WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GUADALUPE MEZA, *Applicant*

vs.

TEAM SAN JOSE; CYPRESS INSURANCE
adjusted by BERKSHIRE HATHAWAY, *Defendants*

Adjudication Number: ADJ15556399
San Jose District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on June 10, 2024, wherein the WCJ found in pertinent part that applicant is entitled to an unapportioned permanent disability award of 27%.

Defendant contends that the permanent disability award of 27% is not supported by substantial medical evidence. Defendant also contends that the WCJ's finding on apportionment is not supported by substantial medical evidence.

We have not received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition and the contents of the Report with respect thereto.

Based on our review of the record, for the reasons stated in the WCJ's Report, which is adopted and incorporated herein, and for the reasons discussed below, we will deny reconsideration.

Turning to apportionment, the Appeals Board discussed Labor Code section 4663 with regard to the issue of apportionment of permanent disability based on causation in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604.

> 1) Section 4663(a)'s statement that the apportionment of permanent disability shall be based on "causation" refers to the causation of the permanent disability, not causation of the injury, and the analysis of the causal factors of permanent

> disability for purposes of apportionment may be different from the analysis of the causal factors of the injury itself.
>
> 2) Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting physician and the WCAB must make determinations of what percentage of the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.
>
> 3) Under section 4663, the applicant has the burden of establishing the percentage of permanent disability directly caused by the industrial injury, and the defendant has the burden of establishing the percentage of disability caused by other factors.

(*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 607 (Appeals Bd. en banc).)

As the WCJ states, the mere fact that a report addresses the issue of causation of permanent disability and makes an apportionment determination ... does not necessarily render the report one upon which the WCAB may rely. (Report, p. 7.) "Even where a medical report 'addresses' the issue of causation of the permanent disability and makes an 'apportionment determination' by finding the approximate relative percentages of industrial and non-industrial causation under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence." (*Escobedo, supra*, at 607.)

A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, and not merely their conclusions. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Granado v. Workmen's Comp. Appeals Bd*. (1970) 69 Cal.2d 399 [33 Cal.Comp.Cases 647].) To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo, supra*.)

We note that "the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence." (*Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].) With respect to the permanent disability rating, defendant contends that the medical evidence does not support the DRE III rating. However, in sum, DRE II is assigned when an individual had a clinically significant radiculopathy consistent with imaging, but no longer has radiculopathy following conservative treatment

whereas DRE III is assigned where the individual still experiences radiculopathy. Here, former primary treating physician Sherman Tran, M.D., found "decreased sensory in bilateral anterior thighs region," based on physical examination, disk bulging with foraminal stenosis based on an MRI, and diagnosed lumbar disk bulging and lumbosacral radiculopathy. (Petition, p. 6; Exhibit D, Dr. Tran's report, dated March 7, 2022, p. 2.) Additionally, Qualified Medical Evaluator (QME) Michael G. Klassen, M.D., found intermittent lower extremity radiculopathy based on a physical examination on June 27, 2022. (Exhibit B, Dr. Klassen's report, dated July 8, 2022, p. 9.) Thus, although Dr. Tran and Dr. Klassen opine that applicant's impairment falls within DRE II, their reports support the WCJ's finding of DRE III.

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. (*Escobedo, supra*, at 621; *Gatten, supra*, at 928.)

Based on the WCJ's Report and for the reasons discussed above, we will not disturb the WCJ's Findings and Award.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 26, 2024

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

GUADALUPE MEZA
DAVID BONEMEYER
LAUGHLIN FALBO

JB/*pm*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1. Applicant's occupation: Cook Helper
   Applicant's current age: 68
   Date of injury: 9/09/2021
   Parts of Body Injured: Low back

2. Identity of Petitioner: Defendant filed the Petition.
   Timeliness: The Petition was timely filed on 6/26/2024.
   Verification: The Petition was properly verified.

3. Date of Issuance of Order: 6/07/2024

4. **Petitioner's contentions**: Petitioner contends that 1) the WCAB has acted in excess of its jurisdiction; and 2) the findings of fact are not supported by the evidence. Specifically, petitioner contends substantial evidence does not exist to justify reliance upon the PTP report of Dr. Kaisler-Meza to provide applicant with a 27% Award; Apportionment was erroneously discredited; and that if apportionment remains unjustified, the Board rely upon the PQME report's impairment determination.

   Applicant has not filed an Answer as of the date of this Report and Recommendation.

II.
FACTS

On 9/09/2021, applicant, Guadalupe Meza, sustained injury arising out of and in the course of employment to the low back while employed as a cook helper by Team San Jose. The claim was accepted. Applicant's treating physician (PTP) is currently Allen Kaisler-Meza, M.D. The parties selected Michael Klassen, M.D. as the Panel Qualified Medical Examiner (QME).

On 3/07/2022, applicant's former PTP, Sherman Tran, M.D. issued a PR-4 report in which he indicated an MRI of the lumbar spine showed disk bulging at L3-S1 with foraminal stenosis. He declared applicant MMI and rated her low back under DRE Category II at 5% WPI, with no apportionment indicated. (Exhibit D)

On 6/27/2022, QME Dr. Klassen evaluated applicant. His report noted applicant's complaints of constant pain in the low back, radiating to the bilateral thighs and knees. His diagnosis was Lombago (sic), with intermittent lower extremity radiculopathy. He declared applicant P&S as of the date of the evaluation and rated applicant under DRE Category II, at 7%

WPI. With regard to apportionment, Dr. Klassen opined that, "based upon the fact that she did have a previous injury and the case is still open, I would describe 20% apportionment to the injury in 2012 or 2013 that pre- dated her September 2021 injury, and 80% of her apportionment to the September 9, 2021 injury." (Exhibit B)

On 10/13/2022, in response to a request for clarification regarding the P&S date and his apportionment opinion, Dr. Klassen issued a supplemental report in which he agreed with Dr. Tran's P&S date of 3/07/2022. Based upon a second review of the records he had previously reviewed, he modified his apportionment opinion. On page 2, he noted the lumbar spine date of injury was 2/05/2011, with x-rays demonstrating mild age compatible degenerative changes. He also noted that in 2013, the MRI of the lumbar spine demonstrated left-sided disc protrusion at L5-S1 with an annular disc tear and bulging at L4-5 and that the applicant had a left sided L4-5 epidural steroid injection on 5/31/2013. Dr. Klassen then opined,

> Based upon these records it appears that I was inaccurate on the apportionment and therefore I would modify my opinion that I described in June of 2022 on apportionment to reflect as follows:
>
> Apportionment to the injury of February 5, 2011, was 10% because there were only minimal degenerative changes on the x-rays.
>
> Apportionment to the injury of February 28, 2013, was 50% since there was a protruded disc and the claimant underwent the epidural.
>
> Then apportionment of 40% to the date of injury of September 9, 2021, based upon aggravation of her previous lumbar spine injuries.
>
> (Exhibit A)

On 11/15/2022, applicant's current PTP, Dr. Kaisler-Meza, issued a comprehensive medical- legal report. He indicated there was no apportionment as he had not been provided with medical records of any prior injury. He rated applicant under DRE Category III, due to radiculopathy and applicant's ADL's. He assigned 13% WPI, plus 2% WPI for pain, for a total of 15% WPI. (Exhibit 2)

On 11/22/2023, Dr. Kaisler-Meza issued a supplemental report in response to applicant's request that he review 396 pages of additional medical records related to the 2/15/2011 and 2/28/2013 prior injuries. He provided a summary of the records and opined,

In my CME report of 11/15/2022, I apportioned 100% of Ms. Meza current impairment to the industrial injury of 2021 only. I stand by this opinion for the following reasons:

1. She had no self-reported history of functional nor vocational limitations leading up to the 9/09/2021 industrial injury. In other words, she had NO labor disabling impairment.

2. She was not under active medical care for injuries sustained in 2011 and 2013 for over 6 years prior to her 2021 injury.

3. She was declared Permanent and Stationary by her then PTP, Dr. Tran on 6/24/2013 with a 0% WPI.

4. Dr. Klassen documented NO non-organic findings.

5. I documented objective abnormal neurological findings (sensation and reflexes) whereas Dr. Tran documented a normal examination.

On 4/18/2024, the parties proceeded to trial. The matter was submitted for decision without testimony. The undersigned found Dr. Kaisler-Meza's 13% WPI rating under DRE III and the 2% pain add-on to be well supported by the medical record and found his reports to be substantial medical evidence. Dr. Kaisler-Meza's 11/15/2022 report rates as follows:

100% - (15.03.01.00 – 15 – [1.4] 21 – 322F – 21 – 27%) 27%

The undersigned also found Dr. Klassen's apportionment opinion conclusory and not substantial evidence, as he did not adequately support his initial apportionment determination, nor his current one, as required by *Escobedo*[1]. Applicant was awarded an unapportioned permanent disability award of 27%, payable at the permanent disability rate of $290 per week, for 112.75 weeks, for a total sum of $32,697.50, less credit for permanent disability advances made to date, and less attorney's fees.

Thereafter, defendant filed a timely Petition for Reconsideration.

III.
DISCUSSION

A CATEGORY III RATING IS SUPPORTED

Defendant argues the undersigned relied upon Dr. Kaisler-Meza's statements as summarized on page 4 of the Opinion. However, the undersigned did not rely on Dr. Kaisler-

[1] *Escobedo v. Marshalls, CAN Ins. Co*., 70 Cal. Comp. Cases 604 (Cal. Workers' Comp. App. Bd. April 19, 2005)

Meza's statements to find there was no apportionment. Rather, the undersigned found Dr. Klassen had not adequately support his apportionment opinion as required by *Escobedo*. Nonetheless, the undersigned will address defendant's arguments on pages 5 and 6 of the Petition. While the undersigned did not rely on Dr. Kaisler-Meza's statement that there was no active medical care for injuries sustained in 2011 and 2013 for over 6 years prior to the current injury, the statement is not erroneous, as defendant asserts. The undersigned reviewed page 18 of Dr. Klassen's 6/27/2022 report and noted a 6-year lapse between the last treatment of 7/02/2015 and the 9/09/2021 Doctor's First Report of Occupational Injury and Illness, supporting Dr. Kaisler-Meza's statement that applicant had not been under active medical care for the 2011 and 2013 injuries for over 6 years prior to her 2021 injury. (Exhibit B)

Defendant correctly asserts that the undersigned relied on Dr. Tran's notes to support the DRE III rating assigned by Dr. Kaisler-Meza. The undersigned is aware that Dr. Tran rated applicant under DRE II, however his findings *support* a DRE III rating. While both Dr. Tran and Dr. Klassen rated applicant's impairment under DRE II, the undersigned found Dr. Kaisler-Meza's rating under DRE III to be well supported by the medical record, which includes Dr. Klassen's and Dr. Tran's findings. The undersigned noted Dr. Klassen diagnosed applicant with Lumbago with intermittent lower extremity radiculopathy, while Dr. Tran assessed left-sided disc protrusion at L5-S1, 3mm disc bulging at L4-L5 with left L4-L5 radiculopathy based on his review of the lumbar MRI, and his diagnosis of lumbar disc bulging and lumbosacral radiculopathy. (Exhibits B and D) An individual in category I has only subjective findings. The [AMA] Guides state that, in category II, the individual has objective findings but no radiculopathy or alteration of structural integrity, while in category III, radiculopathy with objective verification must be present.[2] Table 15-3, indicates category II is assigned when the individual had a clinically significant radiculopathy and has an imaging study that demonstrates a herniated disk at the level and on the side that would be expected based on the previous radiculopathy, *but no longer has the radiculopathy* following conservative treatment. Category III, however, is assigned when there is a history of a herniated disk at the level and on the side that would be expected from objective clinical findings, associated with radiculopathy.[3] Here, Dr. Tran assessed left-sided disc protrusion at L5-S1 and 3MM disc bulging at L4-L5, with left L4-L5 radiculopathy.

[2] AMA Guides, 5th Edition, p. 383.
[3] Table 15-3, AMA Guides, 5th Edition, p. 384.

Defendant further argues Dr. Kaisler-Meza found DRE III "without clear medical evidence" and provides for an unjustified pain add-on. The undersigned disagrees and finds Dr. Kaisler-Meza's rating under DRE III well-supported in his 11/15/2022 report, as he reviewed the 10/29/2021 MRI, noted applicant's constant low back pain that radiates to the bilateral legs, with aggravation of symptoms with activities such as prolonged sitting, standing, walking, twisting, and lifting. Dr. Kaisler-Meza reviewed Dr. Tran's and Dr. Klassen's reports but opined applicant "fits more into DRE Category III of Table 15-3 because of active Lumbar Radiculopathy" and "based on the impact on her ADL's" (Exhibit 2) It is well-established that a WCJ may select amongst admissible reports and rely upon those which are more persuasive. Here, the more persuasive reports are those of Dr. Kaisler-Meza.

APPORTIONMENT IS NOT SUPPORTED

With regard to apportionment, defendant argues Dr. Kaisler-Meza did not take into consideration the 2011 lumbar spine x-ray showing degenerative changes, nor the MRI from the 2013 injury, which demonstrated left-side disc protrusion at L5-S1 and annular disc tear and bulging at L4-5. However, his reports include review and discussion of the MRI and lumbar spine x-ray. Defendant appears to asserts that if the diagnostic studies show a clear pre-existing condition then apportionment is automatically valid. Here, while Dr. Klassen reviewed and mentioned the studies, he did not provide a through explanation of the how and the why apportionment applies. The mere fact that a report addresses apportionment does not make it substantial evidence upon which the trier of fact may rely in applying apportionment.

In *Escobedo v. Marshalls*[4], the Appeals Board, en banc, explained that, while it is now well established that one may apportion to pathology and asymptomatic prior conditions, an apportionment determination must still constitute substantial medical evidence. The mere fact that a report addresses the issue of causation of the permanent disability and makes an apportionment determination by finding the approximate relative percentages of industrial and non-industrial causation does not necessarily render the report one upon which the WCAB may rely. This is because it is well established that any decision of the WCAB must be supported by substantial evidence.[5] Thus, to be substantial evidence on the issue of the approximate percentages of

[4] *Escobedo v. Marshalls, CNA Ins. Co.*, 70 Cal. Comp. Cases 604 (Cal. Workers' Comp. App. Bd. April 19, 2005)
[5] *Escobedo v. Marshalls* (supra, at p. 620)

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. 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. The Board further explained that, for example, if a physician opines that 50% of an employee's disability is caused by degenerative changes, the physician must explain the nature of the degenerative changes, how and why they are causing permanent disability, and how and why they are responsible for approximately 50% of the disability.[6]

Defendant bears the burden of proof that apportionment is appropriate. Here, defendant has not overcome this burden. As explained in the Opinion, Dr. Klassen's apportionment opinions as indicated in his reports are not sufficient as they do not explain the nature of the degenerative changes, nor how and why they are causing permanent disability and how and why they are responsible for the assigned percentage of the disability, as required by *Escobedo*. Similarly, Dr. Klassen did not explain how and why the protruded disc and the epidural injection caused permanent disability, nor how and why they are responsible for the assigned percentage of the disability. Thus, the undersigned found his opinion conclusory and not substantial evidence on apportionment. As such, applicant is entitled to an unapportioned award.

IV.
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be DENIED.

DATE: 07/09/2024

NORMA L. ACOSTA
WORKERS' COMPENSATION JUDGE

[6] *Escobedo v. Marshalls* (supra, at p. 621)