WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JEFFREY BETTENCOURT, ***Applicant***

vs.

AMAZON, AMERICAN ZURICH INSURANCE, administered by SEDGWICK CMS,
Defendants

Adjudication Number: ADJ13163916, ADJ13163896
Lodi District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Applicant Jeffrey Bettencourt seeks reconsideration of the October 9, 2024 Amended Findings of Fact, Award, Orders, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that defendant is entitled to 60% apportionment of applicant's permanent disability to his right knee.

Applicant contends that (1) Jeryl Weins, M.D., Orthopedic Qualified Medical Evaluator, did not explain the how and why with regard to how he derived at his apportionment percentages and did not provide any impairment ratings to support his apportionment based on past injuries; (2) Dr. Wiens opinion on apportionment is not reasonable given applicant's work history and hobbies prior to the industrial injury; and (3) there should not be apportionment under *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679].

We received an answer from defendant American Zurich Insurance. Defendant contends that (1) applicant's reliance on *Hikida* is misplace; (2) apportionment to applicant's right knee disability is supported by case law; and (3) Dr. Wiens medical report constitutes substantial evidence.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we deny reconsideration.

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on October 29, 2024 and 60 days from the date of transmission is Saturday, December 28, 2024. The next business day that is 60 days from the date of transmission is Monday, December 30, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on December 30, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides

---

[1] All statutory references are to the Labor Code unless otherwise indicated.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on October 29, 2024, and the case was transmitted to the Appeals Board on October 29, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on October 29, 2024.

II.

We do not find *Hikida, supra*, applicable in this case. In *Hikida, supra,* 12 Cal.App.5th 1249, the injured worker suffered from carpal tunnel syndrome, which required surgery. The surgery resulted in a new injury in the form of chronic regional pain syndrome (CRPS), causing her debilitating pain in her upper extremities and severely impairing her ability to function. The Orthopedic Agreed Medical Examiner (AME) opined that the injured worker's permanent disability was due *entirely* to the effects of the CRPS as a result of the failed carpal tunnel surgery. The AME further concluded that the injured worker's carpal tunnel itself was 90% due to industrial factors and 10% due to nonindustrial factors. The WCJ apportioned 10% of applicant's permanent disability award to nonindustrial factors. A different Appeals Board panel affirmed the apportionment. The Second District Court of Appeal reversed and concluded that apportionment was not proper. It concluded that the employer is responsible for both the medical treatment and any disability arising directly from unsuccessful medical intervention, without apportionment. (*Id.* at p. 1260.) The Court of Appeal reasoned that the 2004 Amendments to apportionment statutes did not change the long-standing rule that employers are responsible for medical treatment, including the foreseeable consequences of such medical treatment. (*Id.* at p. 1262-1263.)

Approximately three years later, the Sixth District Court of Appeal in *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467] disagreed and limited the holding of *Hikida*. This Court held that although an employer is

responsible for paying all medical treatment without apportionment, it is not responsible for the *consequences* of medical treatment without apportionment when that consequence is permanent disability. (*Id.* at p. 615.) It narrowed the holding in *Hikida*.

> . . . the *Hikida* court's conclusion that there should be no apportionment makes sense only because the medical treatment in *Hikida* resulted in a *new* compensable consequential injury, namely CRPS, which was *entirely* the result of the industrial medical treatment. It was this new compensable consequential injury that, in turn, led *entirely* to the injured worker's permanent disability. The agreed medical examiner's findings underlined this point, as he determined that the injured worker's "permanent total disability was due *entirely* to the effects of the CRPS that she developed as a result of the failed carpal tunnel surgery." (*Hikida, supra*, 12 Cal.App.5th at p. 1253, italics added.) Although parts of the *Hikida* opinion can be read to announce a broader rule that there should be no apportionment when medical treatment increases or precedes permanent disability, it is clear that the rule is actually much narrower. Put differently, *Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability. (*Id.* at pp. 615; emphasis in the original.)

The Sixth District Court of Appeal then concluded that sections 4663 and 4664 make clear that permanent disability shall be apportioned and that an employer shall be liable only for the percentage of permanent disability directly caused by the industrial injury. (*Id.* at p. 615.) In *Justice*, this meant that the injured worker's permanent disability as a result of a total knee replacement was apportioned to significant nonindustrial preexisting knee degeneration, irrespective of whether the industrial injury precipitated the need for total knee replacement.

Thus, *Hikida* and *Justice* seem to be in conflict with each other. "Where a conflict exists between published opinions of different Courts of Appeal, the WCAB is free to choose between the conflicting lines of authority until either the Supreme Court resolves the conflict or the Legislature clears up the uncertainty by legislation." (*Erickson v. S. Cal. Permanente Med. Group/Kaiser Permanente* (2006) 72 Cal. Comp. Cases 103, 108 [2006 Cal. Wrk. Comp. LEXIS 425] citing *Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 456; *People v. Hunter* (2005) 133 Cal.App.4th 371, 382; *McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4; *Maples v. Aetna Cas. & Surety Co.* (1978) 83 Cal.App.3d 641, 650, fn. 5.)

Here, we conclude that the facts here align more with *Justice* than *Hikida*. Applicant has an extensive history of knee injuries and surgeries due to his active lifestyle. (Report, pp. 6-9.)

There is no indication that the total knee replacement he received was unsuccessful and resulted in a new permanent disability like in *Hikida*. Dr. Weins testified in deposition that applicant's permanent disability to his right knee was the result of industrial and nonindustrial preexisting factors. (Report, p. 6.) As such, per *Justice*, we conclude that apportionment to nonindustrial factors is proper here.

Lastly, we agree with the WCJ that Dr. Weins's reports and testimony constitute substantial evidence. In order to constitute substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) "[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations) Further, 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)" (*Gatten*, *supra,* at p. 928.) "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation.)" (*Kyle v. Workers' Comp. Appeals Bd (City and County of San Francisco)* (1987) 195 Cal.App.3d 614, 621.) Here, Dr. Weins extensive reviewed applicant's medical history and mechanism of injury and concluded that applicant's preexisting knee pathology contributed slightly more to applicant's permanent disability, warranting a 60% apportionment to nonindustrial factors. (Report, p. 6.)

Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant Jeffrey Bettencourt's Petition for Reconsideration of the October 9, 2024 Amended Findings of Fact, Award, Orders is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

December 19, 2024

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

JEFFREY BETTENCOURT
WILLIAM S. MORRIS
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP

LSM/oo

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

REPORT AND RECOMMENDATION ON RECONSIDERATION PER 8 CCR 10962 & NOTICE OF TRANSMISSION TO THE APPEALS BOARD

INTRODUCTION

This is a **timely filed** and **verified petition for reconsideration** by Applicant dated **10-11-24**. Applicant challenges the Findings and Orders dated 10-8-24 which found that the Applicant's right knee permanent disability was apportionable.

- ADJ13163916 date of injury (12/3/2019) Right ankle/Achilles:
- ADJ13163896 date of injury (1/28/2020) Right knee
- Applicant age at time of injury 64.
- Occupational variant 460

Reconsideration Petition filed by Applicant.

Apportionment of the right knee permanent disability is the sole issue.

Applicant(Petitioner) asserts that Right Knee PD is not apportionable

- The industrial injury caused a need for a total knee replacement. (TKR) Since the TKR was medical treatment for the industrial injury that resulted a new condition (a knee replacement) the resulting PD was non-apportionable *Hikida v. WCAB (2017) Hikida v. Workers' Comp. Appeals Bd., 12 Cal. App. 5th 1249*, and

- The QME did not explain
  - The how and why about how he came up with specific percentages of apportionment based on past injury history, and
  - Did not provide any impairment ratings to describe any permanent disability that existed prior to the industrial injury

I relied on the facts in the present case and decisions in *Markham v. Workers' Compensation Appeals Board, (2007) 72 Cal. Comp. Cases 265, and County of Santa Clara v. Workers' Comp. Appeals Board, (2020) 49 Cal. App. 5th 605 [262 Cal. Rptr. 3d 876]*.

I also relied on *E. L. Yeager Constr. v. Workers' Comp. Appeals Bd., 71 Cal. Comp. Cases 1687 (Cal. App. 4th Dist. November 28, 2006)* the substantial evidence and the how and why were present.

I recommend reconsideration be denied.

I found opinions of Dr. Weins to be substantial evidence and he did discuss and explain his opinions on apportionment. The how and why were present. The new standard for apportionment may be met *if there is a [*1693] preinjury asymptomatic condition*.

Asymptomatic means the lack of symptoms. Applicant's pre-injury activities, medical treatment, light work are not necessarily controlling under the new apportionment regimen. **E. L. Yeager supra**.

DISCUSSION

Procedural history commencing with the original FAO of 10/26/23.

The case was submitted for decision on 8/28/23 following a trial on 8/15/23. Minutes of hearing and summary of evidence issued on 8/17/23 eams doc 77059624. Those minutes and summary and exhibits were agreed to apply to this submission with 2 new exhibits (Apps. 1&2) and the new issue of timeliness of Applicant's recon petition of 12/11/23 eams doc 49465601.

A Findings, Award, Orders and Opinion on Decision issued on 10/26/23. Both parties filed pre-trial briefs on 8/28/23. eams doc 51590726 and eams doc 51584678 respectively.

An FAO issued 10/26/23 eams doc 77299357. On 11/16/23 Applicant's Attorney by correspondence requested an amendment as Applicant Attorneys were Awarded to the wrong Applicant firm, eams doc 49123255.

An amended FAO issued with a caption including the statement "AMENDED APPLICANT ATTORNEY FEES ONLY" on 11/17/23, eams doc 77371967.

Applicant's attorney filed a petition for reconsideration on 12-11-23.

On 12-26-23 the amended 11/17/23 FAO was rescinded.

On 4-25-24 a trial occurred, and a new decision issued 5-3-24. Defendant filed a petition for reconsideration on 5-23-24. The 5-3-24 F&O was rescinded 6/6/24. Hearing occurred 7-2-24 with submission that date. Those facts brought us to the 9-5-24 decision.

Applicant filed a reconsideration petition challenging the apportionment opinion regarding the right knee ADJ13163896.

In my review I found clerical errors which regarded Applicant's occupational group number which I caught independent of Applicant's Reconsideration. The 9-5-24 decision was rescinded. This decision of 10-8-24 corrects those errors and did result in dollar changes in PD and Attorney fees.

Sole issue-Right Knee apportionment

Apportionment Right Knee

QME Dr. Wiens issued two reports and was deposed, **Joint 100-102**. I reviewed

Hikida v. Workers' Comp. Appeals Bd., 12 Cal. App. 5th 1249.

That review led me to *Markham v. Workers' Compensation Appeals Board, (2007) 72 Cal. Comp. Cases 265, and County of Santa Clara v. Workers' Comp. Appeals Board, (2020) 49 Cal. App. 5th 605 [262 Cal. Rptr. 3d 876]*, Both cases were very similar to the facts presented here. The respective Applicants suffered right knee injuries. Apportionment was found per LC 4663 and LC4664 as industrial and non-industrial factors contributed to the knee surgeries and permeant disability in each case.

In Markham and County of Santa Clara supra. the existing pathology was caused by both industrial and non-industrial factors. Markham supra. (Id. at 266) The resulting total knee replacement did not prevent the apportionment. Markham supra. (Id. at 269)

The sections quoted below are examples demonstrating the extent of the information and review QME Dr. Weins had at the time he expressed his opinions, conducted his exams and obtained the accurate history.

QME Dr. Wiens in his deposition testified that he "*felt [he] needed to say that there's slightly more contribution to [Applicant's] overall knee difficulties from all those other causes than there was from the…January '20 injury, and that's why I went with the 40, 60.*" **(Joint Exhibit 102, p. 22-23)**

Substantial evidence

Substantial evidence in establishing apportionment has been said in Gatten and Escobedo supra. to involve the establishing five components.

1. Dr. must make a specific apportionment determination, using percentages, based on the permanent disability that existed at "the time of his (or her) evaluation of applicant." (It's fine if one of the percentages is 0% and the other is 100%, but there must be a specific determination.)
2. Dr. must analyze permanent disability based on causation of disability (rather than causation of injury);
3. Dr.'s opinion "must not be speculative, it must be based on pertinent facts and on an adequate examination and history;"
4. Dr.'s opinion must be based on "reasonable medical probability;"
5. Dr. must explain how and why he or she arrived at his conclusion.

1. In the present matter the first step has been satisfied.

QME Dr. Weins made a specific apportionment determination using percentages, based on the permanent disability that existed at "the time of his (or her) evaluation of applicant." (It's fine if one of the percentages is 0% and the other is 100%, but there must be a specific determination.)

The petitioner does not contest the PD impairment pre-apportionment. Petitioner objects to no specific finding of exactly what PD% existed prior to the injury. Petition for Reconsideration 10-11-24 page 7 lines12-18. As such the estimate by QME is not Applicant contends that since Dr. Wiens opinions on apportionment are not supported with impairment rating for preexisting disability, no explanation as to what was going on with the Applicant's right knee to specifically make it more susceptible to having a total knee replacement, and improper references to the mechanism of injury make Dr. Wiens' opinions not substantial medical evidence.

- QME Dr. Weins made a specific finding regarding PD at the time of his evaluation.

Permanent Disability

Dr. Wiens used tables 17-5, 17-33 and 17-35 in arriving at Applicant's impairment. These tables are used in WPI determinations regarding the knee and total knee replacement. The impairment rating from QME Dr. Wiens report10/20/22 **Joint 100 page 10 and 11** quoted here.

IMPAIRMENT RATING:
Regarding the right knee, there are two methods that can reasonably be suggested when discussing impairment. One would be to use table 17-5 on page 529 of the AMA Guides where the patient uses a cane on a part-time basis, which would be 15% WPI. Using table 17-35 on page 549, the (p.10) patient would total 62 points based on occasional moderate pain and physical exam findings that when applied to table 17-33 regarding total knee replacement, 62 would place him in the fair results which suggests 20% WPI. The Guides suggest going with the greater number and therefore in this case I would suggest 20% WPI for the right TKA. Joint 100-page 10 last paragraph and page 11 first paragraph.
Rating strings were made in the Findings of Fact and Opinion on Decision 10-8-24 page 8 paragraphs 2-3.

Impairment rating strings are as follows:

- ADJ13163916 date of injury (12/3/2019) Right ankle/Achilles:

(17.07.04.00-3-[l.4]4-460G-6-8) equals 8 percent permanent disability which equates to $6,960.00.

- ADJ13163896 date of injury (1/28/2020) Right knee:

.4 (17.05.10.08-20-[1.4]28-460G-34-43) equals 17 percent, permanent disability of $17,545.00.

QME Dr. Weins made a specific apportionment determination using percentages. Regarding apportionment percentages QME Dr. Weins testifies that Applicant's PD impairment is totally based on the total knee replacement surgery. The total replacement knee surgery of Applicant's right knee is not the injury. The surgical process is what the impairment is based on and that surgery was the result of industrial and non-industrial other factors. Further no new unanticipated condition occurred as a result of the TKR.

In Markham v. Workers' Compensation Appeals Board, (2007) 72 Cal. Comp. Cases 265, and County of Santa Clara v. Workers' Comp. Appeals Board, (2020) 49 Cal. App. 5th 605 [262 Cal. Rptr. 3d 876], Both cases were very similar to the facts presented here. The respective Applicants suffered right knee injuries. Apportionment was found per LC 4663 and LC4664 as industrial and non-industrial factors contributed to the knee surgeries and permeant disability in each case. See above

I relied on the whole record, but I will aluminate some portions. QME Dr. Weins opined in his deposition testimony as follows:

"Q. Okay. Now we go to apportionment, I guess. Let me see if I can find where you talk apportionment in your report. Okay. You indicated a 60 percent apportionment to other causes. I guess I should have you kind of reiterate for me why. A. On the right knee he had at least three prior surgeries, I think, in the lower extremities. He had a total of nine surgeries. Active lifestyle; hunting, fishing, basketball, football, jumping out of airplanes .So, as I looked at the mechanism of injury of January of 2020 and oppose that to the multiple previous activities, injuries, surgeries that he's had on that knee, I felt when this moment came of being deposed, I would have a difficult

time saying that all of those others was equal to this one episode, this one injury, or two injuries when he twisted in addition to the misstep. So, in my mind, I felt I needed to say that there's slightly more contribution to his overall knee difficulties from all of those other causes than there was from the January 22 -- or January '20 injury, and that's why I went with the 40, 60."
(Joint 1 102, Page 22 Lines 4-25 and page 23 lines 1-3).

Additional testimony in (Joint 102 page 23 lines 24-25 and page 24 lines 10-15)

Q. Okay. Well, his impairment is based totally upon his having had a total knee replacement; am I correct?
A. Yes.
Q. Okay. And so we will find the disability by converting that impairment over to disability; do you understand that?
A. Yes.
Q. Okay. So, all of these previous injuries, how are they included in the fact that he has a total knee replacement?
A. Those led to significant deterioration of the knee prior to the work comp injury. Had he not had those injuries, it would be my opinion that his twist off of the step and then catching on the netting would not have been a significant enough injury to require a total knee replacement.

Issue conclusion

The knee surgery is not the injury it is the basis of the impairment caused by industrial and non-industrial factors. The existing pathology was caused by both industrial and non-industrial factors. *Markham supra. (Id. at 266) The resulting total knee replacement did not prevent the apportionment. Markham supra. (Id. at 269)*

Here the other factors in this case are

" On the right knee he had at least three prior surgeries, I think, in the lower extremities. He had a total of nine surgeries. Active lifestyle; hunting, fishing, basketball, football, jumping out of airplanes. So, as I looked at the mechanism of injury of January of 2020 and oppose that to the multiple previous activities, injuries, surgeries that he's had on that knee, **(Joint 1 102, Page 22 Lines 4-25 and page 23 lines 1-3).**

In detail **QME Dr. Weins reports in his evaluation of 9/22/20, Joint 101, page 3, paragraph 2**

"He reports he has had a number of injuries from the years that he was in the Army. He reports he has had seven wrist surgeries, three right shoulder surgeries, three left shoulder surgeries, left elbow surgery, two wrist surgeries, left forearm surgery x3, bilateral ear surgery, four angiocaths, surgery for his flatfeet in each foot, surgery for an injury to his right tibia, bilateral thigh surgery, and surgery for his thyroid. He reports he retired from the military after 31.6 years but was medically boarded out in 2016 for diabetes. He denies any new injuries since the Achilles and knee injury. He feels over the past couple of months he has gotten worse in both the knee and the Achilles."

Finally in even more detail QME Dr. Wiens reviewed the Applicant's deposition **Joint 100-page 6 paragraph 8 and page 7 paragraph 1**

June 22, 2022, *53-page deposition of the patient is reviewed. Page six notes that he was deposed regarding a murder in Gustine, California. Second deposition was when he was in the Army around 2013. Usual clarifications, identifications, and admonitions discussed. Page 11 notes the patient used tobacco products, quitting in 2003. Twenty-year smoker. Patient served in the Army, honorable discharge, denied disabilities at the time of discharge. Following his second service period that ended in 2015, it was a retirement and medical discharge because of his diabetes.*

"Current income sources include retirement from the military, V.A., and Social Security. Patient was on disability from the V.A. for sleep apnea, heart attack, PTSD, diabetes, bilateral shoulder surgeries, bilateral foot surgeries, surgeries of the left elbow, surgery of left forearm, bilateral surgeries of the wrists, hernia operation, bilateral knee surgeries, neck injury. Tinnitus. Migraine headaches. Two different dates of injury are recorded: the first is December 3, 2019, and January 28, 2020. The patient worked loading trucks as a dock worker. Last day worked was February of 2020. The patient notes on page 20 that he did not have any additional employers while he was at Amazon as a dock worker. Notes he also coached football at Gustine and Atwater High Schools. He also worked with his horses and his dogs. \1/hile working as a paramedic for Metropolitan, he had a gamekeeper's thumb injury. In a cast six weeks. He denies prior right ankle injuries regarding December 3, 2019. On page 23, notes he has been diagnosed with arthritis and this was the shoulders, wrists, knees, left elbow, neck. Notes the patient stopped smoking the day of his heart attack. Two concussions in the Army. The patient reports being involved in five MVAs. The patient denied any significant injuries from the MVAs except for a strained neck muscle on the last one.

Describes a box falling on his right Achilles on page 27/28. Patient sent for physical therapy. Reports going to the V.A. doctor because Sedgwick kept denying physical therapy.

Notes the patient used a CAM walker as well as a cane regarding the right Achilles. He then notes the second injury which occurred to his knee, he was up on some rubber steps that were wobbly and he twisted and went down on the ground and then on the other side of the truck there was some netting hanging down that was underneath the conveyor belt and he got hung up on that, twisting his right knee. The patient reports prior injuries to the right knee, arthroscopy in 2006, 2005, 1993/1992. First knee injury described playing basketball during the Army. He then recalls having another injury when he was out hunting, stepped wrong, twisted it, was Dr. Casey and operated on the meniscus again. Regarding the other three surgeries, the patient indicates everything was fine. He reports he was able to get back to water skiing, snow skiing, hunting, fishing. On page 37, line 11, he discusses there may have been an ACL but not sure about that. He also had a tumor removed from his throat and part of his thyroid in Temple, Texas. He reports he has had bilateral surgeries on his thighs to remove tumors. Tumors were benign. The patient rents the property that he is living on but owns three pickups, two boats, and five horses. Notes he has not ridden his horse since his injury. The patient reports he likes to hunt deer, boating, hunting wild turkey, wild pig, ride horses. He played softball, water skied, hunted duck, snow skied. The patient indicates the doctor said he should not be doing those activities. He also golfs. On page 44, he discusses complaining about his back acting up and he said it is primarily because of his gait when he was with the therapist. He does report treating his low back previously with a parachute accident in '75 in the Army. He reports a 1250-foot parachute jump. He had to hold his parachute when he came down, hit the ground and tweaked his back. He was treated in Italy where it happened. Physical therapy. On page 47/48, the patient indicates in one of the MVAs he was

involved in he was treated for his back and neck. He was placed in a brace. When the patient was discharged from the military he had a 100% disability. Social Security may have classified the patient as 100% disabled. But both have said that he can still work if he wants to. Notes he does dishes. He uses the vacuum cleaner. He can get groceries. If his truck needs to be washed, he drives it through the car wash. He doesn't walk his dog because it is a puller; he is concerned about taking a chance of getting hurt. Request for movies, pictures, and videos as it looks like an investigator was on this case." Deposition ends on page 53."

As to apportionment of disability Dr. Wiens has very specifically identified the pre-existing injuries, surgeries and activities constituting the "other factors" which advanced degenerative conditions which contributed to Applicant's total knee replacement and PD. Petitioner has stated that the total knee replacement was the cause of the PD which was medical treatment caused by both industrial and non-industrial factors. As medical treatment it was not apportionable.

The total knee was not the injury. Applicant stepping off the step and twisting his knee was the industrial injury. The total knee replacement is the basis of the impairment. And since it was caused by both industrial and non-industrial causes it is apportionable. See QME Dr. Weins testimony above and in Joint

2. Dr. must analyze permanent disability based on causation of disability (rather than causation of injury.

As discussed, and quoted above and below are parts of the record. QME Dr. Weins addressed PD/impairment and its cause. The basis for the PD which is the total right knee replacement surgery and not the cause of the injury. Apportionment was taken as the other factors contributing to the PD. The quoted points are parts of the whole record which was relied on.

3. Dr.'s opinion "must not be speculative, it must be based on pertinent facts and on an adequate examination and history;"

Petitioner, Applicant does not challenge the history taken or the examination. Petitioner does challenge if the How and Why were presented by the QME. That will be discussed below in #5.

Dr. Weins. Below I quote portions of the record which shows the detail and level of examination and history taken.

Initially in his evaluation report of 9/22/20 **Joint 101 pg.6 Physical Examination and pg.7 through pg.8** DIAGNOSTIC IMPRESSION
Initially in his evaluation report of 9/22/20 **Joint 101 pg.6 Physical Examination and pg.7 through pg.8** DIAGNOSTIC IMPRESSION

QME Dr. Weins as quoted above in his deposition testimony in part at. **(Joint Exhibit 102, p. 22-23) supra.**

Quoted above and here QME Dr. Weins reports in his evaluation of 9/22/20, **Joint 101, page 3, paragraph 2**

“He reports he has had a number of injuries from the years that he was in the Army. He reports he has had seven wrist surgeries, three right shoulder surgeries, three left shoulder surgeries, left elbow surgery, two wrist surgeries, left forearm surgery x3, bilateral ear surgery, four angiocaths, surgery for his flatfeet in each foot, surgery for an injury to his right tibia, bilateral thigh surgery, and surgery for his thyroid. He reports he retired from the military after 31.6 years but was medically boarded out in 2016 for diabetes. He denies any new injuries since the Achilles and knee injury. He feels over the past couple of months he has gotten worse in both the knee and the Achilles."

Addressing his apportionment in his deposition testimony, which is quoted above and here,
"So as I looked at the mechanism of injury of January of 2020 and oppose that to the multiple previous activities, injuries, surgeries that he's had on that knee, I felt when this moment came of being deposed, I would have a difficult time saying that all of those others was equal to this one episode, this one injury, or two injuries when he twisted in addition to the misstep. So, in my mind, I felt I needed to say that there's slightly more contribution to his overall knee difficulties from all of those other causes than there was from the...January '20 injury, and that's why I went with the 40, 60." (Joint 102, Page 22-23, Lines 11-3).

Dr. Weins further explained, “Those led to significant deterioration of the knee prior to the work comp injury. Has he not had those injuries, it would be my opinion that his twist off of the step and then catching on the netting would not have been a significant enough injury to require a total knee replacement.” **Joint 102 page 24 lines 10-15**.

QME Dr. Wein additionally expressed, in his 10-20-22 report. **Joint 100- page 11 paragraph 4.**

“APPORTIONMENT:
Regarding the patient's right knee, I would suggest 40% is due to the January 2020 work-related injury and the remaining 60% would be due to causes other than the work-related injury of January of 2020. Again, this is an estimate. Given the history of the patient having a very active lifestyle, as previously discussed, having previous multiple surgeries to this knee, it would be my estimate that nonwork-related contributing factors are greater than the mis-step off the stool that occurred in January of 2020. Mis-stepping off a stool, as described by the patient, and the fact that the patient continued to work for a brief period of time thereafter and then eventually requiring a total knee replacement would suggest to me, based on experience, that there were significant underlying degenerative changes in the joint that eventually required the total knee replacement. Apportionment regarding the right Achilles, in my opinion, would be 100%

The total right knee replacement (TKR) is the basis for the PD/impairment of the right knee not the injury. QME Dr Weins has apportioned 60% to other factors and 40% to this industrial injury,

4. Dr.’s opinion must be based on “reasonable medical probability;”
As quoted and discussed above QME Dr. Weins was extensive and accurate. However, the terms reasonable medical probability or reasonable likelihood are not used. The rub here is the missing terms. I believe a complete and thorough examination was done and an accurate history was obtained. In fact, no issues were raised by petitioner regarding the examination and history taken. QME Dr. Weins did express his estimates were based on his experience supra “APPORTIONMENT” **Joint 100-page 11 paragraph 4**.

5. Dr. must explain how and why he or she arrived at his conclusion
Extensive records were reviewed by QME Dr. Weins in particular but not limited to the 3 previous surgeries and the current TKR surgical report. QME Dr. Weins stated clearly that the apportionment was indicated due these 3 previous surgeries and the surgery here in after both injuries of ADJ13163916 date of injury (12/3/2019) and ADJ13163896 date of injury (1/28/2020) In review of the surgery report of 3/18/13

PREOPERATIVE DIAGNOSIS
1. Left knee patellofemoral chondromalacia.
2. Possible meniscal tear.

POSTOPERATIVE DIAGNOSES
1. Grade IV left patellofemoral chondromalacia.
2. Central degenerative tear of the lateral meniscus.
3. Grade III medial femoral chondromalacia.

NAME OF OPERATION
1. Patellofemoral chondroplasty.
2. Patellofemoral microfracture.
3. Lateral meniscectomy.
4. Medial femoral chondroplasty.
5. Injection left knee with approximately 10 mL of 0.25% Marcaine with epinephrine.

SURGEON: John Casey, MD

PROCEDURE: After satisfactory induction of general anesthetic, the left lower extremity was prepped and draped in the usual sterile fashion. The left leg was exsanguinated, and a pneumatic tourniquet was inflated to 350 mmHg. The medial and lateral parapatellar portals were developed using standard technique. Diagnostic arthroscopy was carried out. The suprapatellar pouch, medial and lateral gutters were explored with no abnormal findings. The undersurface of the patella did show some grade III chondromalacia and there was associated grade IV chondromalacia of the trochlear groove. A patellofemoral chondroplasty was then performed. The grade IV lesion was also microfracture.

On visualization of the medial compartment, there was noted to be an intact medial meniscus. There was noted to be grade III chondromalacia involving the weightbearing surface of the medial femoral condyle and a medial femoral chondroplasty was performed. The ACL and PCL were probed and noted to be intact. On exploration of the lateral compartment, there was noted to be an intact lateral meniscus. There was also noted to be a degenerative central tear of the lateral meniscus and a partial lateral meniscectomy was carried out. The knee was then lavaged with the shaver. The knee was then lavaged to remove all loose debris. The portals were closed with staples and the knee incision sites were then injected with approximately 10 mL of 0.25% Marcaine with epinephrine. There were no intraoperative complications. Needle and sponge counts were correct.

Def I – Paginated 00177,00178,00180, 00194, 00195

These findings are wear and tear microtrauma

These are the difficulties and degeneration QME Dr. Wein was referring to. He reviewed these reports pre-opp. and opp. reports in Joint 101 page 5. QME specifically referencing the findings diagnostic, pre-opp and post opp. and the surgical procedures. Def. - I

And page 11 “APPORTIONMENT”

…total knee replacement would suggest to me, based on experience, that there were significant underlying degenerative changes in the joint that eventually required the total knee replacement.

The difficulties and degeneration found by QME are expressed in the reports of 9-2-20 **Def - F**

Report:
HISTORY: Chronic knee pain. COMPARISON: 7/12/2013.
T CHNIQUE: 4 image(s) of the right knee. Findings:
No acute fracture malalignment. Trace knee joint effusion. No definite focal soft tissue swelling. Small enthesophyte at the patellar attachment of the quadriceps tendon. Bony spur at the tibial attachment of the anterior cruciate ligament has increased in conspicuity and may reflect a history of remote ACL injury.
There is mild medial femoral compartment joint space narrowing. There is trace tricompartmental osteophytosis. No definite focal soft tissue swelling.

Impression:
1. No acute fracture or malalignment.

2. Mild degenerative changes of the right knee as described.

3. Bony spurring at the tibial attachment of the anterior cruciate ligament, possibly related to remote ACL injury and increased in conspicuity compared to the prior radiographs.

4. Trace knee joint effusion.
Def-F Palo Alto VA paginated 00054, 00055

After several hearings and amended decisions the issue all along was the right knee apportionment. In review of this record I believe apportionment to other factors is supported by substantial evidence.

DATE: 10-29-2024

Timothy Nelson
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE