

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

DARREN HAILEY, *Applicant*

vs.

**CONTINENTAL LABOR; NATIONAL UNION FIRE INSURANCE COMPANY,
Administered by GALLAGHER BASSETT SERVICES, INC., *Defendants***

**Adjudication Numbers: ADJ11207109 (MF); ADJ11207111
Bakersfield District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Applicant seeks reconsideration of two Findings and Awards, both issued on October 19, 2021, wherein the workers' compensation administrative law judge (WCJ) found that in Case No. ADJ11207109, applicant, while employed as a crane operator on October 20, 2017, sustained industrial injury to left knee, lumbar spine and right knee. In ADJ11207111, the WCJ found that applicant, while employed as a crane operator on December 1, 2017, sustained industrial injury to left knee, lumbar spine, right knee and right wrist. In both cases, the WCJ apportioned 50 percent of applicant's permanent disability to nonindustrial factors.

Applicant contends that the apportionment opinion of the QME does not constitute substantial medical evidence.

We have received an Answer from defendant. 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. For the reasons discussed below, we will affirm the F&A in both cases.

FACTS

Applicant has two pending cases. In Case No. ADJ11207109, applicant claims injury to left knee, lumbar spine, and right knee, while employed as a crane operator by defendant Continental Labor on October 20, 2017. Defendant admits injury to the left knee and lumbar spine, but disputes injury to the right knee.

In Case No. ADJ11207111, applicant claims injury to the left knee, lumbar spine, right knee and right wrist while employed as a crane operator by defendant Continental Labor on December 1, 2017. Defendant admits injury to the left knee, lumbar spine and right wrist, and disputes injury to the right knee.

The parties selected Michael Kenly, M.D., as the Qualified Medical Evaluator (QME) in orthopedic medicine.

The parties proceeded to trial on April 21, 2021, and framed for decision, in relevant part, the issues of permanent disability and apportionment. The parties submitted the matter for decision the same day on the documentary record.

On October 19, 2021, the WCJ issued two decisions. In ADJ11207109, the WCJ determined in relevant part that applicant's injury resulted in six percent permanent disability after apportionment. (ADJ11207109, Finding of Fact No. 7.) In ADJ11207111, the WCJ similarly awarded six percent permanent disability after applying apportionment. (ADJ11207111, Finding of Fact No. 6.) In both cases, the WCJ found the QME's apportionment opinions to be substantial evidence, and on that basis, apportioned 50 percent of applicant's permanent partial disability to preexisting nonindustrial factors, and further apportioned industrial permanent disability equally between the two pending injuries.

Applicant's Petition contends the apportionment opinions of the QME were based on speculation, conjecture, and surmise, and that it was error for the WCJ to rely on those opinions to apportion the award of permanent disability. (Petition, at p. 2:13.)

Defendant's Answer responds that the QME appropriately identified factors of nonindustrial apportionment and approximated their percentages by which those factors contribute to applicant's present permanent disability, based on the QME's analysis and clinical judgment. (Answer, at p. 4:13.)

The WCJ's Report observes that the apportionment identified in both of the October 19, 2021 decisions is supported by the QME's competent apportionment analysis.

DISCUSSION

Applicant challenges the QME's apportionment analysis as speculative and not based on substantial evidence.

QME Dr. Kenly has evaluated the applicant and issued four reports. In his initial report of February 5, 2019, Dr. Kenly reviewed the submitted medical records and documented his clinical evaluation of applicant. The QME's report identifies both industrial causation and resulting permanent disability. (Ex. 1, Report of Michael Kenly, M.D., dated February 5, 2019, at p. 10.) With respect to apportionment, the QME states:

It is impossible to know the degree of lumbar spine degeneration or pre-existing foraminal stenosis. There is no indication of prior complaints of lumbar radiculopathy. It is my opinion that the morbid obesity of the applicant has inhibited his ability to make a more meaningful recovery from his industrial injury. If not for the injury itself, the above described impairment would likely not exist. Equally, if not for the morbid obesity, the above described injuries would have been expected to make a more complete recovery and not result in a permanent impairment. I will apportion 50% of the impairment to the industrial injury with 50% of the impairment to nonindustrial causes. If not for the morbid obesity, this degree of impairment would not be expected.

(*Id.* at p. 11.)

In a supplemental report of March 10, 2020, the QME apportioned the 50 percent industrial causation equally between applicant's two claimed injuries: "[t]o be clear, the lumbar spine impairment will be apportioned at 50% to pre-existing, 25% to the injury of October 20, 2017 and 25% to the injury of December 1, 2017." (Ex. 4, Report of Michael Kenly, M.D., dated June 12, 2020, at p. 4.)

Applicant contends the QME's opinion is based on conjecture and surmise. Applicant argues the QME failed to explain "how the applicant's condition of obesity directly resulted in any WPI," and does not specify "the degree of lack of recovery stemming from the obesity." (Petition, at p. 5:1.) Moreover, applicant asserts the use of "such round figures as 50/50, denotes a rather unscientific conclusion." (*Id.* at p. 5:11.)

Section 4663 sets out the requirements for the apportionment of permanent disability and provides, in relevant part, as follows:

(a) Apportionment of permanent disability shall be based on causation.

(b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.

(c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall 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 approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(Lab. Code, § 4663.)

Our Supreme Court has explained that “the new approach to apportionment [since the April 19, 2004 adoption of Senate Bill 899] is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries, not disregard of them.” (*Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72 Cal.Comp.Cases 565].)

In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc) (*Escobedo*).) However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report 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 that factors other than the industrial injury at issue caused permanent disability. (*Id.* at p. 621.) Our decision in *Escobedo* summed up the minimum requirements for an apportionment analysis as follows:

[T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical 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.

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.

(*Ibid.*, italics added.)

In *E.L. Yeager-Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687] (*Gatten*), the court approved a physician's apportionment determination of the approximate percentage of permanent disability caused by a degenerative condition, as it was based on the physician's medical expertise, and it was not "merely a random number that he settled upon." (*Id.* at p. 930.) Pursuant to *Gatten*, when a physician's judgment is based on his or her expertise in evaluating the significance of relevant medical facts, it will not be held to be unduly speculative.

Here, the QME has reasonably explained the basis of his apportionment determination. In deposition testimony, the QME has identified obesity as a preexisting, nonindustrial factor of apportionment and explained that the condition "absolutely" would cause degeneration of the spine and knee absent other conditions. (Ex. 5, Transcript of Deposition of Michael Kenly, M.D., dated August 25, 2020, at p. 18:24.) The QME described how obesity "itself is an increased load on all of the joints ... [leading] to more rapid deterioration of those joints." (*Ibid.*) When asked about the mechanism of degenerative change, the QME explained, "[i]ncreased stress and load on the joints both in the knee and the spine, gravity ... [i]t causes accelerated wear and tear, for lack of a better term, on those joints because they're under increased load." (*Id.* at p. 19:8.) The QME confirmed that "[a]bsent the industrial injury, [applicant] would have had less impairment." (*Id.* at p. 18:5.) Accordingly, "[i]f not for the morbid obesity, [applicant] would be expected to make a more

complete [and] meaningful recovery from his industrial injury.” (Ex. 3, Report of Michael Kenly, M.D., dated March 10, 2020, at p. 11.)

The QME thus reviewed the submitted medical record, including relevant diagnostic studies and a clinical evaluation and reached a considered opinion that a nonindustrial and preexisting condition contributed to his present permanent disability. Insofar as the QME has attributed approximately fifty percent of applicant’s present disability to a preexisting factor, we note that the standard is reasonable medical probability and that the QME has exercised his clinical judgment in this regard. (Lab. Code, § 3202.5.) And in this respect, we note the holding of the Court of Appeal in *Gatten, supra*, 145 Cal.App.4th at p. 930, when it observed that “[t]he doctor made a determination based on his medical expertise of the approximate percentage of permanent disability caused by degenerative condition of applicant’s back. Section 4663, subdivision (c), requires no more.”

We therefore decline to disturb the WCJ’s reliance on the opinions of the QME with respect to apportionment. We will affirm the WCJ’s decision in both cases, accordingly.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers’ Compensation Appeals Board, that the October 19, 2021 Findings and Award issued in ADJ11207109 is **AFFIRMED**.

IT IS FURTHER ORDERED that that October 19, 2021 Findings and Award issued in ADJ11207111 is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

I DISSENT (See Dissenting Opinion),

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 29, 2025

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

**DARREN HAILEY
GHITTERMAN, GHITTERMAN & FELD
MULLEN & FILIPPI**

SAR/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 agree with my colleagues that the QME has reasonably identified the factors causing permanent disability “both before and subsequent to the industrial injury.” (Lab. Code, § 4663(c).) Here, the QME has identified industrial injury and applicant’s preexisting obesity as factors resulting in permanent disability and has explained how each factor is presently causing permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) However, because the QME has not *adequately explained the extent to which* each of those factors is contributing to present permanent disability, expressed as an approximate percentage, the QME’s apportionment analysis is incomplete and does not constitute substantial evidence upon which we may base an award of disability. (*Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 282 [39 Cal.Comp.Cases 210]; *Zemke v. Workmen’s Compensation Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358].) Accordingly, I would amend the WCJ’s decision in both pending cases to find that defendant has not met its burden of establishing apportionment to nonindustrial factors.

Labor Code section 4663 requires that any physician preparing a report addressing permanent disability also address the issue of causation of the permanent disability. (Lab. Code, § 4663(b).) The evaluating physician is required 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 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(c).) Thus, a physician’s apportionment determination requires that the physician *first identify the factors causing permanent disability* both before and after the industrial injury. Once the physician has identified each of the factors that are contributing to the employee’s overall present permanent disability, the physician must then *make a finding of the approximate percentage* of the permanent disability was caused by each factor.

Accordingly, apportionment under section 4663 involves two separate but related analyses: (1) the identification of the factors causing permanent disability, and (2) the extent to which each of those factors contributed to present permanent disability, expressed as an approximate percentage.

Here, I agree with my colleagues that the QME has reasonably identified a preexisting factor of obesity and discussed why it is causing permanent disability at the time of the evaluation. (*Escobedo, supra, at p. 621.*) In deposition testimony, the QME testified that applicant's obesity resulted in "increased load on all of the joints which include the spine and the knee [which] leads to more rapid deterioration of those joints." (Ex. 5, Transcript of Deposition of Michael Kenly, M.D., dated August 25, 2020, at p. 19:2.) The QME further explained that over time, the increased stress "causes accelerated wear and tear ... on those joints." (*Id.* at p. 19:8.) Pursuant to our analysis in *Escobedo, supra*, the QME has explained the reasoning behind his opinion and disclosed familiarity with the concept of apportionment. (*Escobedo, supra, at p. 621.*) In addition, the QME has explained why the identified factor of apportionment, in this instance obesity, is presently manifesting in permanent disability. The QME's opinion is based on a competent clinical examination, a review of applicant's history and relevant medical record, and the physician's knowledge and experience. I therefore agree with my colleagues that the QME has appropriately identified the factors causing permanent disability both before and after the industrial injury, as required by section 4663(c).

However, I am unable to conclude that the QME has adequately explained *the extent to which* each of those factors contributed to present permanent disability, expressed as an approximate percentage. This is because the QME has failed to offer *any* explanation as to how he arrived at the figure of 50 percent apportionment. The QME's initial formulation offers only the conclusory statement that 50 percent of applicant's impairment arose out of his obesity, without any accompanying explication or analysis. (Ex. 1, Report of Michael Kenly, M.D., dated February 5, 2019, at p. 11.) None of the QME's subsequent reporting or deposition testimony sheds any light on how and why the applicant's obesity is causing 50 percent of his current disability as opposed to any other percentage. While the QME's deposition testimony ably identifies a factor of apportionment and explains the *mechanism* by which applicant's obesity results in degenerative changes to his knees and low back, the QME fails to explain why the identified factor has caused fully half of applicant's present permanent disability.

The assignment of a particular percentage value of approximate causation is not a minor consideration or an afterthought. It is a reflection of the analysis required under section 4663, wherein a physician must consider all factors causing permanent disability at the time of evaluation and opine as to how much each factor, expressed as a percentage, is contributing to present

permanent disability. The evaluating physician's identification of a percentage value of apportionment is the *culmination* of a statutorily required process in which the applicant's medical history, treatment records, clinical presentation, and any other relevant facts or circumstances are reviewed, analyzed, and ultimately distilled down to factors of causation and their corresponding percentages. And while section 4663 does not require medical certainty in assigning percentages of causation, the physician must nonetheless explain *how they have arrived at that percentage*, even if that percentage reflects approximation rather than certitude.

In addition, I do not find the Court of Appeal's decision in *Gatten, supra*, 145 Cal.App.4th 922, to be incompatible with the requirement that an evaluating physician explain how they have determined the extent to which each factor of apportionment contributed to present permanent disability, expressed as an approximate percentage. In *Gatten*, the court relied on the QME's assignment of an approximate percentage of apportionment in part because the QME offered an analysis of why he had settled on that particular percentage. The QME had "himself noted that apportionment would have been greater if applicant had had more extensive treatment for his back ... [o]n the other hand, the doctor may have given applicant a higher disability rating because he appeared to be in more pain than other patients with similar injuries because of the preexisting pathology." (*Gatten, supra*, at p. 930.) Here, in contrast, the record is silent as to any of the considerations used by the QME in determining that applicant's preexisting obesity caused 50 percent of his present permanent disability.

Based on the foregoing, I agree with my colleagues that the QME has appropriately identified the factors of industrial injury and preexisting nonindustrial obesity as causing applicant's present permanent disability. However, because the QME offers no explanation of how he identified the extent to which each of those factors contributed to present permanent disability, expressed as an approximate percentage, the apportionment analysis is incomplete and cannot be adopted. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 621; *Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 647 [33 Cal.Comp.Cases 647] [Appeals Board may not rely on an apportionment opinion expressed as a mere legal conclusion].)

Accordingly, I would amend the WCJ's decision in both pending cases to find that defendant has not met its burden of establishing apportionment to nonindustrial factors.



WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 29, 2025

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

**DARREN HAILEY
GHITTERMAN, GHITTERMAN & FELD
MULLEN & FILIPPI**

SAR/abs

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