

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

FREDY MEDINA, *Applicant*

vs.

**LOS ANGELES UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered
by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ11645082
Van Nuys District Office**

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

Applicant seeks reconsideration of the Findings of Fact & Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on August 10, 2021, wherein the WCJ found in pertinent part that the October 3, 2018 injury caused 12% permanent partial disability, that 50% of applicant's permanent disability was caused by/apportioned to pre-existing factors, and that defendant was to receive credit for benefits paid by the Employment Development Department (EDD) during the period from February 2, 2019, through June 5, 2019, in the amount of \$4,930.00.

Applicant contends that defendant should not receive credit for benefits that the EDD paid to applicant, and that the reports from orthopedic qualified medical examiner (QME) Steven N. Brouman, M.D., are not substantial evidence regarding the issue of apportionment.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition be granted for the limited purpose of amending the Findings to reduce defendant's credit for benefits paid by the EDD from \$4,930.00 to \$2,071.43; the WCJ's recommendation is appropriate and we will amend the F&A to reduce the amount of the credit to \$2,071.43. We did not receive an Answer from defendant.

We have considered the allegations in the Petition for Reconsideration (Petition), and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration and we will affirm the F&A except that we will amend the F&A to find

that the October 3, 2018 injury caused 21% permanent disability, and defendant's credit for the EDD benefits is reduced to \$2,071.43 (Finding of Fact 3); that the trial record does not contain substantial evidence regarding apportionment of permanent disability (Finding of Fact 4); and that a reasonable attorney's fee based on applicant's permanent disability award is \$3,501.75 (Finding of Fact 6). The Award will be amended based thereon.

BACKGROUND

Applicant claimed injury to his cervical and lumbar spine while employed by defendant as a teacher's assistant on October 3, 2018. Applicant had previously sustained an injury to his back when his car was "T-Boned on the passenger side" in a September 7, 2018 motor vehicle accident. (Def. Exh. A, Dr. Brouman, April 17, 2019, p. 5, Prior Non-Industrial Injuries.)

Applicant was evaluated by QME Dr. Brouman on April 17, 2019. (Def. Exh. A) Dr. Brouman examined applicant, took a history, and reviewed the medical record. He diagnosed applicant as having cervical and lumbar spine strain with degenerative disc disease. (Def. Exh. A, p. 22.) Dr. Brouman concluded that applicant's condition was permanent and stationary, and that he had 8% cervical spine whole person impairment and 6% lumbar spine whole person impairment. (Def. Exh. A, pp. 24 and 28.)

Regarding the issue of apportionment, Dr. Brouman stated:

With the medical evidence presented, it is impossible to distinguish between the two injuries in terms of the force of the injury or to the overall contribution of disability. In a sense both injuries are inextricably intertwined involving the patient's disability to the neck and back. I would apportion the patient's disability as being equally distributed between the September 7, 2018 injury and the October 3, 2018 injury.
(Def. Exh. A, p. 26.)

In response to correspondence from applicant's counsel, Dr. Brouman submitted a supplemental report wherein he stated:

The only thing that I could state is that the patient felt that each injury was equally forceful in contributing to his overall disability, but there is a great degree of subjectivity in that. I can simply state that 50/50 apportionment is my best estimate, but it is certainly no more than an educated guess.
(Def. Exh. B, Dr. Brouman, October 2, 2019, p. 2.)

The parties proceeded to trial July 26, 2021. (Minutes of Hearing and Summary of Evidence (MOH/SOE), July 26, 2021.) The issues submitted for decision included temporary disability, permanent disability/apportionment, and credit for the EDD overpayment of state disability benefits. (MOH/SOE, p. 3.)

DISCUSSION

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].) In order to constitute substantial evidence on the issue of apportionment, 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 (Appeals Board *en banc*)). The 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. A medical opinion is not substantial evidence if it is based on surmise, speculation, conjecture, or guess. (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378 - 379 [35 Cal.Comp.Cases 525].)

As noted above, in his first report Dr. Brouman stated that it was "impossible to distinguish between the two injuries" as to their "contribution of disability." He then stated that regarding applicant's neck and back disability, the "injuries are inextricably intertwined involving the patient's disability to the neck and back" and that he would apportion applicant's disability "equally" between the two injuries. (Def. Exh, A, p. 26.) In his subsequent report, Dr. Brouman stated, "I can simply state that 50/50 apportionment is my best estimate, but it is certainly no more than an educated guess." (Def. Exh. B, p. 2.) The doctor did not explain how and why applicant's injury caused by the September 7, 2018 motor vehicle accident was causing permanent disability at the time of the evaluation, nor did he explain how and why those factors are responsible for 50% of applicant's disability. Dr. Brouman's conclusions regarding apportionment, do not comply with the requirements stated by the Appeals Board in *Escobedo, supra*. Further, he specifically

stated that his opinion as to apportionment was, “no more than an educated guess.” (Def. Exh. B, p. 2.) Thus, his opinions do not constitute substantial evidence on the issue of apportionment.

It is well established that the burden of proof rests upon the party holding the affirmative of the issue. (Lab. Code, § 5705; *Lantz v. Workers’ Comp. Appeals Bd.* (2014) 226 Cal.App.4th 298, 313 [79 Cal.Comp.Cases 488]; *Hand Rehabilitation Center v. Workers’ Comp. Appeals Bd. (Obernier)* (1995) 34 Cal.App.4th 1204 [60 Cal.Comp.Cases 289.]) The employer has the burden of proof to establish apportionment of permanent disability to non-industrial factors or previous industrial injuries, with substantial 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].)

As explained above, the reports from Dr. Brouman are not substantial evidence upon which a finding of apportionment can be made. Our review of the trial record indicates there is no other evidence that addresses the issue of apportionment. Based thereon, defendant did not meet its burden of proof as to apportionment.

Labor Code section 5906 provides that:

Upon the filing of a petition for reconsideration ... the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge on the basis of evidence previously submitted in the case...
(Lab. Code, § 5906.)

Although Dr. Brouman’s reports are not substantial evidence regarding apportionment, we agree with the WCJ that Dr. Brouman’s April 17, 2019 report is substantial evidence on the issue of applicant’s cervical spine and lumbar spine impairment/disability. (Def. Exh. A, pp. 24 and 28.) Based on the whole person impairment assigned by Dr. Brouman, applicant’s disability is rated as follows:

CERVICAL: 15.01.01.00 - 8 - [1.4] 11 - 214F - 11 - 13 PD
LUMBAR: 15.03.01.00 - 6 - [1.4] 8 - 214F - 8 - 9 PD
13 C 9 = 21 % PD

Accordingly, we grant reconsideration, and affirm the F&A except that we amend the F&A to find that the October 3, 2018 injury caused 21% permanent disability, and defendant’s credit for the EDD benefits is reduced to \$2,071.43 (Finding of Fact 3); that the trial record does not contain substantial evidence regarding apportionment of permanent disability (Finding of Fact 4);

and that a reasonable attorney's fee based on applicant's permanent disability award is \$3,501.75 (Finding of Fact 6). The Award is amended based thereon.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact & Award issued by the WCJ on August 10, 2021, is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the August 10, 2021 Findings of Fact & Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

3. The October 3, 2018 injury caused 21% permanent disability; applicant is entitled to a permanent disability award of 21% equivalent to 80.50 weeks payable at the rate of \$290.00 per week per week commencing February 2, 2019, to present and continuing equaling \$23,345.00, less any permanent disability paid during that period for that date of injury, less credit for overpaid benefits paid by the Employment Development Department during the period April 17, 2019, to June 5, 2019, totaling \$2,071.43, and less a reasonable attorney's fee as set forth below.

4. The trial record does not contain substantial evidence regarding apportionment of permanent disability; applicant's disability will not be apportioned to pre-existing or non-industrial factors.

* * *

6. A reasonable attorney's fee based on applicant's permanent disability award is found to be \$3,501.75, which shall be commuted from the final weekly payments of applicant's permanent disability award to the extent necessary to pay as one lump sum.

AWARD

* * *

1) Permanent disability indemnity in the amount of \$23,345.00 less any permanent disability indemnity previously paid, less credit for overpaid state disability benefits in the amount of \$2,071.43, and less attorney fees of \$3,501.75.

* * *

3) Applicant's attorney is awarded fees in the amount of \$3,501.75.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 3, 2021

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

**FREDDY MEDINA
LAW OFFICES OF MICHAEL SABZEVAR
HANNA BROPHY**

TLH/pc

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