

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

MARIEANGE FIVEASH, *Applicant*

vs.

**THE MEN'S WAREHOUSE, INC.; SAFETY NATIONAL CASUALTY
CORPORATION, administered by CORVEL CORPORATION, *Defendants***

**Adjudication Number: ADJ10915228
Santa Ana District Office**

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

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will grant reconsideration, amend the WCJ's decision as recommended in the report, and otherwise affirm the May 28, 2021 Findings and Award. We will also reserve jurisdiction on the issues of further medical treatment and attorney fees.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the May 28, 2021 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the May 28, 2021 Findings and Award is **AFFIRMED**, **EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

1. MARIEANGE FIVEASH while employed during the period October 1, 1997 through April 26, 2017 as a tailor, occupational group number 221 at Freemont, California, by THE MENS WEARHOUSE INC, TAILORED SHARED SERVICES, whose

workers' compensation insurance carrier was SAFETY NATIONAL CASUALTY CORPORATION administered by CORVEL, sustained injury arising out of and occurring in the course of employment to her bilateral wrists.

* * *

5. The issue of future medical care is deferred, with jurisdiction reserved at the trial level.
6. The issue of attorney fees is deferred, with jurisdiction reserved at the trial level.

WORKERS' COMPENSATION APPEALS BOARD

/s/ DEIDRA E. LOWE, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 18, 2021

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

**MARIEANGE FIVEASH
LAW OFFICE OF JOSEPH E. RICHARDS
SLADE NEIGHBORS, A PROFESSIONAL LAW CORP.**

PAG/ara

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

Applicant was employed as a tailor by defendant The Men's Warehouse where she began working in 1997 as a tailor. Applicant alleges she sustained industrial injury to her bilateral wrists, upper extremities, hands, left shoulder, left forearm, bilateral fingers, and suffered neurological issues as a result of her employment from October 1, 1997 through April 26, 2017. Defendant accepted applicant's claim of carpal tunnel to her wrists and denied all other body parts for which injury is claimed.

According to the history provided to Dr. Vicente Fortanasce who examined applicant as a PQME in neurology, at some point in approximately 2011 applicant began developing pain to her left shoulder and forearm. (Exhibit F, page 2). She continued working and in 2014 began to develop pain in her right thumb. After this, applicant began to notice a tingling sensation in the fingers on both hands. She continued working during which time the tingling sensation increased as both hands began swelling. Applicant began privately treating for her complaints and was diagnosed in 2017 with carpal tunnel syndrome by Dr. Esther Hsiao, a neurologist. Applicant thereafter underwent a carpal tunnel release to both hands in 2017. (Exhibit F, page 3).

The matter proceeded to trial on the issues of parts of body injured, permanent disability, and apportionment, with the matter being submitted by the parties on the documentary record, finding applicant to have only sustained injury to her wrists in the form of carpal tunnel syndrome and left shoulder, and issued an unapportioned Award of 45% permanent disability. Defendant is aggrieved of the undersigned's Findings and Award and filed a timely and verified Petition for Reconsideration contending that there are inconsistencies in the Findings and Award, that apportionment should be allowed by the Court, and that the rating provided by Dr. Fortanasce is incorrect.

INCONSISTENCY IN FINDINGS AND AWARD

Defendant first contends an error in the Court's finding of injury to applicant's bilateral hands instead of bilateral [wrists (CTS)]. Review of the Findings and Award reveals a scrivener's error in Finding number 1 that indicates bilateral hands as an injured body part instead of applicant's bilateral [wrists (CTS)]. The Board is asked to amend the Findings and Award to substitute bilateral [wrists (CTS)] in place of bilateral hands. No injury was found to applicant's hands as is indicated in Finding number 2.

Defendant also contends that no attorney fees or future medical treatment was addressed in the Findings and Award and Opinion on Decision. The Minutes of Hearing and Summary of Evidence from the trial reflects that the parties did not place these issues before the Court. As the issues were not submitted to the Court they were not considered, and the undersigned addressed only the raised issues of parts of body injured, permanent disability, and apportionment.¹

¹ The parties expressed the intent on the morning of trial that they believed they would resolve and settle upon determination of the issues regarding the medical reporting dispute.

APPORTIONMENT

Defendant next argues that the undersigned erred by disallowing the apportionment indicated by Dr. Fortanasce. Dr. Fortanasce found apportionment of 90% to industrial causation and 10% to "...non-industrial factors which predispose her to the development of carpal tunnel syndrome including activities of daily living and the degeneration and inflammatory [sic] that occurs due to the aging process." (Exhibit B, page 4).

The undersigned found that Dr. Fortanasce's opinion on apportionment is conclusory and fails to point to what non-industrial factors predisposed the applicant to the development of carpal tunnel syndrome and further fails to be substantial medical evidence in that it fails to adequately address the "how and why" aspect of non-industrial apportionment.

The Court's opinion in *Thomas v. Long Beach Unified School* discusses the requirements for valid apportionment determinations, while quoting *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 33 Cal.Comp.Cases 660:

"Thus, to be substantial evidence on the issue of 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, 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 [*11] 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.)" *Thomas v. Long Beach Unified School*, 2012 Cal. Wrk. Comp. P.D. LEXIS 317

In *Thomas*, the Court found that the apportionment determination by the doctor in that case was not substantial medical evidence where the apportionment determination read “I continue to believe the bilateral upper extremity disability should be apportioned 100% to cumulative trauma. The back, neck, and left shoulder conditions are apportioned 25% to the specific injury of April 23, 1998; 5% of the low back disability is apportioned to the specific injury of December 1, 1999; 50% of the low back disability is apportioned to non-industrial natural progression of degenerative disc disease; and the remainder is apportioned to cumulative trauma. For the right shoulder, 50% is apportioned to cumulative trauma; and 50% to the natural progression of degenerative disc disease. For the cervical spine, 50% is apportioned to the natural progression of degenerative disc disease which is non-industrial; 20% is apportioned to the specific injury of April 1998; and 30% is apportioned to cumulative trauma.” Dr. Fortanasce uses similar vague language in his report, which the undersigned found vague enough to lack justifying his apportionment determination.

Defendant carries the burden to show apportionment. *Jackson v. County of Los Angeles*, 2013 Cal. Wrk. Comp. P.D. LEXIS 558. Here, no supplemental reporting addressed the deficiencies found in Dr. Fortanasce’s original opinion and the undersigned found no valid apportionment applied to applicant’s claim.

RATING

Defendant’s final argument is that the rating provided by Dr. Fortanasce is incorrect in that his rating for carpal tunnel syndrome incorrectly uses a grade 3 sensory deficit whereas a grade 4 deficit was more appropriate. Dr. Fortanasce opined that as applicable to Table 16-10 of the AMA Guides², “...Grade III is chosen due to the distorted superficial tactile sensibility, abnormal sensation or slight pain that inference with some activities...” and utilized a 50% modifier from the range of 26-60. (Exhibit A, page 3). In his report of November 13, 2019 he indicated that “Post-surgery EMG/Nerve Conduction Study have shown worsening of her carpal tunnel syndrome in spite of conservative treatment and surgery.” (Exhibit B, page 2). Diagnostic testing from 2017 to 2019 also indicated deterioration of applicant’s median nerve neuropathy. It was also noted in reporting of August 8, 2019 that comparison of the diagnostic studies indicated applicant’s right wrist was “consistent with extremely severe right carpal tunnel syndrome which would continue to explain the complaints of paresthesia in the right hand and fingertips. (Exhibit C, page 8).

Dr. Fortanasce was selected by the parties as the PQME in this matter, and was the only medical report submitted that the undersigned found appropriate off which to base a rating. Dr. Christopher Fleming acted as a consulting physician in orthopedic surgery to whom Dr. Fortanasce deferred opinion on applicant’s left shoulder and elbow to an orthopedic surgeon. Dr. Fortanasce subsequently incorporated the opinion of Dr. Fleming into his own reporting, finding that there was no industrial injury to either of these body parts.

As the only report on which to rely in regards to the carpal tunnel, the undersigned rated the report of Dr. Fortanasce as issued by the doctor using the impairments he indicated. Defendant’s petition would have the Court utilize a corrected rating which uses Grade 4

² Guides to the Evaluation of Permanent Impairment, 5th edition Chapter 16, page 482

impairment that they believe is more representative of applicant's condition, however it would be improper for the undersigned to alter the doctor's findings and assessment.

RECOMMENDATION

It is respectfully recommended that the Board grant reconsideration to amended Finding Number 1 to reflect only injury to applicant's bilateral wrists (CTS).

As to all other contentions the undersigned would recommend defendant's Petition be denied.

DATE: July 6, 2021

Jeremy Clift
WORKERS' COMPENSATION JUDGE