

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

ROSALIND DE LISSER, *Applicant*

vs.

**UNIVERSITY OF CALIFORNIA, SAN FRANCISCO;
permissibly self-insured, administered by SEDGWICK CLAIMS MANAGEMENT
SERVICES, INC., *Defendants***

**Adjudication Number: ADJ12061992
San Francisco District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.¹

Applicant seeks reconsideration of the Findings of Fact and Award (F&A) issued on July 28, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in relevant part, that, while employed as a nurse on January 26, 2018, applicant sustained an industrial injury to her lumbar spine, resulting in 17% permanent disability and the need for future medical treatment.²

Applicant contends that the opinion of Panel Qualified Medical Evaluator (PQME) John Finkelberg, M.D., apportioning 50% of applicant's permanent disability to degenerative arthritis and underlying congenital pars defects does not constitute substantial medical evidence and cannot support the determination of her final permanent disability.

We have received an Answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations in applicant's Petition and defendant's Answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and the reasons discussed below, as our Decision After Reconsideration, we rescind the F&A and issue a new F&A

¹ Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

² The WCJ also found that applicant did not sustain injury to her cervical spine. Applicant does not challenge this finding on reconsideration.

to reflect that applicant sustained 34% permanent disability without apportionment and to adjust the amount of attorney fees. We otherwise make no substantive changes to the F&A.

BACKGROUND

Applicant, while employed by defendant as a nurse on January 26, 2018, sustained an industrial injury to her lumbar spine.

The parties jointly submitted into evidence the PQME reports and deposition of Dr. Finkelberg. (Joint Ex. 1-3, 6-8).

In his report dated July 24, 2020, PQME Dr. Finkelberg, after evaluating applicant, took a history that, based on an MRI dated January 3, 2019, she had Grade I spondylolisthesis at L4-L5 with moderate canal stenosis with moderate to severe neuroforaminal narrowing at L5-S1 on the right. (Joint Ex. 1, pp. 3, 7.) A CT scan of the lumbar spine performed on January 24, 2019 revealed multilevel degenerative changes, including chronic bilateral L4 pars interarticularis defects, mild spinal canal stenosis, and moderate to severe bilateral foraminal narrowing at L4-L5, consistent with L4 radiculopathy. (*Id.* at pp. 3, 8.) On August 15, 2019, applicant underwent an L4-L5 discectomy followed by a fusion procedure both performed by Lionel Metz, M.D. (*Id.* at p. 3; Joint Ex. 2, Supplemental Report, p. 16.) This surgery left her with significant pain and loss of function in her left leg due to her hematoma, which required urgent evaluation and treatment. (Joint Ex. 1 at p. 3.) PQME Dr. Finkelberg diagnosed an L4-L5 pars interarticularis fracture with Grade I spondylolisthesis and moderate spinal stenosis. (*Id.* at p. 16.)

PQME Dr. Finkelberg found applicant reached maximum medical improvement (MMI). (*Ibid.*) He determined she had 25% whole person impairment under DRE Lumbar Category IV pursuant to Table 15-3 on page 384 of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), based on her extreme lateral interbody fusion and discectomy procedures, as well as left leg pain. (*Id.* at p. 17.)

In his supplemental report dated April 9, 2021, PQME Dr. Finkelberg stated that lifting tables would not have caused applicant's bilateral vertebral pars fractures but would only aggravate it along with her chronic degeneration, leaving his opinion on apportionment unchanged. (Joint Ex. 3, p. 2.)

With respect to apportionment, PQME Dr. Finkelberg opined that 50% of her permanent disability related to her chronic nonindustrial degenerative arthritis and a previous L-4 bilateral pars fracture with moderate stenosis. (*Id.* at p. 17.)

This resulted in permanent disability calculated as follows:

LUMBAR SPINE – DRE

50% (15.03.91.00 – 25 – [1.4] 35 – 212E – 32 – 34) 17%

At his deposition of January 21, 2022, with respect to apportionment, PQME Dr. Finkelberg explained that applicant's underlying spinal defects, including spondylolisthesis and degenerative changes, were likely preexisting, either congenital or from a prior severe trauma. He apportioned 50% of her lower lumbar degenerative arthritis to nonindustrial causes contributing to her needing a fusion surgery and the remaining 50% to the work-related injury. (Joint Ex. 6, pp. 13:13-25 to 14:1-22.) PQME Dr. Finkelberg attributed 50% of applicant's overall impairment to nonindustrial causes based on her preexisting bilateral congenital pars defects, which led to spondylolisthesis. For purposes of apportionment, he grouped the degenerative arthritis and preexisting pars defects together rather than attempt to apportion them separately. He apportioned 50% because the congenital pars defects predisposed applicant to chronic low back problems, although he acknowledged that some physicians might have assigned a higher percentage. He further noted that a more acute traumatic event, such as a fall resulting in a fracture, would have warranted a different apportionment analysis. (*Id.* at pp. 15:16-25 to 18:1-5.)

The parties proceeded to trial on June 1, 2022. Applicant testified in pertinent part that, on January 26, 2018 at 8:30 a.m., while preparing for a faculty retreat at her home, she experienced an immediate sharp pain in her low back while pushing a table with her administrative assistant. The pain caused her to fall to the ground for approximately 25 minutes, after which she was able to stand and continue with the event. She first sought medical treatment the following Monday at defendant's health clinic, denied any prior low-back problems, and did not miss work during the first week after the injury. (Minutes of Hearing / Summary of Evidence (MOH/SOE), 06/01/2022, 5:15-32.) She underwent lumbar surgery and subsequently developed a hematoma and had difficulty walking for one week. (MOH/SOE, 06/01/2022, 6:15-18.)

On July 27, 2022, the WCJ issued his F&A awarding applicant 17% permanent disability and accepted PQME Dr. Finkelberg's opinion apportioning 50% of permanent disability to preexisting factors.

It is from this F&A that applicant seeks reconsideration.

DISCUSSION

Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors, to allocate legal responsibility fairly. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 911 [70 Cal.Comp.Cases 787].)

To comply with Labor Code section 4663³, a physician must do more than simply state the cause of disability and assign approximate percentages of industrial and nonindustrial contribution. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687]; *Mills v. State Comp. Ins. Fund* (2025) 91 Cal.Comp.Cases 64, 68 [2025 Cal. Wrk. Comp. P.D. LEXIS 305]; *Anaya v. State Dep't of Corr.* [2022 Cal. Wrk.Comp. P.D. LEXIS 262, *23].)⁴ A proper apportionment analysis requires the physician to first identify all factors contributing to applicant's permanent disability, both prior to and following the industrial injury, and then determine the approximate percentage of overall permanent disability attributable to each factor. (*Mills, supra*, 91 Cal.Comp.Cases at p. 69.)

A physician must determine apportionment based on causation, because an employer is liable solely for the portion of permanent disability directly attributable to an injury arising out of and occurring in the course of employment. (Lab. Code, §§ 4663(a) and 4664(a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc) (*Escobedo*).) Apportionment now includes pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial evidence establishing that these other factors have caused permanent disability. Pursuant to *Escobedo*, a physician's opinion must constitute reasonable medical probability, must not be speculative, rely on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of the conclusions. (*Id.* at p. 621.) That is, a physician must explain the

³ Unless otherwise stated, all further statutory references are to the Labor Code.

⁴ Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

“how and why” of their apportionment opinion (*Ibid.*) and consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or condition. (*Benson v. Permanente Med. Group* (2007) 72 Cal.Comp.Cases 1620, 1622 (Appeals Board en banc).)

In explaining the “how and why” of apportionment to a preexisting condition, a physician must demonstrate that, even absent the industrial injury, a portion of the disability would have resulted from the natural progression of the underlying condition. (See *Pullman Kellogg v. Workers’ Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d 450, 454 [45 Cal.Comp.Cases 170].)

Ultimately, the burden of proof to establish apportionment falls on defendant. (*Id.* at p. 456; *Kopping v. Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In other words, an employee does not have the burden of disproving apportionment while defendant remains passive. (*Alcantar v. Martinez* [2025 Cal. Wrk. Comp. P.D. LEXIS 231, *9]; *Moraido v. County of San Diego* [2024 Cal. Wrk. Comp. P.D. LEXIS 375, *13, fn. 3]; *Arias v. William Roofing Co.* [2024 Cal. Wrk. Comp. P.D. LEXIS 29, *5]; *Matias v. Naturipe Berry Growers* [2024 Cal. Wrk. Comp. P.D. LEXIS 52, *4]; *Herrera v. Maple Leaf Foods* [2018 Cal. Wrk. Comp. P.D. LEXIS 430, *15].)

Here, PQME Dr. Finkelberg identified applicant’s underlying congenital pars defects, a condition creating a structural weakness in the vertebrae, which concentrates mechanical stress during normal or repetitive spinal motion. This predisposition can lead to stress fractures of the pars, or spondylolysis, and, over time, allow forward slippage of the vertebra, or spondylolisthesis, and progressive degenerative changes. (AMA Guides, Table 15-3, p. 384.) Although he diagnosed a fracture related to the pars defects, PQME Dr. Finkelberg did not provide the detailed causation analysis required to link it to specific nonindustrial permanent disability. Instead, he concluded that the fracture required a “more serious injury” than pushing chairs or tables, yet offered no clinical evidence supporting his assumption that the disabling symptoms otherwise arose from repetitive, naturally occurring motions. This omission violates apportionment standards, which require physicians to explain the “how and why” and prohibits simply lumping such a condition into preexisting degenerative arthritis. Consequently, his apportionment conclusion lacks a substantial medical foundation and is legally insufficient. (*Normand, supra*, 26 Cal.3d at pp. 454-456; *Calhoun v. Workers’ Comp. Appeals Bd.* (1981) 127 Cal.App.3d 1, 9–10 [46 Cal.Comp.Cases 1333]; *Gay v. Workers’ Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 562 [44 Cal.Comp.Cases 817]; *Duthie v. Workers’ Comp. Appeals Bd.* (1978) 86 Cal.App.3d 721, 728 [43 Cal.Comp.Cases 1214].)

Therefore, with defendant having failed to meet its burden of proof on apportionment, applicant is entitled to 34% permanent disability.

Accordingly, our Decision After Reconsideration, we rescind the F&A and issue a new F&A to reflect that applicant sustained 34% permanent disability without apportionment. We otherwise make no substantive changes to the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact & Award dated July 28, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Rosalind De Lisser, while employed on January 26, 2018 as a nurse, occupational group number 212, at San Francisco, California, by the University of California, permissibly self-insured, administered by Sedgwick Claims Management Services, Inc., sustained injury arising out of and in the course of her employment to her lumbar spine, but not to her cervical spine.
2. At the time of injury, applicant's earnings were the maximum for permanent disability and temporary disability indemnity, warranting indemnity rates of \$1,215.27 for temporary disability and \$290.00 for permanent disability.
3. Defendant paid temporary total disability from January 22, 2019 through January 27, 2019 and temporary disability wage loss from January 4, 2019 to January 21, 2019, then again from January 28, 2019 through March 10, 2019. Applicant has been adequately compensated for all periods of temporary disability claimed through June 1, 2022.
4. Applicant's injury caused permanent disability of 34%.
5. Defendant failed to meet its burden with respect to apportionment of applicant's permanent disability.
6. Applicant is entitled to further medical treatment to cure or relieve the effects of the industrial injury.
7. Applicant's attorney, Allegiance Law, has provided legal services of the reasonable value of 15% of the permanent disability indemnity awarded applicant.

AWARD

AWARD is made in favor of Rosalind De Lisser, against University of California, permissibly self-insured, administered by Sedgwick Claims Management Services, Inc., as follows:

1. Permanent disability of 34% payable for 159.00 weeks at \$290.00 per week, beginning July 24, 2020 to the present and continuing, less attorney fees of 15%.
2. Further medical treatment to cure or relieve the effects of the industrial injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

PATRICIA A. GARCIA, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 25, 2026

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

**ROSALIND DE LISSER
LUNDBERG & KOPILENKO, PC dba ALLEGIANCE LAW
LAUGHLIN, FALBO, LEVY & MORESI, LLP**

DLP/ara

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