

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

SHARON JACKSON, *Applicant*

vs.

**UNIVERSITY OF CALIFORNIA BERKELY, permissibly self-insured, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ9616392
Sacramento District Office**

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

Applicant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on June 25, 2021, wherein the WCJ found in pertinent part that applicant's low back injury caused 33% permanent partial disability, after adjustment for apportionment.

Applicant contends that the reports from pain medicine qualified medical examiner (QME) Lee T. Snook, Jr., M.D., are not substantial evidence on the issue of apportionment, and defendant did not meet its burden of proof.

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.

We have considered the allegations in the Petition for Reconsideration (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 grant reconsideration and affirm the F&A, except that we will amend the F&A to find that the injury caused 47% permanent partial disability (Finding of Fact 2) and the Award will be amended based thereon.

BACKGROUND

Applicant claimed injury to her low back while employed by defendant as a custodian on July 26, 2013.

On October 4, 2016, applicant was evaluated by QME Dr. Snook. (Joint Exh. AA, Dr. Snook, October 4, 2016.) Dr. Snook examined applicant, took a history, and reviewed the medical record. The diagnoses included left side sciatica, low back pain, disc displacement, post laminectomy syndrome, and chronic pain syndrome. (Joint Exh. AA, p. 19.) The doctor found applicant's condition to have reached maximum medical improvement (MMI) and using the American Medical Association Guides to the Evaluation of Permanent Impairment, (AMA Guides) DRE (Diagnosis-Related Estimates) method, he assigned 23% whole person impairment (WPI), plus a 3% pain add-on. As to the issue of apportionment Dr. Snook stated:

In this case, the injured worker was able to engage in the full requisite duties of her job as defined in the job description evidenced in the medical record without limitations until the date specific injury of 07/26/13. Thus, within a reasonable medical probability, 70% of the injured worker's impairment is derived from the date specific injury of 07/26/13 and 30% to non-industrial and other factors. (Joint Exh. AA, p. 20.)

Dr. Snook was subsequently provided imaging studies (lumbar spine MRIs) and review of those studies did not change his opinions as stated in the October 4, 2016 report. (Joint Exh. BB, Dr. Snook, November 28, 2016, p. 4.)

Dr. Snook was asked to provide an ROM (Range of Motion) method rating and in his January 21, 2020 supplemental report he stated that using the ROM method resulted in a 23% WPI rating for applicant's lumbar spine. (Joint Exh. CC, Dr. Snook, January 21, 2020, p. 4.) The doctor was asked to review his ROM rating and in his March 29, 2020 report he concluded that the ROM method resulted in 21% WPI; he then included a 3% pain add-on. (Joint Exh. DD, Dr. Snook, March 29, 2020, p. 5.)

When asked to clarify his opinion regarding apportionment, Dr. Snook submitted a supplemental report wherein he stated:

The degenerative conditions in the spine predated the date-specific injury of 07/26/13, but as noted the patient was able to engage in the full requisite duties of her job prior to that date--specific injury which caused her impairment and permanent disability, in part due to the injury and in part due to the surgical correction. ¶ ... Degenerative joint disease was seen in the facets at T12-L1 through L5-S1 except at L4-5 where the facets are fused. There was mild annular bulging of the discs L3-4 and L4-5 but diminished at L4-5 since the prior exam. There remains severe stenosis in the left neural foramen at L5-S1 from bulging discs which appear to entrap the left L5 nerve. As interpreted by James Engelhart, MD. ¶ The patient continues to complain of left lower back pain and

left lower extremity paresthesia primarily in the LS distribution to the dorsal foot. ¶ 482 pages of medical records were reviewed from 10/03/16 and previously reported upon. The records reflect that the injured worker was able to engage in the full requisite duties of her job prior to the date-specific injury. She had preexisting pathology which contributed to her impairment, thus, the basis for apportionment and the basis for 30% apportionment to nonindustrial causes.

(Joint Exh. EE, Dr. Snook, July 19, 2020, p. 4.)

The parties proceeded to trial on June 14, 2021. The issues submitted for decision included permanent disability and apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), June 14, 2021, p. 2.)

DISCUSSION

Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors, in order to fairly allocate legal responsibility. (*Brodie, supra*, 40 Cal.4th at p. 1321.) The employer has the burden of proof to establish apportionment of permanent disability with substantial evidence. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1107, 1114-1115 [71 Cal.Comp.Cases 1229].)

Labor Code section 4663 sets out various requirements for doctors' reports on the issue of apportionment, including that each report must "address" the issue of causation of the permanent disability and must make an "apportionment determination" by finding the approximate relative percentages of permanent disability directly caused by the industrial injury and that caused by other factors. (Lab. Code, § 4663) Nevertheless, 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 non-industrial causation does not necessarily render the report one upon which the Appeals Board may rely. This is because it is well established that any decision of the WCAB 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]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

If as here, the doctor states that a portion of the injured worker's disability is caused by a degenerative condition, the physician must explain the nature of the degenerative disease, how and

why it was causing permanent disability at the time of the evaluation, and how and why it was responsible for the percentage of the disability assigned by the physician. For example, if a physician states 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, and how and why the injury is responsible for approximately 50% of the disability. Further, if a physician states 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 was causing permanent disability at the time of the evaluation, and how and why it was responsible for approximately 50% of the disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

As noted above, in his July 19, 2020 report Dr. Snook gave a detailed description of applicant's pre-existing degenerative lower back condition. (Joint Exh. EE, p. 4.) However, the doctor did not explain how and why the pre-existing degenerative condition was causing permanent disability at the time of the evaluation, nor did he explain how and why it was responsible for 30% of applicant's lumbar spine disability. His report is not substantial evidence on the issue of apportionment and cannot be the bases for the F&A. Thus, defendant did not meet its burden of proof and applicant is entitled to an unapportioned award of permanent disability.

Accordingly, we grant reconsideration and affirm the F&A, except that we amend the F&A to find that the injury caused 47% permanent partial disability (Finding of Fact 2) and we amend the Award based thereon.¹

¹ The Opinion on Decision includes the rating of applicant's disability and indicates that before apportionment the rating is 47%. (See F&A p. 4, Opinion on Decision.) Our rating and the Award is based on the WCJ's rating with no apportionment.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued by the WCJ on June 25, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of June 25, 2021, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. The reports from QME Lee T. Snook, Jr., M.D., are not substantial evidence on the issue of apportionment, and the July 26, 2013 injury caused 47% permanent partial disability.

* * *

AWARD

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1. Permanent disability indemnity in the total amount of \$57,500.00 payable at the rate of \$230.00 per week for 250 weeks or until the total amount thereof shall have been paid, less credit for permanent disability indemnity advances previously paid, and less attorney fees in the amount of \$8,625.00.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 13, 2021

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

**SHARON JACKSON
SMOLICH & SMOLICH
LAW OFFICE OF WILLIAM S. FRANK**

TLH/pc

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