

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

**MARY ANNE AIKENS, *Applicant***

**vs.**

**CHILD ABUSE PREVENTION; STATE COMPENSATION INSURANCE FUND,  
*Defendants***

**Adjudication Number: ADJ9485504  
Sacramento District Office**

**OPINION AND DECISION AFTER RECONSIDERATION**

We previously granted reconsideration in this matter to further study the factual and legal issues.<sup>1</sup> This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings and Award (F&A) issued on April 15, 2021, wherein the workers' compensation administrative law judge (WCJ) found that (1) per the parties' stipulations, while employed on August 7, 2009, applicant sustained injury to her cervical spine, lumbar spine, right shoulder, right arm, right hip, bilateral knees, and psyche; (2) applicant did not sustain injury to her head; and (3) applicant sustained permanent disability of 66% due to the industrial injury.

The WCJ awarded applicant (1) permanent disability indemnity of \$264.50 per week for a period of 399.25 weeks, beginning on May 6, 2012, less 15% payable to applicant's attorney as attorney's fees, and less credit for payments previously made; and (2) further medical treatment to cure or relieve from the effects of the industrial injury.

Applicant contends that the WCJ erroneously found that defendant is entitled to apportionment.

We did not receive an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that the Petition be denied.

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<sup>1</sup> Commissioner Lowe is no longer a member of the Workers' Compensation Appeals Board. Commissioner Capurro has been substituted in her place. Deputy Commissioner Sussman has been substituted in place of Commissioner Dodd.

We have reviewed the contents of the Petition and the Report. Based upon our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that defer the issues of apportionment of applicant's (1) permanent disability of the cervical spine, right shoulder, right hip and bilateral knees; and (2) permanent disability of the psyche; and we will return the matter to the trial level for further proceedings consistent with this decision.

### **FACTUAL BACKGROUND**

On October 7, 2020, the matter proceeded to trial of the following issues.

1. Parts of the body: Employee claiming her head was injured.
2. Permanent disability and apportionment.
3. Occupation and Group number: Employee claiming Group 214 and employer claiming Group 211.
4. Attorney fees.
5. Whether the rating for the psychiatric injury should be added to the disability or combined to the orthopedic disability.

(Minutes of Hearing and Summary of Evidence, October 7, 2020, pp. 2:33-42.)

The parties stipulated that (1) while employed by defendant on August 7, 2009, applicant sustained injury arising out of and in the course of employment to her cervical spine, lumbar spine, right shoulder, right arm, right hip, bilateral knees and psyche; (2) at the time of injury, the employer was insured by State Compensation Insurance Fund; (3) at the time of injury, the employee's earnings were \$463.52 per week warranting indemnity rates of \$309.08 for temporary disability and \$230.00 per week for permanent disability; (4) the carrier paid temporary disability indemnity at the rate of \$309.08 per week through the period of March 10, 2010 through March 6, 2012 and permanent disability indemnity at the rate of \$230 per week for the period of May 6, 2012 to April 3, 2016; (5) the employer has furnished some medical treatment; and (6) no attorney fees have been paid and no attorney fee arrangements have been made. (*Id.*, p. 2:4-26.)

The WCJ admitted an exhibit entitled Report of Dr. Joel Renbaum dated February 5, 2020, into evidence. (*Id.*, p. 3:8-9.) In it, Dr. Renbaum states:

Per the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition: Table 15-5, page 392, DRE Cervical Category II=8% WPI. This level of impairment is felt to most accurately reflect the residual effects of the work injury and takes into account the Almaraz/Guzman II decision.

Figure 16-40, page 476, right shoulder flexion to 90 degrees = 6% UEI. Extension to 0 degrees = 3% UEI. Figure 16-43, page 477, right shoulder abduction to 90

degrees = 4% UEI. Adduction to 10 degrees = 1% UEI. Figure 16-46, page 479, right shoulder internal rotation to 20 degrees = 2% UEI. External rotation to 20 degrees = 1% UEI. 17% UEI converts to 10% WPI per Table 16-3, page 439. This level of impairment is felt to most accurately reflect the residual effects of the work injury and takes into account the Almaraz/Guzman II decision.

Table 495, residuals of right carpal tunnel release = 5% UEI. This converts to 3% WPI per Table 15-3, page 439. There is no specific rating for the right thumb based on today's examination per the AMA Guides. This level of impairment is felt to most accurately reflect the residual effects of the work injury and takes into account the Almaraz/Guzman II decision.

15-3, page 438, DRE Lumbar Category II= 7% WPI. This level of impairment is felt to most accurately reflect the residual effects of the work injury and takes into account the Almaraz/Guzman II decision.

Table 17-33, page 546, right hip trochanteric bursitis = 3% WPI. This level of impairment is felt to most accurately reflect the residual effects of the work injury and takes into account the Almaraz/Guzman II decision.

Table 17-31, page 544, right knee arthritis impairment with 3 mm cartilage interval= 3% WPI. This level of impairment is felt to most accurately reflect the residual effects of the work injury and takes into account the Almaraz/Guzman II decision.

Table 17-33, page 547, left total knee replacement, fair result 20% WPI. This level of impairment is felt to most accurately reflect the residual effects of the work injury and takes into account the Almaraz/Guzman II decision.

I would defer evaluation of her issues with stress and depression to the appropriate psychologist or psychiatrist as these conditions are outside of my area of expertise as an orthopedic surgeon.

...

Using a reasonable degree of medical probability, it is my opinion that it is appropriate to apportion 15% of her cervical spine, right shoulder, right hip and bilateral knee impairment to pre-existing degenerative changes and 85% to the August 7, 2009 work injury. I would be glad to review medical records regarding her lumbar spine and issue a supplemental report regarding apportionment at that time.

(Ex. AA, Report of Dr. Renbaum, February 5, 2020, pp. 10-12.)

The WCJ also admitted an exhibit entitled Report of James Cole, Ph.D., dated May 17, 2018, into evidence. (*Id.*, p. 3:26-27.) In it, Dr. Cole states:

Ms. Aikens denies pre-existing psychological treatment except for a few months with pain management course per previous industrial injury in 1985. Robert Larsen,

M.D., on a psychiatric AME basis, in October 1990, in reference to that industrial injury, rendering a GAF of 65, permanent and stationary status.

...

On an AME orthopedic basis, Joel Renbaum, M.D. finding warranted 15% apportionment to non-industrial factors. The cognitive and psychiatric aspects of this case are directly related to Ms. Aikens' industrial medical condition . . . With these understandings, I find approximately 50% of the permanent disability from the combined cognitive and psychiatric perspective caused by the direct result of the industrial injury on August 7, 2009 and 50% of the disability caused by other factors both before and subsequent to the industrial injury.

(Ex. GG, Report of James Cole, Ph.D., May 17, 2018, pp. 31-32.)

In the Report, the WCJ states:

While working at the Child Abuse Prevention Council of Sacramento on August 7, 2009, applicant sustained an injury to her cervical spine, lumbar spine, right shoulder, right arm, right hip, bilateral knees, and psyche, when she tripped and fell in the parking lot.

...

Treatment was conservative until applicant underwent left knee surgery on April 22, 2011. The surgery did not provide improvement of her pain, and applicant next underwent a left total knee arthroplasty on November 30, 2011.

Applicant's care was transferred to Dr. Carl Shin who has provided ongoing pain management. Orthopedic consultations for her right shoulder and bilateral carpal tunnel conditions have not resulted in surgical recommendations.

Applicant was evaluated by Dr. Joel Renbaum acting as Agreed Medical Evaluator. Dr. Renbaum provided reports dated December 1, 2014, February 12, 2015, September 21, 2016, April 28, 2017, and February 25, 2020. (Exhibits AA, BB, CC, DD, EE.)

Applicant developed psychiatric symptoms and was evaluated by Dr. James Cole acting as Agreed Evaluator. Dr. Cole issued reports dated May 17, 2018, and October 30, 2019. (Exhibits FF, GG.)

...

While Dr. Renbaum's reports are terse, each finding of apportionment is supported by the review of records, which shows that diagnostic studies showed degenerative changes at the apportioned parts of body. Notably, for the carpal tunnel and lumbar spine impairments, there was no corresponding diagnostic findings of degenerative disease processes and likewise, no apportionment.

...

While one would have hoped for a more substantial discussion of the apportionment, it is not difficult to understand the doctor's rationale for apportionment. Further, the amount is seen as reasonable. Dr. Renbaum has made a modest apportionment of 15% for those body parts for which there were

underlying nonsymptomatic findings. He did not provide any apportionment for those parts of body for which there were no such studies.

...

While recognizing that it is defendant's burden on apportionment, it would be unfair to accept Dr. Renbaum's terse, one-line findings on impairment, while rejecting the equally terse findings on apportionment. Recognizing Dr. Renbaum's role as an AME, his reporting was understood and accepted as substantial medical evidence, even if not a model of thorough reporting.

...

Dr. Cole, also serving as an AME, found that applicant had pre-existing psychiatric disability which was supported by his review of a prior psychiatric AME resulting from a previous industrial injury. He noted that subsequent to the injury applicant had significant emotional response to the deaths of her mother, aunt, and another family member. Dr. Cole also found that personality testing was supportive of apportionment to nonindustrial causation. (Exhibit GG, pages 31 to 32.)

Dr. Cole also noted that due to the relationship with the orthopedic condition he considered Dr. Renbaum's apportionment.  
(Report, pp. 2-3.)

## DISCUSSION

The burden of proving apportionment of permanent disability rests with the defendant. (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App. 4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 607 (en banc).)

In *Escobedo v. Marshalls, supra*, the Appeals Board held that (1) Labor Code section 4663<sup>2</sup> requires the reporting physician to make an apportionment determination; (2) apportionment to other factors allows apportionment to causation, including pathology, prior conditions, and retroactive work restrictions; (3) applicant holds the initial burden to prove industrial injury and also has the added burden of establishing the approximate percentage of permanent disability directly related to the industrial injury; (4) defendant has the burden of establishing the approximate permanent disability caused by other factors; and (5) a medical report addressing apportionment may not be relied upon unless it constitutes substantial evidence. (*Escobedo, supra*, at p. 612.)

To 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

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<sup>2</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

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. Furthermore, if a physician opines that a percentage of disability is caused by a degenerative disease, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Id.*)

In this case, AME Dr. Renbaum's reporting apportions 15% of applicant's permanent disability of the cervical spine, right shoulder, right hip and bilateral knees to pre-existing degenerative changes and 85% to the August 7, 2009 work injury but does not disclose what pre-existing degenerative changes resulted in injury which contributed to the disability or how or why the pre-existing degenerative changes caused the extent of disability attributed to them. (Ex. AA, Report of Dr. Joel Renbaum, February 5, 2020, pp. 10-12; Report, pp. 2-3.)

Because AME Dr. Renbaum's reporting fails to explain the nature of the degenerative changes and how and why disability resulted from them, we conclude that the record should be further developed as to apportionment of applicant's orthopedic disability.

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence or when appropriate to provide due process or fully adjudicate the issues. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [72 Cal. Rptr. 2d 898, 63 Cal.Comp.Cases 261]; see also *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 394 [65 Cal. Rptr. 2d 431, 62 Cal.Comp.Cases 924]; §§ 5701, 5906.) The Appeals Board also has a constitutional mandate to "ensure substantial justice in all cases" and may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-404 [94 Cal. Rptr. 2d 130, 65 Cal.Comp.Cases 264].) The "Board may act to develop the record with new evidence if, for example, it concludes that neither side has presented substantial evidence on which a decision could be based, and even that this principle may be appropriately applied in favor of the employee." (*San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal. App. 4th 928, 937-938 [88 Cal. Rptr. 2d 516, 64 Cal.Comp.Cases 986].) The preferred procedure to develop a deficient record is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed

medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, then the WCJ can appoint a physician to evaluate applicant pursuant to section 5701.

Accordingly, we will substitute a finding that defers the issue of apportionment of applicant's cervical spine, right shoulder, right hip and bilateral knees disability so that the medical record may be further developed, preferably by AME Dr. Renbaum.

In *ATC/VANCOM, Inc. v. Workers' Comp. Appeals Bd.* (2014) 79 Cal.Comp.Cases 1329 (writ den.), an Appeals Board panel affirmed a trial level finding that where the applicant's qualified medical evaluator in psychiatry reported that the applicant's psychiatric injury caused 69 percent permanent disability and apportioned the disability based upon the applicant's orthopedic disability, the psychiatric evaluator's reporting did not constitute substantial evidence on the issue of apportionment.

In *Mayorga v. Dexter Axle Chassis Group*, 2015 Cal. Wrk. Comp. P.D. LEXIS 359, the Appeals Board panel states:

It is the responsibility of each medical evaluator to determine apportionment for the body parts or body systems within his or her area of expertise. Where a sequela is caused by the combined effects of multiple orthopedic injuries, each individual doctor must independently determine whether apportionment from the orthopedic injuries carries over to the sequela. If apportionment is found, the doctor must provide an independent and substantial opinion. Doctors cannot simply mirror the apportionment opinions of other doctors in a case without providing independent justification for their opinion. To do so fails to meet the requirements of substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 620–621 (Appeals Board en banc opinion) and *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal. App. 4th 922, 928 [52 Cal. Rptr. 3d 133, 71 Cal. Comp. Cases 1687].) In some cases apportionment may mirror; in other cases it may differ; in some cases the doctor may find no apportionment or that the disability is inextricably intertwined between the dates of injury such that apportionment cannot be stated with reasonable medical probability. However, the apportionment opinion of each doctor must be an independent judgment and must meet the requirements of substantial medical evidence.

Hence, it is the responsibility of each medical evaluator to determine apportionment for the body parts or systems within his or her area of expertise and the evaluating physician cannot simply rely upon the apportionment opinion of another physician without providing independent justification for his or her own opinion. (See also *Jensen v. County of Santa Barbara*, 2018 Cal. Wrk. Comp. P.D. LEXIS 185.)

In the case before us, AME Dr. Cole apportions 50% of applicant's permanent disability of the psyche to non-industrial factors by relying on AME Dr. Renbaum's 15% apportionment of orthopedic disability but does not provide independent justification for doing so. (Ex. GG, Report of James Cole, Ph.D., May 17, 2018, pp. 31-32; Report, p. 3.)

We view AME Dr. Cole's reliance upon AME Dr. Renbaum's apportionment reporting as "pass-through" apportionment which contravenes the foregoing authorities. Therefore, we conclude that the record requires further development on the issue of apportionment as to the permanent disability of the psyche. Accordingly, we will substitute a finding that defers the issue of apportionment of applicant's permanent disability of the psyche so that the record may be further developed, preferably by AME Dr. Cole.

Accordingly, as our Decision After Reconsideration, we will rescind the F&A and substitute findings that defer the issues of apportionment of applicant's (1) permanent disability of the cervical spine, right shoulder, right hip and bilateral knees; and (2) permanent disability of the psyche; and we will return the matter to the trial level for further proceedings consistent with this decision

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration, that the Findings and Award issued on April 15, 2021 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

#### **FINDINGS OF FACT**

1. Mary Anne Aikens, age 56 on the date of injury, while employed on August 7, 2009, by Child Abuse Prevention Council of Sacramento, Incorporated, sustained injury arising out of and in the course of employment to her cervical spine, lumbar spine, right shoulder, right arm, right hip, bilateral knees, and psyche.
2. Applicant did not sustain injury to her head.
3. Applicant's job duties place her in occupational group 214.
4. The issue of apportionment of applicant's permanent disability of the cervical spine, right shoulder, right hip and bilateral knees is deferred.
5. The issue of apportionment of applicant's permanent disability of the psyche is deferred.
6. All other issues are deferred.



**AWARD**

**AWARD IS MADE** in favor of MARY ANNE AIKENS against STATE  
COMPENSATION INSURANCE FUND of:

1. Further medical treatment to cure or relieve from the effects of the  
industrial injury.

**IT IS FURTHER ORDERED** that this matter is hereby **RETURNED** to the trial level  
for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**

**/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER**



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

**APRIL 22, 2025**

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

**MARY ANNE AIKENS  
SMOLICH & SMOLICH  
STATE COMPENSATION INSURANCE FUND**

**SRO/bp**

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