

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

**MOISES JIMENEZ, *Applicant***

**vs.**

**PACIFIC CAMBRIA, INC.; EVEREST NATIONAL INSURANCE COMPANY,  
*Defendants***

**Adjudication Number: ADJ14232382  
San Luis Obispo District Office**

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

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award<sup>1</sup> of June 15, 2022 wherein it was found that, while employed on July 5, 2019 as a dishwasher/cook, applicant sustained industrial injury to his left knee causing permanent disability of 50% and the need for further medical treatment. In finding permanent disability of 50%, the WCJ found there was no basis to apportion permanent disability pursuant to Labor Code section 4663.

Defendant contends that the WCJ erred in finding permanent disability of 50% arguing that the WCJ should have applied the apportionment determination of qualified medical evaluator orthopedist Scott A. Graham, M.D. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, we will affirm the WCJ's finding of 50 percent permanent disability without apportionment. However, we will grant reconsideration and amend the WCJ's decision to include an Award.

Applicant sustained industrial injury to his left knee when he fell off barrels at work. Dr. Graham explained that applicant "failed conservative treatment so [treating orthopedist Dr. N. Birrell] Smith recommended left total knee replacement surgery." The surgery took place on August 24, 2020. (May 6, 2021 report at p. 3.) Dr. Graham rated applicant's permanent

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<sup>1</sup> Despite being captioned as a Findings and Award, the decision does not contain an Award.

impairment based on a “Diagnosis-Based Estimate” for having undergone the left total knee replacement and the result of the surgery. As explained in the AMA Guides:

Some impairment estimates are assigned more appropriately on the basis of a diagnosis than on the basis of findings on physical examination. A good example is that of an individual impaired because of a successful replacement of a hip. This person may function well but require prophylactic restrictions of activities of daily living to prevent a further impairment, such as premature failure of the prosthesis. Table 17-33 provides impairment estimates for certain lower extremity impairments, the ranges of impairment are broad, and the estimate will depend on the clinical manifestations and their impact on the ability to perform the activities of daily living. Hip replacements should first be rated using Table 17-34 and knee replacements using Table 17-35. The points obtained from the assessment are then applied to Table 17-33 for the diagnosis impairment rating.

(AMA Guides, §17.2j Diagnosis-Based Estimates, p. 545.)

Dr. Graham calculated that the applicant had 42 “points” under Table 17-35 (AMA Guides, p. 549) which corresponds to “Total knee replacement ... poor results, less than 50 points” pursuant to Table 17-33 (AMA Guides, p. 547). The AMA Guides impairment rating for undergoing a total knee replacement with poor results is 30% WPI (AMA Guides, Table 17-33, p. 547), which was Dr. Graham’s impairment rating (May 6, 2021 report at p. 10).<sup>2</sup>

With regard to the issue of apportionment, Dr. Graham wrote in his May 6, 2021 report:

The claimant did have an arthroscopic partial medial meniscectomy some 30+ years ago when he was working for a ranch for [a] short period of time. He states that after surgery, his knee was totally pain free until this industrial injury. However, the claimant was found to have severe osteoarthritis in that left knee that was not caused by this industrial injury but previously existed. Epidemiological studies indicate that individuals with osteoarthritis of the knee are symptomatic 50% of the time, asymptomatic 50% of the time. Insofar as the claimant states that he was asymptomatic antedating this injury, 50% is apportioned to the pre-existing condition, 50% to the industrial injury of 07/05/19.

(May 6, 2021 report at p. 11.)

Labor Code section 4663 requires a reporting physician to “make an apportionment determination by finding what *approximate percentage of the permanent disability* was caused by the direct result of injury arising out of and occurring in the course of employment and what

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<sup>2</sup> In contrast, the rating for a “good result” is 15% WPI and the rating for “fair results” is 20% WPI. (AMA Guides, Table 17-33, p. 547.) Thus, merely having to undergo the procedure accounts for 15% WPI.

***approximate percentage of the permanent disability*** was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.” (Lab. Code, § 4663, subd. (c). [Emphasis added.]

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.]

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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.)

In this case, the relevant inquiry for the apportionment determination was what percentage of the permanent disability was caused by factors other than the industrial injury. As explained above, the permanent impairment rating was derived from applicant having undergone a full knee replacement and having obtained a poor result from the surgery. Thus, in order to constitute substantial medical evidence of apportionment, Dr. Graham needed to describe, with specificity, how factors other than the industrial injury contributed to the need for a total knee replacement and how those factors contributed to the poor result obtained from the procedure. Instead, Dr. Graham based his apportionment determination on the percentage of people with osteoarthritis

who are symptomatic or asymptomatic. We are unable to discern how this relates to the percentage of applicant's permanent disability caused by factors other than the disability. Accordingly, since there is no substantial medical evidence of apportionment, we affirm the WCJ's finding of 50% permanent disability without apportionment.

Accordingly, as explained above, we will grant reconsideration and amend the WCJ's decision to add an Award, since the decision does not contain one. Since there is not substantial medical evidence of apportionment, there is no need to consider the applicability of *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] to the instant case. Although we take no position on the issue, we will remove the discussion of *Hikida* in the WCJ's decision. (Finding of Fact 5.) We also correct a typographical error in the calculation of permanent disability indemnity, in that 271.25 weeks of permanent disability at a weekly rate of \$290.00 per week produces a total award of \$78,662.50 rather than \$79,662.50. (Finding of Fact 3.)

For the foregoing reasons,

**IT IS ORDERED** that Defendant's Petition for Reconsideration of the Findings and Award of June 15, 2022 is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision after Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of June 15, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

### **FINDINGS OF FACT**

1. Applicant, Moises Jimenez, while employed on July 5, 2019 as a dishwasher/cook, occupational group number 322, sustained injury arising out of and in the course of his employment to his left knee.
2. At the time of injury, the employer's worker's compensation carrier was Everest National Insurance Company, administered by Sedgwick CMS.
3. Applicant is entitled to a permanent disability award of fifty percent (50%) for permanent disability, equivalent to 271.25 weeks of indemnity payable at the rate of \$290.00 per week, in the total sum of \$78,662.50, commencing on January 21, 2021, less reasonable attorney's fees of eighteen percent (18%) of permanent disability awarded, to be commuted from the far end of the award.
4. Permanent disability is calculated as follows:  
17.05.10.08 - 30 - [1.4] - 42 - 322F - 42 - 50  
No apportionment.
5. There is no basis for apportionment of permanent disability.
6. Applicant is entitled to future medical care to cure or relieve the effects of the industrial injury.
7. There is no basis to rebut the PDRS. Both vocational evaluators found applicant amenable to vocational retraining under *Dahl*.
8. Defendants are ordered to adjust and/or negotiate the Labor Code Section 5811 costs of Mr. Ramirez, with jurisdiction reserved to the WCAB.

## **AWARD**

AWARD IS MADE in favor of Moises Jimenez and against Everest National Insurance Company of:

- a. Permanent disability indemnity payable at the rate of \$290.00 per week for 271.25 weeks in the total sum of \$78,662.50, commencing on January 21, 2021, less any permanent disability indemnity already advanced, less reasonable attorney's fees of eighteen percent (18%) of permanent disability awarded, to be commuted from the far end of the award.

b. All medical treatment reasonably required to cure or relieve from the effects of the industrial injury herein.

c. Reimbursement of the Labor Code section 5811 costs of Mr. Ramirez in an amount to be adjusted, with jurisdiction reserved in the event of a dispute.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ MARGUERITE SWEENEY, COMMISSIONER**

**I CONCUR,**

**/s/ PATRICIA A. GARCIA, DEPUTY COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**September 6, 2022**

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

**MOISES JIMENEZ  
ALBERT AND MACKENZIE  
WILLIAM A. HERRERAS**

**DW/pc**

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