

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

DAVOOD TAJBAKHSI, *Applicant*

vs.

**HYDRAULICS INTERNATIONAL, INC.;
SECURITY NATIONAL, administered by AMTRUST, *Defendants***

**Adjudication Numbers: ADJ11833787; ADJ15461170
Los Angeles District Office**

**OPINION AND ORDER
GRANTING PETITION FOR RECONSIDERATION
AND DECISION AFTER RECONSIDERATION**

Applicant seeks reconsideration of the Findings and Order and Award (F&O) issued on April 15, 2024, wherein the workers' compensation administrative law judge (WCJ) found in case number ADJ15461170 as relevant that (1) while employed as a polisher during the period March 1, 2014 to October 31, 2021, applicant sustained injury arising out of and in the course of employment to his left shoulder; and (2) the left shoulder injury resulted in permanent disability of 5 percent, after apportionment, payable at \$290.00 per week, for a total sum of \$4,250.00, less an attorney's fee of 15 percent.

The WCJ issued an award in accordance with these findings.

Applicant contends that the WCJ erroneously found defendant 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.

We have reviewed the contents of the Petition and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings in case number ADJ15461170 that defendant is not entitled to apportionment and applicant's left shoulder injury resulted permanent disability of 19 percent, payable at \$290.00 per week, for a total sum to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute, less an attorney's fee of 15 percent.

FACTUAL BACKGROUND

On January 16, 2024, the matter proceeded to trial of the following issues in case number ADJ15461170.

1. Permanent disability.
2. Apportionment.
3. Attorney's fees.

(Minutes of Hearing and Summary of Evidence, January 16, 2024, pp. 3:22-25.)

In case number ADJ15461170, the parties stipulated that AME Dr. Newton “reported 19% whole person impairment for this claim, without apportionment included,” and that the “rate for permanent disability is \$290.00 per week.” (*Id.*, p. 3:6-13.)

The WCJ admitted an exhibit Medical Report of Dr. Peter Newton dated March 29, 2022, into evidence. In it, Dr. Newton states:

Based on the 12/21/18 mechanism of injury it is unlikely the applicant sustained injury to his left shoulder at that time however, it is probable that he aggravated an underlying non-industrial degenerative condition.

...

Based on the job description the applicant gave me, it is reasonable that he sustained a continuous trauma to his left shoulder as a result of his regular work through 12/21/18.

...

Factors contributing to the applicant's left shoulder condition/disability/impairment are non-industrial activities of daily living, prior work, and the four years of work through 12/21/18.

...

To a reasonable degree of medical probability, 80% of this applicant's left shoulder condition/disability/impairment is apportioned to non-industrial factors including non-industrial activities of daily living and prior work, and 20% to his work at Hydraulics International through 12/21/18.

(X2, Medical Report of Dr. Peter Newton, March 29, 2022, pp. 11-12.)

The WCJ admitted an exhibit entitled Deposition Transcript of Dr. Peter Newton dated December 8, 2022, into evidence. In it, Dr. Newton testifies as follows:

Q: Okay. Then let me just clarify that. So, it's your opinion that the four years work at Hydraulics could not have been the substantial factor in his degenerative changes, correct?

A: Yes.

Q: But any employment prior to that could have?

A: Perhaps, yes.

...

Q: Okay. So basically your 80% apportionment, in some part, could be a medical probability to his employment history as well; correct?

A: Yes.

Q: Okay. Now, if it's not for the employment history, what kind of activities of daily living he could have performed that would have substantially advanced his degenerative changes if he isn't right hand dominant?

A: I can't think of any.

(X4, Deposition Transcript of Dr. Peter Newton, December 8, 2022, pp. 12:25-14:2.)

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 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 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. Newton's report states that applicant's non-industrial activities of daily living (ADLs) caused 80 percent of his left shoulder permanent disability but does not disclose what ADLs resulted in injury which contributed to the permanent disability or how or why the ADLs caused the extent of the disability attributed to them. (X2, Medical Report of Dr. Peter Newton, March 29, 2022, pp. 11-12.) AME Dr. Newton's testimony is that some of the permanent disability he apportioned to non-industrial activities could actually be the result of applicant's industrial activities, and he could not think of specific non-industrial activities which applicant may have performed which could have contributed to his permanent disability. (X4, Deposition Transcript of Dr. Peter Newton, December 8, 2022, pp. 12:25-14:2.)

On this record, it appears that AME Dr. Newton's reporting on apportionment is based on surmise, conjecture or guess. (See *Escobedo, supra; Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].) As such, defendant failed to meet its burden of proof on apportionment. (*Benson, supra; Kopping, supra; Escobedo, supra.*)

Accordingly, we will substitute a finding in case number ADJ15461170 that defendant is not entitled apportionment.

We observe that the parties stipulated that applicant's left shoulder injury resulted in a 19 percent whole person impairment, and that the rate for permanent disability benefits payable to applicant is \$290.00 per week. (Minutes of Hearing and Summary of Evidence, January 16, 2024, pp. 3:6-13.)

Accordingly, we will substitute a finding that applicant's left shoulder injury resulted in permanent disability of 19 percent, payable at \$290.00 per week, for a total sum to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute, less an attorney's fee of 15 percent.

Accordingly, we will grant reconsideration, and, as our Decision After Reconsideration, we will rescind the F&O and substitute findings in case number ADJ15461170 that defendant is not entitled to apportionment and applicant's left shoulder injury resulted in permanent disability of 19 percent, payable at \$290.00 per week, for a total sum to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute, less an attorney's fee of 15 percent.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Order and Award issued on April 15, 2024 is **GRANTED**.

IT IS ORDERED, as the Decision After Reconsideration, that the Findings and Order and Award issued on April 15, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

In ADJ11833787:

1. Mr. Davood Tajbakhsh, born _____, while employed on December 21, 2018 as a Polisher, Occupational Group Number 330, at Chatsworth, California by HYDRAULICS INTERNATIONAL, INC., sustained injury out of and in the course of employment to his right hand/right wrist, as previously awarded.
2. At the time of injury, the employer's workers' compensation claims administrator was SECURITY NATIONAL administered by AMTRUST, as previously awarded.
3. The Applicant is found to be to be permanent and stationary from the effects of this injury on 03/29/2022 pursuant to the findings of Peter Newton, M.D.
4. Applicant has not sustained new and further disability.
5. As there is no further award to the Applicant, there are no attorney's fees to be awarded in this case.

In ADJ15461170:

1. Mr. Davood Tajbakhsh, born _____, while employed during the period 03/01/2014 to 10/31/2021 as a Polisher, Occupational Group Number 330, at Chatsworth, California by HYDRAULICS INTERNATIONAL, INC., sustained injury out of and in the course of employment to his left shoulder.
2. Defendant is not entitled to apportionment.
3. Applicant's left shoulder injury resulted in permanent disability of 19 percent, payable at \$290.00 per week, for a total sum to be adjusted by the parties, with jurisdiction reserved to the WCJ in the event of a dispute, less an attorney's fee of 15 percent.

ORDER

In ADJ11833787, the Petition for New and Further Disability is denied.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 24, 2024

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

**DAVOOD TAJBAKHSH
LAW OFFICES OF VICTOR SARGAZY
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY**

SRO/cs

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