 2023 report from Dr. Abelow was admitted into evidence and the issue submitted for decision was whether Dr. Abelow's opinion regarding apportionment was valid (i.e. substantial evidence). (MOH/SOE, November 29, 2023, p. 2.)

DISCUSSION

As we stated in our Opinion, in order to constitute substantial evidence concerning the issue of apportionment the physician must explain the nature of the non-industrial 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, although Dr. Abelow did explain in detail the nature of applicant's pre-existing non-industrial factors, he did not explain how and why those factors were causing permanent disability at the time he evaluated applicant, nor did he explain how and why those factors were responsible for the percentage of disability he assigned to those factors. Thus, his reports, including the August 9, 2023 supplemental report, do not constitute substantial evidence addressing the issue of apportionment. (*Escobedo v. Marshalls, supra.*)¹

The Appeals Board has the discretionary authority to develop the record when the record does not contain substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (Lab. Code §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [62 Cal.Comp.Cases 924]). However, our discretion to develop the record must be balanced with the parties' obligation to exercise due diligence in submitting substantial

¹ We also note that in his most recent report, orthopedic QME Robert Henrichsen, M.D., stated, "I continue to be unable to address issues such as cumulative trauma, apportionment and work restrictions because I have inadequate medical information." (Joint Exh. 9, Robert Henrichsen, M.D., March 31, 2022, p. 4.) Clearly, his reports are not substantial evidence regarding apportionment.

evidence as to the issues submitted for decision. (See *San Bernardino Community Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986].) In accordance with Labor Code section 4663(c), the defendant has the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (See also, Lab. Code, §05705.) In this matter, by our June 9, 2023 Order, we gave defendant the opportunity to develop the record so that it contained substantial evidence regarding the issue of apportionment. If a party fails to meet its burden of proof by obtaining and introducing competent evidence, it is not the job of the Appeals Board to rescue that party by ordering the record to be developed. (*San Bernardino Community Hospital v. Workers' Comp. Appeals Bd. (McKernan)*, *supra*; *Telles Transport Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290].) Under the circumstances of this matter, it is not necessary, nor is it appropriate, that we again order further development of the record. Thus, defendant did not meet its burden of proof and applicant is entitled to an un-apportioned award of permanent disability. Therefore, applicant's disability is rated as follows: 16.02.02.00 - 23 - 32 -322G - 35 - 42%.

Accordingly, we grant reconsideration, rescind the Findings, and substitute a new Findings of Fact and Award, finding in part that applicant's permanent disability is properly rated using occupational group number 322; that defendant did not meet its burden of proof on the issue of apportionment; and that applicant's injury caused 42% permanent partial disability; permanent disability indemnity and attorney fees are awarded based thereon.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Findings of Fact issued by the WCJ on January 25, 2024, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the January 25, 2024 Findings of Fact is **RESCINDED**, and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Lorna Sutherland, while 61 years of age, sustained injury arising out of and in the course of employment to her right shoulder on January 7, 2019, while employed by Gold Trail Union School District as a school bus driver and cafeteria worker, at Placerville, California; at the time of the injury, Gold Trail Union School District was permissibly self-insured.
2. At the time of injury, applicant's earnings during the school year were \$852.47 per week, warranting the indemnity rate of \$290.00 per week for permanent disability.
3. Temporary disability indemnity was paid during the periods from January 8, 2019, through January 11, 2019; May 22, 2019, through June 7, 2019; and August 12, 2019, through October 27, 2019. Permanent disability advances began on October 28, 2019, and will be adjusted subject to proof.
4. Applicant's permanent disability is properly rated using occupational group number 322.
5. Stephen P. Abelow, M.D.'s reports do not constitute substantial evidence on the issue of apportionment.
6. Defendant has not met its burden of proof on the issue of apportionment; applicant is entitled to an un-apportioned award of right shoulder permanent disability.
7. The injury caused 42% permanent partial disability, after adjustment for age and occupation.

AWARD

AWARD IS MADE in favor of **LORNA SUTHERLAND** and against **GOLD TRAIL UNION SCHOOL DISTRICT** as follows:

(a) Permanent disability indemnity in the total amount of \$62,350.00 payable forthwith, less credit for any permanent disability indemnity previously paid to and received by applicant, and less attorney fees in the amount of \$9,300.00 payable to applicant's attorney.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 12, 2024

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

**LORNA SUTHERLAND
SMOLICH & SMOLICH
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, 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*