

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

**MARTA ORTIZ, *Applicant***

**vs.**

**BLACK OAKS, INC.; TECHNOLOGY INSURANCE, *Defendants***

**Adjudication Number: ADJ10822061  
(Santa Barbara District Office)**

**OPINION AND ORDER DENYING  
PETITION FOR RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of May 6, 2024, wherein it was found that while employed on April 3, 2016 as a housekeeper, applicant sustained industrial injury to her knees, causing permanent disability of 86% and the need for further medical treatment. In finding permanent disability of 86% it was found that there was no legal basis for apportionment of permanent disability.

Defendant contends that the WCJ erred in finding that applicant's injury caused permanent disability of 86% arguing that the WCJ should have incorporated the apportionment determination of panel qualified medical evaluator orthopedist Scott A. Graham, M.D., who opined that applicant's permanent disability should be apportioned 50% to non-industrial factors. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated in the portions of the Report quoted below, we will deny the defendant's Petition. We have omitted a one-sentence paragraph regarding the effect of applicant's undergoing a total knee replacement on apportionment.

**REPORT AND RECOMMENDATION  
ON PETITION FOR RECONSIDERATION**

**I.  
INTRODUCTION**

1. Applicant's Occupation: Housekeeper

- |                                  |   |
|----------------------------------|---|
| Age of Applicant:                | [Date of Birth Redacted] (57)                                     |
| Date(s) of Injury:               | April 3, 2016   |
| Parts of Body Injured:           | Bilateral knees   |
| Manner in Which Injury Occurred: | Not in dispute  |
| 2. Identity of Petitioner:       | Defendant   |
| Timeliness:                      | The Petition is timely  |
| Verification:                    | The Petition is verified  |
| Services:                        | The Petition was served on all parties                            |
| 3. Date of Issuance of Order:    | May 6, 2024   |
| 4. Petitioner's Contention:      | The WCJ erred in awarding applicant 86% PD without apportionment. |

**II.**  
**FACTS**

Applicant sustained an admitted specific injury to her right knee as a housekeeper on April 3, 2016. She also claimed injury to her left knee (as a compensable consequence) which was admitted at the time of trial. Applicant also claimed injury to her lumbar spine, which was not found to be industrially related by the WCJ and this determination is not challenged.

Applicant was evaluated by Scott Graham, M.D. in the capacity of a PQME. Dr. Graham authored six (6) medical reports, and these were the only medical evidence submitted by the parties.

Following an Opinion on Decision and Findings of Fact and Award finding Applicant to have sustained 86% permanent disability without apportionment, Defendant filed this instant Petition for Reconsideration.

**III.**  
**DISCUSSION**

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied

upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures those defects.

Defendant complains the Award of 86% is in error and contends the proper permanent disability total should be less. Following trial, rating instructions were issued directing the rater to rate according to the April 6, 2023, medical reporting of Dr. Graham. (Exhibit 6)

A formal rating was issued by DEU. The rating instructions were neither objected to nor was there a request for cross-examination of the rater. The rating instructions directed the rater to provide a rating based on pages 14 -15 of the April 6, 2023, medical report of Dr. Graham. Under the heading of "Impairment:", the doctor found 21% WPI for the right knee following the total knee replacement and 23% for the left knee.

However, the rating instructions provided for the rater to rate the report of April 6, 2023, not just accept the 23% and 21% provided by the physician and the WCJ. Per Blackledge, the rater followed the rating instructions and found a way to maximize the value of the permanent disability contained in his report. That is what the rater should do.

Then Dr. Graham wrote,

"Therefore, per the Kite decision, with synergy of the bilateral knees, impairments, the claimant is provided a total of . . ."

This opinion constituted an appropriate medical opinion and substantial medical evidence and support the adding of the disabilities rather than placing them on the combined values chart (CVC). The rating calculated by DEU at 86% permanent disability is warranted and appropriate.

Defendant's next objection is premised on the Court finding the apportionment as reflected in the medical reporting not to constitute substantial medical evidence and finding Defendant has failed in the burden on apportionment resulting in Applicant being entitled to an unapportioned Award.

On Page 15 of the April 6, 2023, report, under the heading of "Apportionment:" Dr. Graham, writes,

". . . I did opine at that time that if the claimant was provided impairment based upon osteoarthritis, that 50% would be apportioned to the underlying degenerative condition and 50% to the industrial injury of 04/03/16. This was based upon the epidemiological studies that indicate that 50% of individual with knee osteoarthritis are asymptomatic and 50% are symptomatic. It is my understanding that antedating the industrial

injury of 4/03/16, that she fell within the asymptomatic cohort. To reiterate, 50% is apportioned to the pre-existing degenerative osteoarthritis of the knee and 50% to the industrial injury of 04/03/16.”

Continuing on Page 16 of the April 6, 2023, report, Dr. Graham, further opines,

“It is my understanding that compensatory injuries are apportioned identical to the index injury. If not, this would be moot as the apportionment analysis for the right knee applies to the left knee.”

As pointed out in Applicant’s Answer to Petition for Reconsideration, the doctor does not identify what the “underlying degenerative studies” are or explain the how and why the degenerative condition caused or contributed to Applicant’s permanent disability.

[One sentence paragraph regarding the effect of the applicant’s undergoing a total knee replacement on the issue of apportionment omitted.]

Lastly, the doctor wrote at the top of page 16 on the same report,

“It is my understanding that compensatory injuries are apportioned identical to the index injury. If not, this would be moot, as the apportionment analysis is only for the right knee applies to the left.”

If I understand what the doctor is saying, he believes that if there is apportionment for one extremity and there is a compensable consequence to another body part, the apportionment is the same for the compensable body part as the body part initially injured.

This is not the current law, and the doctor seems to say if that is not the law then there is no apportionment to the left knee. Each body part should be analyzed separately to determine if there is any apportionment to other facts, industrial or non-industrial.

#### **IV.** **RECOMMENDATION**

For the reasons stated, it is respectfully recommended that Defendant’s Petition for Reconsideration be denied based on the arguments and merits addressed herein.

For the foregoing reasons,

**IT IS ORDERED** that Defendant's Petition for Reconsideration of the Findings and Award of May 6, 2024 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

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

I CONCUR,

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ JOSÉ H. RAZO, COMMISSIONER**



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

**July 29, 2024**

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

**MARTA ORTIZ  
LLARENA, MURDOCK, LOPEZ & AZIZAD  
WOLFF WALKER LAW**

**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*