

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

RYAN HICKMAN, *Applicant*

vs.

**COUNTY OF LOS ANGELES, Permissibly Self-Insured, Administered By SEDGWICK
CLAIMS MANAGEMENT SERVICES, INC., *Defendant***

**Adjudication Number: ADJ11182584
Pomona District Office**

**OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge (WCJ) Findings and Award of July 6, 2021, wherein it was found that, while employed on December 1, 2017 as a probation officer, applicant sustained industrial injury to his right lower extremity and right hip, causing temporary disability from December 29, 2017 to October 31, 2018, permanent disability of 38%, and the need for further medical treatment. In finding permanent disability of 38%, the WCJ found that defendant did not carry its burden of showing that apportionment of permanent disability was appropriate in this matter.

Defendant contends that the WCJ erred in not finding apportionment of permanent disability as outlined by agreed medical evaluator orthopedist Chester A. Hasday, M.D. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we quote below, and we adopt and incorporate, except as discussed below, we will deny defendant's Petition. While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

[A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]

Moreover, in 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. [Citations.]

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 p. 621.)

We disagree with the WCJ's statement that Dr. Hasday "did not provide any medical evidence to show that applicant's femur had ... been weakened by the radiation treatment." (Report at p. 3.) Applicant's surgeon Nicholas Bernthal, M.D. did diagnose "pathologic fracture ... secondary to radiation" (November 5, 2018 report at p. 13), computerized tomography showed "diffuse osteopenia" (July 17, 2019 report at p. 7), and Dr. Hasday's expert opinion of course constitutes evidence. However, while asymptomatic conditions and pathology are now bases for apportionment, Dr. Hasday did not sufficiently explain the mechanism behind how applicant's short course of radiology treatment almost 30 years ago contributed to applicant's current permanent disability. As noted in the WCJ's Report, applicant testified that he had a "very physical job" for the past 23 years. (Minutes of Hearing and Summary of Evidence of May 5, 2021 trial at p. 4.) Additionally, applicant weighed 370 pounds on the date of injury. (November 5, 2018 report at p. 4.) Dr. Hasday did not sufficiently explain how applicant's condition would be completely asymptomatic for almost 30 years despite an active job and heavy weight-bearing.

Additionally, Dr. Hasday does not sufficiently explain the "how and why" of the percentages of apportionment attributed to the industrial injury and to the non-industrial pathology. Asked to explain his apportionment determination at his deposition, Dr. Hasday merely recited his apportionment determination testifying, "Taking a look at everything this guy went through, what

is the relative fault of the radiation on his femur versus the fall in the hole. And I thought that the radiation of the femur was at least three times more causative than the fall in the hole.” (November 24, 2020 deposition at p. 12.)

Accordingly, for the reasons stated above and for the reasons in the WCJ’s Report quoted below, we will deny the defendant’s Petition. We have taken out parts of the Report which we do not incorporate and edited the Report with bracketed sections.

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

INTRODUCTION

Petitioner:	Defendant
Timeliness of Petition:	Timely
Verification:	Verified
Issue:	Findings of Fact and Opinion

Applicant, Ryan Hickman, while employed on December 1, 2017, as a probation officer, occupational group number 390, at City of Commerce, California, by County of Los Angeles Probation Department, legally uninsured and administered by Sedgwick, sustained injury arising out of and occurring in the course of employment to the hip and right lower extremity.

Trial proceeded on the issues of permanent disability, apportionment, need for further medical treatment, and attorney fees. This included a claim by applicant’s attorney for reimbursement of costs incurred for the deposition of AME Dr. Hasday.

The Findings and Award found applicant’s injury caused permanent disability of 38%, without apportionment. Defendant disputes the finding of no apportionment of permanent disability.

Applicant filed a response to the Petition for Reconsideration and contends defendant failed to sustain its burden of proof on the issue of apportionment.

Defendant filed a Petition for Reconsideration on the following grounds:

The WCAB acted without or in excess of its power;
The decision was not justified by the evidence;
The Findings of Fact do not support the decision.

DISCUSSION

The Petition for Reconsideration admits the applicant sustained injury to

the right thigh and knee on December 1, 2017. Further, that two weeks after that injury the applicant's right thigh bone snapped while he was getting into a vehicle. That incident is described in the Petition for Reconsideration as "without pressure of force" without reference to any medical evidence stating that point. The applicant's history of treatment in 1993, preoperative radiation therapy, is addressed by the AME reporting and deposition.

It is not disputed the applicant began his employment with the Los Angeles County Probation Department in April, 1998. Applicant's trial testimony that he has a very physical job and is on his feet all day has not been rebutted. The AME reports of Dr. Hasday (exhibit Joint 1) stated the applicant worked 56 hours per week with frequent overtime. None of this was disputed at trial. The applicant has been working a very physical job with frequent overtime since April, 1998.

There is no dispute the applicant underwent three radiation treatments to his right leg for cancer treatment in 1994. There were no further radiation treatments after 1994. There was no further treatment to his right leg after 1994. Between 1994 and 2017 applicant had no right leg complaints and was able to continue to do his usual and customary job duties without complaints regarding his right leg (Minutes of Hearing and Summary of Evidence May 5, 2021, page 3 and 4).

There is no dispute the applicant was injured in the course [...] of his employment as a Probation Officer on December 1, 2017. Applicant injured his right knee and thigh when he stepped into a deep hole. The medical reports no x-rays were taken and applicant still had right knee and thigh pain and throbbing and gradually had right knee symptoms on December 7, 2017.

[Four] weeks following the injury on December 1, 2017, applicant suffered a fracture of the right thigh bone. It was described as occurring when he was getting into a vehicle. Treatment was obtained at UCLA Harbor Medical Center. Applicant was subsequently treated at UCLA Santa Monica Medical Center by Dr. Nicholas Bernthal. In a review of records the AME Dr. Hasday reviewed an operative report dated January 2, 2018 (Dr. Bernthal) in which Dr. Bernthal provided a diagnosis of pathologic fracture right femur secondary to radiation. No other medical reports of Dr. Bernthal were addressed nor were any entered into evidence.

The reports issued by the AME, Dr. Hasday (exhibit Joint 1), addressed the issue of apportionment. In the report dated November 5, 2018 (pages 18 and 19), Dr. Hasday stated it appeared the specific injury on December 1, 2017, was primarily a contusional injury to the right knee, as he landed with full body weight into a two feet deep hole. Further, that although there was no direct indication that the applicant sustained injury to his midshaft right thigh, per the AME the medical facts of the case, to the level of reasonable medical

probability, points to the applicant's industrial injury as causing a microfracture in the applicant's already weakened midshaft right femur due to preoperative radiation he received following his definitive tumor resection in 1994.

The parties deposed the AME and Dr. Hasday testified to what he described as deleterious effects on bone due to radiation. Just prior to that discussion, in his deposition Dr. Hasday testified the applicant was able to compensate for that treatment through a strengthening program and returned to full activities, including sports.

The discussion on apportionment in the deposition of the AME (pages 9 to 11), stated there was no evidence the applicant had residual weakness in the muscles following the cancer treatment. Dr. Hasday went on to describe that radiation has deleterious effects on bone, that it is not uncommon that irradiated bone structurally weakens and would be susceptible to what he described as trivial trauma later in time, such in this case.

However, neither the deposition testimony nor the two AME reports from Dr. Hasday provided [sufficient] evidence the applicant's femur had in fact been damaged by the radiation treatment. There was no discussion of any medical treatment, in fact the evidence is that the applicant only underwent radiation treatments in 1994 but between that date and 2017 there is no evidence of any treatment or even any complaints to the right leg. There was no discussion of any medical records or diagnostic tests to confirm any conclusion the applicant's femur had been weakened by the radiation treatment. The report of Dr. Bernthal reviewed by the AME Dr. Hasday did not provide any medical evidence to show the applicant's femur had in fact been weakened by the radiation treatment.

The apportionment of causation of [disability] due to the finding the applicant's femur had been damaged as a result of radiation treatment in 1994 is not [sufficiently explained].

The AME's deposition testimony and medical reports in support of the finding of apportionment of 75% of the permanent disability to what is described as non-industrial due to weaking due to radiology therapy in 1994 is found to be [conclusory and insufficiently explained]. As stated in applicant's response to the Petition for Reconsideration, defendant in this case has the burden of proof on the issue of apportionment. The AME in his reports and deposition testimony did not set forth a valid basis of apportionment as stated, 75% to be apportioned to the radiation treatment in 1994 with only 25% apportioned as industrial. The AME Dr. Hasday did state in his deposition it was not uncommon for irradiated bone to structurally weaken and be susceptible to trivial trauma later in life (AME deposition page 9), but the conclusion that is what occurred in this case is [not sufficiently explained given the time lapse, during which time applicant had a very active job, and heavy weight bearing on the right leg.]

CONCLUSION

It is respectfully recommended the Petition for Reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of July 6, 2021 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT,

/s/ DEIDRA E. LOWE, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 20, 2021

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

**RYAN HICKMAN
MARTIN VON MIZENER
EDWARD DE LA LOZA**

DW/oo

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

DISSENTING OPINION OF COMMISSIONER DEIDRA E. LOWE

I respectfully dissent. I would have granted reconsideration and amended the WCJ's decision to reflect the apportionment found by agreed medical evaluator orthopedist Chester Hasday, M.D.

As conceded by my colleagues in the majority, it is now well-established since the passage of Senate Bill 899 in 2004, and the current version of Labor Code section 4663, that apportionment of permanent disability is now to causation of the permanent disability, and apportionment to pathology or asymptomatic conditions is apposite. While the WCJ based her decision on the fact that there were no medical records or symptoms in the 27 years between the radiation treatment and the fracture, the nature of asymptomatic conditions is that they are, as the name makes clear, asymptomatic. While my colleagues subtly pivot the basis behind the decision to the fact that Dr. Hasday did not sufficiently explain his decision, his discussion easily meets the standard set by the Court of Appeal in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].

In *Gatten*, the Court of Appeal reversed a WCAB finding of no apportionment, and found, in accordance with an independent medical examiner's report, that 20 percent of the injured worker's permanent disability was caused by non-industrial factors. The medical evidence supporting apportionment in *Gatten* was the physician's review of an MRI showing degenerative disc disease. The *Gatten* court held that apportionment was proper even though the applicant was asymptomatic prior to the industrial injury, writing that, "[t]he doctor made a determination based on his medical expertise of the approximate percentage of permanent disability caused by [the] degenerative condition [in] applicant's back. [Labor Code] [s]ection 4663, subdivision (c), requires no more." (*Gatten*, 145 Cal.App.4th at p. 930.)

Similarly, here, Dr. Hasday made a determination based on his medical expertise after an adequate examination and after review of the relevant medical record. Dr. Hasday utilized his medical expertise in concluding that radiation treatment frequently leads to weakening of bone. Additionally, Dr. Hasday reviewed the medical records, in which computerized tomography showed diffuse osteopenia, and in which the surgeon who physically repaired the applicant's bone diagnosed a pathological fracture secondary to radiation. Dr. Hasday made a determination based on applicant's extensive prior history to the same body part, and review of diagnostic tests medical records. Like in *Gatten*, Labor Code section 4663 requires no more.

“[W]orkers’ compensation law favors agreed medical [evaluators] in resolving medical disputes fairly and expeditiously.” (*Green v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 1426, 1444 [70 Cal.Comp.Cases 294].) Therefore, an agreed medical evaluator’s opinion should ordinarily be followed unless there is good reason to find that opinion unpersuasive. (*Power v Workers’ Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114]; *Los Angeles Unified School Dist. v. Workers’ Comp. Appeals Bd. (Steele)* (2000) 65 Cal.Comp.Cases 300, 301 [writ den.]; *Siqueiros v. Workers’ Comp. Appeals Bd.* (1995) 60 Cal.Comp.Cases 150, 151 [writ den.].)

I would have followed the agreed medical evaluator’s apportionment opinion. Accordingly, I respectfully dissent.

/s/ DEIDRA E. LOWE, COMMISSIONER



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**RYAN HICKMAN
MARTIN VON MIZENER
EDWARD DE LA LOZA**

DW/oo

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