

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

EDWARD KARLA, *Applicant*

vs.

LOS ANGELES UNIFIED SCHOOL DISTRICT, *Permissibly Self-Insured, Defendant*

**Adjudication Number: ADJ15113297
Van Nuys District Office**

**OPINION AND ORDER DENYING
PETITION FOR RECONSIDERATION**

Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of September 30, 2024, wherein it was found that while employed on January 15, 2019 as a substitute teacher, applicant sustained industrial injury to the right hip and lumbar spine causing permanent disability of 35%. In finding permanent disability of 35%, the WCJ declined to adopt the apportionment determination of panel qualified medical evaluator orthopedist Lawrence Borelli, M.D. with regard to the lumbar spine, but did incorporate Dr. Borelli's apportionment determination with regard to the right hip. Dr. Borelli opined that 90% of applicant's right hip permanent disability was attributable to nonindustrial factors.

Applicant contends that the WCJ erred in finding permanent disability of only 35% arguing that the right hip disability should not have been apportioned because Dr. Borelli's reporting did not constitute substantial medical evidence of apportionment. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate and quote below, as well as the additional reasons stated below, we will deny the applicant's Petition.

Preliminarily, we note that former Labor Code 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. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code 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 Labor Code 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 November 4, 2024, and 60 days from the date of transmission is January 3, 2025. This decision is issued by or on January 3, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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 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. Labor Code 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 November 4, 2024, and the case was transmitted to the Appeals Board on November 4, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 4, 2024.

Turning to the merits, we will deny reconsideration for the reasons stated by the WCJ his Report. Dr. Borelli's discussion of apportionment with regard to the right hip meets the standard set by the Court of Appeal in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687]. In *Gatten*, the Court of Appeal reversed a WCAB finding of no apportionment, and found, in accordance with an independent medical examiner's report, that 20 percent of the injured worker's permanent disability was caused by non-industrial factors. The medical evidence supporting apportionment in *Gatten* was the physician's review of an MRI showing degenerative disc disease. The *Gatten* court held that apportionment was proper even though the applicant was asymptomatic prior to the industrial injury, writing that, "[t]he doctor made a determination based on his medical expertise of the approximate percentage of permanent disability caused by [the] degenerative condition [in] applicant's back. [Labor Code] [s]ection 4663, subdivision (c), requires no more." (*Gatten*, 145 Cal.App.4th at p. 930.)

Similarly, here, with regard to the hip, Dr. Borelli made a determination based on his medical expertise after an adequate examination and after review of the relevant medical record. Dr. Borelli noted applicant's extensive prior history to the same body part, and review of diagnostic tests medical records. "His conclusion cannot be disregarded as being speculative when it was based on his expertise in evaluating the significance of these facts." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687].)

We otherwise deny the Petition for the reasons stated by the WCJ in the Report, which we quote below:

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

A Findings and Award issued in this matter on September 30, 2024 in which it was found, inter alia, that the apportionment outlined by Dr. Borelli as to applicant's right hip is legal and valid apportionment. Applicant filed a timely verified petition for reconsideration of the September 30, 2024 Findings and Award. Petitioner contends the WCJ erred by: a) finding that the apportionment outlined by Dr. Borelli as to applicant's right hip is legal and valid apportionment; and b) issuing a Findings of Fact and Opinion on Decision which petitioner contends does not comply with Labor Code § 5313.

II **FACTS**

Karla Edward went to work for the Los Angeles Unified School District on March 11, 2018. On January 15, 2019, while working as a substitute teacher she sustained an industrial injury as

“she walked from the classroom, tripped over a door jamb and fell with her extended right arm and directly onto her right hip. She was assisted up by coworkers and was able to stand up and resumed teaching.” (Exhibit Y1, PQME report of Lawrence Borelli, M.D. dated 11/17/2021, page 2).

On March 26, 2019 Ms. Edward underwent an MRI of the right hip. She was initially evaluated by PQME Lawrence Borelli, M.D. on November 17, 2021. He reviewed the MRI report stating:

There are mild to moderate degenerative changes of the right hip joint. These changes are noted by joint space narrowing, loss of cartilage, marginal osteophytosis and subchondral degenerative cystic changes. The patient is status post left total hip replacement.” (Exhibit Y1, PQME report of Lawrence Borelli, M.D. dated 11/17/2021, page 12).

Ms. Edward completed her last day of physical work on 06/11/2021 and retired on 07/15/2021. On January 10, 2022 she underwent a right total hip replacement. She was reevaluated by PQME Borelli on March 3, 2023. Dr. Borelli noted that the right hip injury was caused by the fall. However on pages 13 through 14 he commented that:

The patient developed classical symptoms of end-stage osteoarthritis right hip that was initiated by the fall. The degenerative process was well underway before the fall occurred. . . .

The osteoarthritis was not caused by the fall. Within reasonable medical probability it was present prior to the fall but the injury permanently aggravated that condition and is now symptomatic and requiring care. The mechanism of injury, onset of symptoms and the above diagnosis are consistent with industrial causation. (Exhibit Y2, PQME report of Lawrence Borelli, M.D. dated 3/3/2023, pages 13-14).

Dr. Borelli rated Ms. Edward for a hip replacement pursuant to table 17-34, page 548, and table 17-33, page 546 of the AMA Guides. (Exhibit Y2, PQME report of Lawrence Borelli, M.D. dated 3/3/2023, pages 15-16). He then discussed apportionment of applicant’s right hip impairment stating on page 17 that:

As early as 03/26/2019, the patient had moderate degenerative x-ray

changes in the right hip and had already undergone a left total hip replacement. These factors indicate that the vast majority of the patient's impairment is due to factors that predate the work injury. Clearly, the degenerative changes seen will inextricably lead to end-stage osteoarthritis in (sic) the need for hip replacement. It is my best clinical estimate that 90% of her right hip and (sic) impairment is due to factors that predate the work injury and the remaining 10% is due to the specific work injury. (Exhibit Y2, PQME report of Lawrence Borelli, M.D. dated 3/3/2023, page 17).

This matter proceeded to trial on the issue of apportionment of permanent disability, with applicant contending that Dr. Borelli's opinion on apportionment is not substantial medical evidence. Findings and Award and Opinion on Decision issued on September 30, 2024 awarding applicant 35% permanent disability after the apportionment of applicant's hip disability as outlined by Dr. Borelli. The Opinion on Decision notes that the apportionment outlined by Dr. Borelli as to applicant's right hip is legal and valid apportionment and that he explained how and why he arrived at his apportionment figures, noting that the nature and extent of applicant's degenerative hip disease would inexorably lead to end-stage osteoarthritis and the need for total hip replacement. Applicant's petition for reconsideration followed.

III **DISCUSSION**

A

Legal and Valid Apportionment by Dr. Borelli as to Right Hip Disability

Labor Code section 4663(a) provides that apportionment of permanent disability shall be based on causation. Section 4664(a) states that the employer shall only be liable for percentages of permanent disability directly caused by the industrial injury. As stated in *Brodie v. WCAB* (2007) 40 Cal. 4th 1313, the new approach to apportionment is to look at the current disability and parcel out its causative sources- nonindustrial, prior industrial and current industrial- and decide the amount directly caused by the current industrial source. (*Brodie*, supra 40 Cal.4th, page 1328). Section 4663(b) requires that a report determining permanent disability also requires a determination of apportionment. The physician shall make a finding of apportionment based on the industrial cause, and also determine the percentage caused by other factor both before and subsequent to the industrial injury. Such other factors may include pathology and asymptomatic prior conditions. *City of Petaluma v. WCAB*, (2018) (*Lindh*) 29 Cal. App.5th 1175, at page 1184); *City of Santa Clara v. WCAB (Justice)* (2020) 40 Cal. App. 5th 605, 84 CCC 467.

In both the *Justice* and *Lindh* cases, the applicants had extensive preexisting pathology and/or asymptomatic conditions, which when combined with their

respective industrial injuries, led to permanent disability. In Lindh, the applicant had an underlying eye condition which along with his workplace injury caused impairment of his vision. In Justice, the applicant had underlying pre-existing osteoarthritis of the knee, which along with the workplace injury, led to total knee replacement, and a finding of permanent disability. The instant case is the same. Applicant, Karla Edward, had clearly documented pre-existing osteoarthritis in the right hip. The x-rays and MRI findings showed moderate degenerative changes in the right hip which predated her industrial injury. Additionally, Ms. Edward had previously undergone a left total hip replacement surgery. Those factors indicate that the vast majority of the applicant's impairment is due to factors that predate her work injury. On page 17 of his March 3, 2023 report PQME Borelli explained that:

As early as 03/26/2019, the patient had moderate degenerative x-ray changes in the right hip and had already undergone a left total hip replacement. These factors indicate that the vast majority of the patient's impairment is due to factors that predate the work injury. Clearly, the degenerative changes seen will inextricably lead to end-stage osteoarthritis in (sic) the need for hip replacement. It is my best clinical estimate that 90% of her right hip and impairment is due to factors that predate the work injury and the remaining 10% is due to the specific work injury. (Exhibit Y2, PQME report of Lawrence Borelli, M.D. dated 3/3/2023, page 17).

On this basis, PQME Borelli's opinion on apportionment of applicant's right hip disability is consistent with the holdings in the Lindh and Justice cases and constitutes substantial medical evidence.

B

Compliance with Labor Code § 5313.

Any defect contained in the Opinion on Decision under Labor Code section 5313 is cured by the herein WCJ's Report and Recommendation on Reconsideration. (*Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal. Comp. Cases 1026 (writ denied)).

IV

RECOMMENDATION

It is respectfully recommended that applicant's petition for reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings of Fact and Award and Order of October 8, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

I DISSENT (See attached Dissenting Opinion),

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2025

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

**KARLA EDWARD
NABI LAW GROUP
ARMSTRONG LAW GROUP**

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

DISSENTING OPINION OF COMMISSIONER CRAIG SNELLINGS

I respectfully dissent. I would have granted the applicant's Petition, and amended the WCJ's decision to rate applicant's permanent disability without apportionment to the right hip.

Panel qualified medical evaluator orthopedist Lawrence N. Borelli, M.D.'s discussion of apportionment of the right hip disability was as follows:

As early as 03/26/2019, the patient had moderate degenerative x-ray changes in the right hip and had already undergone a left total hip replacement. These factors indicate that the vast majority of the patient's impairment is due to factors that predate the work injury. Clearly, the degenerative changes seen will inextricably lead to end-stage osteoarthritis in the need for hip replacement. It is my best clinical estimate that 90% of her right hip and [sic] impairment is due to factors that predate the work injury and the remaining 10% is due to the specific work injury.

(November 17, 2021 report at p. 16.) In stating that applicant had undergone a prior left total hip replacement, Dr. Borelli was referencing a December 2012 procedure. (November 17, 2021 report at p. 8.)

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.)

While Dr. Borelli's report may be substantial evidence of some level of apportionment, he does not adequately explain the level of nonindustrial apportionment, as required by *Escobedo*. He simply does not explain how and why moderate degenerative changes and having had a previous hip replacement was responsible for virtually all (90 percent) of applicant's permanent disability. Accordingly, I would have granted reconsideration, and amended the WCJ's decision to issue findings and an Award that did not include apportionment of the right hip permanent disability. I therefore respectfully dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 3, 2025

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

**KARLA EDWARD
NABI LAW GROUP
ARMSTRONG LAW GROUP**

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