

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

LOYD COX, *Applicant*

vs.

**RAMOS TANK LINES; NATIONAL UNION FIRE
INSURANCE COMPANY OF PITTSBURGH, PA,
adjusted by GALLAGHER BASSETT, *Defendants***

**Adjudication Number: ADJ11733612
Sacramento District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to allow us time to further study the factual and legal issues in this case. We now issue our Opinion 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 affirm the December 31, 2021 Findings and Award.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the December 31, 2021 Findings and Award is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

I DISSENT, (see attached dissenting opinion)

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 6, 2022

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

**LOYD COX
SMOLICH & SMOLICH
MULLEN & FILIPPI**

PAG/abs

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

DISSENTING OPINION OF CHAIR ZALEWSKI

I dissent. 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].)

Although orthopedic panel qualified medical examiner (PQME) Joel Weddington, M.D., outlines the non-industrial factors to which he is apportioning, and states his opinion as to why there should be apportionment to those factors, I am not persuaded that he adequately explains how he arrived at the percentages he assigned to each body part. In fact, his characterization of the low back and left knee injuries as “trivial” (Joint Exhibit 1, Dr. Weddington’s 9/2/20 report, at pp. 17-18) would appear to support more than a 50/50 split. Based on this lack of adequate explanation, I would defer the issue of permanent disability and return this matter to the trial level for further development of the record by way of a supplemental report from Dr. Weddington on the issue of apportionment.



WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

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**LOYD COX
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PAG/abs

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**REPORT AND RECOMMENDATION ON
PETITION FOR RECONSIDERATION**

INTRODUCTION

1. Applicant's Occupation: Truck Driver.
Applicant's Age at Injury: 58.
Date of Injury: November 27, 2017.
Body Parts: Low back, left shoulder and left knee.

2. Identity of Petitioner: Applicant.
Timeliness: Applicant's petition was timely filed.
Verification: Applicant's petition was properly verified.

3. Date of Issuance of Findings and Order: December 31, 2021.

4. Petitioners Contentions:
 - A. Petitioner contends that the apportionment opinion of Dr. Weddington is not substantial evidence.

FACTS

On November 9, 2021, applicant's attorney and defense attorney appeared at trial (Minutes of Hearing, November 9, 2021). The parties submitted the case on the issues of: 1) permanent disability and apportionment and 2) attorney fees. The September 2, 2020 PQME report of Dr. Weddington was the only exhibit offered into evidence (Joint Exhibit 1). No testimony was received.

On December 31, 2021, the subject Finding and Award issued finding that applicant's injury caused permanent disability of 40% (Findings and Award, December 31, 2021). The undersigned felt that Dr. Weddington's opinion on apportionment was substantial medical evidence.

On January 13, 2022, applicant filed a timely and verified Petition for Reconsideration. As of January 28, 2022, defendant has not filed an Answer.

DISCUSSION

The sole issue on reconsideration is whether Dr. Weddington's apportionment opinion is substantial medical evidence. Citing *Escobedo*, applicant argues that Dr. Weddington's apportionment opinion is not substantial evidence because it does not explain the how and why

the pre-existing pathology was causing disability at the time of the evaluation (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604).

In *Escobedo*, the Appeals Board held that for a medical opinion on apportionment to constitute substantial evidence, the 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." (*Escobedo*, 70 Cal.Comp.Cases at 621-622. accord: *Andersen v. Workers' Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1381-1382 [72 Cal.Comp.Cases 389]; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 917, fn. 7 [70 Cal.Comp.Cases 787].)

In this case, the Opinion on Decision addressed the issue of permanent disability and apportionment as follows:

“Dr. Weddington evaluated the applicant as the Panel Qualified Medical Evaluator for the November 27, 2017 specific injury and issued one report dated September 2, 2020 (Joint Exhibit 1). Dr. Weddington took a history that noted a prior left knee injury while applicant was in the military that resulted in a surgical ACL repair with good results (Joint Exhibit 1, at page 5). Subsequently, applicant had another knee injury at work around 1989 or 1990 while with Pauli & Griffin (Joint Exhibit 1, at page 5). The history suggests that applicant had another knee surgery that resulted in applicant going through vocational rehabilitation to become a truck driver (Joint Exhibit 1, at page 5). Dr. Shin’s October 4, 2019 report confirms a 1991 left knee ACL repair (Joint Exhibit 1, at page 12).

Dr. Weddington also reviewed the October 11, 2018 MRI of the left shoulder which noted:

“1) There is an age indeterminate partial thickness articular-sided tearing of the anterior fibers of the supraspinatus tendon superimposed on mild to moderate tendinosis of the supraspinatus and infraspinatus tendons. There is moderate tendinosis of the subscapularis tendon which exhibits mild articular-sided fraying without evidence of full-thickness tear. (2) There is degeneration of the superior labrum which exhibits intermediate signal intensity. There is fraying of the posterior superior labrum. There is a tear of the posterior inferior labrum. The posterior labrum is largely replaced by spur and spur is mildly edematous. There is degeneration of the anterior labrum present. (3) There is chronic thickening of the axillary pouch which could be related to previous capsulitis or capsular sprain. (4) There is lateral downsloping of the acromion with narrowing of the supraspinatus outlet with mild inflammation within the subacromial subdeltoid bursa. (5) There is edema within the anterior aspect of the

humeral head which could be related to reactive edema, friction syndrome, direct trauma and clinical correlation is needed. (6) Prominent scarring at the level of the coracoclavicular ligaments, likely related to previous injury. Please correlate with history.” (Joint Exhibit 1, at page 13)

The lumbar spine MRI of December 19, 2017 was also reviewed by Dr. Weddington noting:

“Impression: Bilateral L3 pars intra-articularis defects/spondylolysis, likely chronic in timeframe with Grade I anterolisthesis, L3-4. Multilevel spondylosis without significant canal narrowing. Severe left foraminal narrowing, L3-4, with impingement of the exiting left L3 nerve root. Moderate foraminal narrowing on the right at L3-4 and 14-5.” (Joint Exhibit 1, at page 16).

The initial orthopedic consult with Dr. Coward’s office noted that the x-rays of the left knee showed medial compartment degenerative joint disease with centrally located patella and mild patellofemoral compartmental degenerative joint disease without patellar tilt. There was evidence of previous ACL reconstruction with retained hardware (Joint Exhibit 1, at page 15).

The November 27, 2017 x-ray noted “status post ACL reconstruction with approximate anatomic alignment. Mild to moderate tricompartmental degenerative changes. Tiny effusion. No fracture. No abnormal lytic or sclerotic lesions” (Joint Exhibit 1, at page 16).

Dr. Weddington provided the following diagnoses: 1) left knee s/p arthroplasty; 2) past history of left knee injuries and ACL reconstructions; 3) left shoulder impingement and partial rotator cuff tears; 4) chronic low back pain; and 5) lumbar degenerative disc disease (Joint Exhibit 1, at page 16). In addressing causation, Dr. Weddington felt the low back was related to the November 27, 2017 injury. Specifically, Dr. Weddington noted that the chronic appearing degenerative changes at multiple levels were not caused by the injury, but the strain type of injury is a well-known mechanism to exacerbate or aggravate underlying degenerative changes in the lumbar spine (Joint Exhibit 1 at page 17).

In addressing apportionment, Dr. Weddington felt that 50% of applicant’s current disability for his low back is related to the November 27, 2017 injury and 50% related to other factors including the pre-existing and underlying degenerative changes in the lumbar spine (Joint Exhibit 1, at page 17). Dr. Weddington noted that this was a trivial injury to applicant’s low back and absent the underlying pathology, the strain would likely have resolved within weeks or months (Joint Exhibit 1, at page 17).

With regard to the left knee, Dr. Weddington felt that 50% of applicant's disability was related to the November 27, 2017 specific injury and 50% related to pre-existing osteoarthritis which includes the natural progression of the degenerative changes shown on the x-rays and the history of multiple ACL reconstructions (Joint Exhibit 1, at page 17). Dr. Weddington noted that ACL ruptures are well-known to accelerate degenerative arthritis in the knee and that this was a trivial injury with no direct trauma, no hypertension mechanism or fall from height (Joint Exhibit 1, at page 17).

With regard to the left shoulder, Dr. Weddington felt that 75% of the disability is related to the November 27, 2017 injury and 25% due to other factors (Joint Exhibit 1, at page 17). Dr. Weddington noted that there was evidence of age related pathology seen on the MRI in the form of degenerative changes associated with labral tear, partial rotator cuff tear, fraying of tendons and labrum (Joint Exhibit 1, at page 18). Dr. Weddington felt that if applicant did not have the degenerative pathology, he would have expected applicant to have less disability, but due to the significance of the mechanism of injury, he felt the higher degree of disability was related to the November 27, 2017 injury (Joint Exhibit 1, at page 18).

Dr. Weddington concluded that the estimates of apportionment were based on a reasonable degree of medical probability (Joint Exhibit 1, at page 18)."

In this case, the undersigned felt that Dr. Weddington's opinion on apportionment was substantial medical evidence. Dr. Weddington took an accurate history and reviewed the pertinent medical records. Dr. Weddington addressed the fact that applicant had documented pre-existing degenerative changes in his low back, left shoulder and left knee. Dr. Weddington addressed the mechanism of injury, noting that the injury to the low back and left knee were trivial in nature, while the left shoulder mechanism of injury was more significant justifying a higher percentage of industrial permanent disability. There is no other evidence in the record to suggest the injury to the low back, left knee and left shoulder was something other than as Dr. Weddington described it. Nevertheless, Dr. Weddington addressed "how" there is apportionment to other causes (pre-existing degenerative findings) and why there is apportionment to other causes (trivial injury to the low back and left knee, with a more significant injury to the left shoulder).

Though applicant doesn't cite *Hikida v. Workers' Comp Appeals Bd.*, (2017) 12 Cal. App. 5th 1249 [[82 Cal. Comp. Cases 679] in his Petition for Reconsideration, applicant alludes to it suggesting that there is unlikely any osteoarthritis in applicant's left knee post total knee replacement (Petition for Reconsideration, January 7, 2022, at page 4, lines 1-5). In *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)*(2020) , 49 Cal. App. 5th 605, 615 [85 Cal.Comp.Cases 467], the Court of Appeal stated that: "Section 4663 and 4664 make clear that permanent disability "shall" be apportioned and that an employer "shall" be liable only for the percentage of the permanent disability "directly caused" by the industrial injury. There is no case or statute that stands for the principle that

permanent disability that follows medical treatment is not subject to the requirement of determining causation and thus apportionment, and in fact such a principle is flatly contradicted by sections 4663 and 4664”.

Nothing in applicant’s Petition for Reconsideration would alter or change the analysis set forth in the opinion on decision.

RECOMMENDATION

It is respectfully recommended that applicant’s Petition for Reconsideration be denied.

Date: January 28, 2022

NOAH W. TEMPKIN
WORKERS’ COMPENSATION
ADMINISTRATIVE LAW JUDGE