

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

MARTIN HARRINGTON, *Applicant*

vs.

**CITY OF BAKERSFIELD, Permissibly Self-Insured, Administered By ACCLAMATION
INSURANCE MANAGEMENT SERVICES, *Defendant***

**Adjudication Number: ADJ11930165
Bakersfield District Office**

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

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of May 15, 2023, wherein it was found that, while employed on December 24, 2017 as an equipment operator, applicant sustained admitted injury to his neck, thoracic spine, and low back, causing permanent disability of 38% after apportionment. In finding permanent disability of 38% , the WCJ followed the apportionment determination of qualified medical evaluator pain management specialist Kamyar Assil, M.D., who opined that 20 percent of applicant's cervical and lumbar spine impairments were attributable to non-industrial factors. (No apportionment was found with regard to the thoracic spine impairment.)

Applicant contends that the WCJ erred in applying apportionment of permanent disability because Dr. Assil's apportionment determination did not constitute substantial medical evidence. We have not received an answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

As explained below, Dr. Assil did not sufficiently explain his apportionment to non-industrial factors with regard to the cervical and lumbar spine. We therefore grant reconsideration and amend the WCJ's decision to reflect that applicant sustained 44% permanent disability.

Dr. Assil found applicant permanent and stationary in a November 14, 2020 report. For all three regions of the spine, applicant's impairment was rated by use of the AMA Guides Diagnosis-Related Estimates (DRE) method and was found to be in DRE Category II for all three regions. Dr. Assil rated applicant's cervical spine impairment at 7% whole person impairment, thoracic

spine at 6% whole person impairment, and lumbar spine at 8% whole person impairment. (November 14, 2020 report at p. 19.)

With regard to apportionment of permanent disability, Dr. Assil wrote:

In assessing apportionment, I have considered Labor Code Section 4663 (a) and 4664, as well as the *Escobedo* and *Benson* en banc decisions.

Following is my apportionment opinion, within reasonable medical probability:

It is my medical opinion, within reasonable medical probability that 80% of his cervical spine impairment is due to the December 4, 2017 industrial injury and 20% is due to pre-existing or nonindustrial factors.

It is my medical opinion, within reasonable medical probability that 100% of his thoracic spine impairment is due to the December 4, 2017 industrial injury with no apportionment to pre-existing or nonindustrial factors.

It is my medical opinion, within reasonable medical probability that 80% of his lumbar spine impairment is due to the December 4, 2017 industrial injury and 20% is due to pre-existing or nonindustrial factors.

(November 14, 2020 report at p. 20.)

Asked to expand upon his opinion on apportionment, Dr. Assil wrote in a December 17, 2021 report:

I did rely upon MRI findings of the lumbar spine that demonstrated multiple levels of degeneration along with Dr. Sanchez's comments regarding CS-6 degenerative disc disease. While some of these changes could be considered as industrial, one cannot ignore body weight and habitus with a BMI of 36.2. There also must be consideration of the natural progression of degeneration in a 57-year-old gentleman.

(December 17, 2021 report at p. 3.)

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.)

Dr. Assil's explanation of apportionment is conclusory and does not constitute substantial medical evidence. The reports do not describe in detail how non-industrial factors are contributing to applicant's permanent impairment. While we understand that non-industrial obesity may be contributing to applicant's condition, Dr. Assil does not sufficiently explain how obesity is contributing to the permanent impairment. Additionally, even assuming age in and of itself could be a basis for apportionment, there is insufficient explanation regarding how applicant's age (rather than activities or conditions during applicant's lifetime) have contributed to degeneration and how this degeneration has contributed to applicant's permanent impairment.

The burden of proving apportionment falls on the [defendant]...." (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) Since evidence of non-industrial apportionment does not constitute substantial medical evidence, we find applicant entitled to a non-apportioned award of permanent disability. At trial, the parties stipulated that Dr. Assil's reports rate at 44% without apportionment. (Minutes of Hearing and Summary of Evidence of March 30, 2023 trial at p. 3.) We therefore grant reconsideration and amend the Findings and Award of May 15, 2023 to reflect that applicant's injury has caused 44% permanent disability.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Findings and Award of May 15, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of May 15, 2023 is **AMENDED** as follows:

FINDINGS OF FACT

1. Applicant, Martin Harrington, then 54 years of age, sustained a specific injury to his neck, thoracic and low back while employed on December 4, 2017, in Bakersfield, California, as an equipment operator (Occupational group 480) by Defendant, City of Bakersfield.
2. On December 4, 2017, Defendant-Employer, City of Bakersfield, was permissibly self-insured for California workers' compensation liability. Its program of permissible self-insurance is presently administrated by Acclamation Insurance Management Services.
3. On December 4, 2023, Applicant had an average earnings of \$973.20 per week, warranting indemnity rates of \$648.80 for temporary disability and \$290.00 for permanent disability.
4. The employer has paid as follows: (a) Salary continuation at the weekly rate of \$648.80 from July 2, 2018 to July 3, 2018; July 26, 2018 to August 5, 2018; December 13, 2018 to February 6, 2019; April 19, 2019 to February 7, 2020. (b) Temporary disability at the rate of \$648.80 per week from February 8, 2020 to February 7, 2021. (c) Permanent disability at the rate of \$290.00 per week from February 8, 2021 to September 16, 2022.
5. Applicant has been advanced a total of \$24,227.16 in permanent disability indemnity by Defendant.
6. Applicant has been adequately compensated for all periods of temporary disability claimed through January 26, 2023.
7. The Employer has furnished some medical treatment.
8. The primary treating physician is Dr. Shamarick Blue.
9. Defendant issued a supplemental job displacement voucher to Applicant on November 10, 2021.

10. Applicant was permanent and stationary, on November 14, 2020, from the effects of the injury of December 4, 2017.

11. The report of PQME Dr. Kamyar Assil, dated November 14, 2020, rates at forty four percent (44%) permanent disability.

12. Applicant sustained permanent disability of forty-four percent (44%) after adjustment for age and occupation, equivalent to 229 weeks of indemnity, commencing on November 14, 2020, at \$290.00 per week for a total of \$66,410.00. Defendant did not carry its burden of showing apportionment of permanent disability.

13. Applicant is in need of further medical treatment to cure and/or relieve the effects of Applicant's December 4, 2017 injury.

14. The reasonable value of the services of Applicant's attorney is \$9,868.51, representing 15 percent of the present value of applicant's permanent disability award.

AWARD

AWARD IS MADE in favor of MARTIN HARRINGTON against CITY OF BAKERSFIELD of:

a. Applicant is awarded permanent disability indemnity of forty-four percent (44%), equivalent to 229 weeks of indemnity payable at \$290.00 per week, in the total sum of \$66,410.00, less reasonable attorney fees to Ghitterman, Ghitterman and Feld, in the amount of \$9,868.51, less credit to Defendant for permanent disability indemnity advances, previously made in the amount of \$24,227,16.

b. Applicant is awarded further medical treatment to cure and/or relieve the effects of Applicant's December 4, 2017 injury

WORKERS' COMPENSATION APPEALS BOARD

/s/ NATALIE PALUGYAL, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 7, 2023

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

**MARTIN HARRINGTON
GHITTERMAN, GHITTERMAN & FELD
HANNA, BROPHY, MacLEAN, McALEER & JENSEN**

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