

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

**JUAN VILLALOBOS, *Applicant***

**vs.**

**F.D. THOMAS;  
ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ9174557, ADJ9174544  
Sacramento District Office**

**OPINION AND DECISION  
AFTER RECONSIDERATION**

The Appeals Board previously granted reconsideration<sup>1</sup> to study the factual and legal issues. Having completed our review, we now issue our Opinion and Decision After Reconsideration.

In the Findings and Award of December 1, 2021 (F&A), the workers' compensation administrative law judge (WCJ) found, in relevant part, that the applicant, while employed as an industrial painter by F.D. Thomas, Inc., sustained industrial injury to his left eye in ADJ9174557 (specific injury) and also sustained industrial injury to his cervical spine, lumbar spine, right shoulder, bilateral knees, and bilateral hearing loss in ADJ9174544 (cumulative trauma injury). The WCJ found that applicant's injuries entitled applicant to periods of temporary total disability (TTD), permanent disability (PD), and future medical treatment.

On December 27, 2021, the defendant timely filed his Petition for Reconsideration (Petition) of the WCJ's decision. Defendant contends the WCJ's award of TTD was in excess of its powers and contravenes Labor Code section 4656(c)(2)<sup>2</sup>, the WCJ's failure to apportion permanent disability conflicts with the evidence and with existing law, and the WCJ's failure to

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<sup>1</sup> Commissioner Lowe, who was on the panel that granted reconsideration to further study the factual and legal issues in this case, no longer serves on the Workers' Compensation Appeals Board. Another panel has been assigned in her place.

<sup>2</sup> All further references are to the Labor Code unless otherwise noted.

consider the applicant's history and reporting of the evaluations physicians conflicts with existing law.

On January 4, 2022, the applicant submitted an Answer.

On January 10, 2022, the WCJ submitted a Report and Recommendation on Petition for Reconsideration (Report) recommending defendant's Petition be denied except to amend the award in ADJ9174544 to change the period of temporary disability to August 18, 2013 through and including August 16, 2015, payable at the rate of \$1,066.72 per week with credit to defendant for the 28 days of overlap. (Report, p.6.)

We have considered the Petition, the Answer, and the contents of the Report with respect thereto. Based on our review of the record and for the reasons stated in the WCJ's report, which we adopt and incorporate, and for the reasons discussed below, we will amend the F&A (Findings of Fact numbers (10) and (11) and Award numbers (1) and (2) in ADJ9174544), but otherwise affirm the WCJ's decision of December 1, 2021.

### **FACTS**

Applicant sustained a specific injury on August 14, 2013 to his left eye and a cumulative trauma injury through August 14, 2013 to his cervical spine, lumbar spine, right shoulder, bilateral knees, and bilateral hearing loss. (F&A, p.1.)

Applicant was evaluated by various medical evaluators for his injuries. Parties initially agreed to orthopedic surgeon, Dr. Max Moses, as the Agreed Medical Evaluator (AME). Dr. Moses issued a narrative report dated August 13, 2014 and found industrial injury to applicant's cervical spine, lumbar spine, right shoulder, left elbow, and the bilateral knees due to the cumulative trauma injury through August 21, 2013. (Joint Exhibit CC, p.13.) However, Dr. Moses was subsequently replaced by Dr. Stephen Abelow, who served as the new orthopedic surgery AME. Dr. Abelow issued two narrative reports dated July 26, 2020 and October 11, 2020. In the initial report, Dr. Abelow noted applicant's complaints of pain in his left shoulder and left elbow "from a long time ago...from 2004 or so with surgery in 2006 and 2007" while he was working for a prior employer, Certified Coating. (Applicant Exhibit 1, p.6.) Dr. Abelow opined "with reasonable medical probability, that Mr. Villalobos has indeed suffered cumulative job trauma through 8/14/13 to his neck, upper back, midback, lower back, right shoulder, and right and left knees." In addressing applicant's left shoulder and left elbow, Dr. Abelow opined "with reasonable medical probability, that 100% is due to prior industrial injury to the left shoulder and elbow requiring left

shoulder surgery and left elbow surgery, prior to working for F.D. Thomas and Mr. Villalobos receiving a \$100,000 settlement, and the natural progression of those problems.” (*Id.* at p.21.) Dr. Abelow found applicant TTD from August 18, 2013 through July 16, 2020. (*Id.* at p.17.)

Parties also proceeded with Dr. Philip Edington as the panel qualified medical evaluator (QME) in ophthalmology who issued one narrative report dated January 31, 2018. Dr. Edington opined applicant’s visual impairment was caused by the August 14, 2013 specific injury. (Joint Exhibit AA, p.6.) He found applicant TTD from August 14, 2013 through September 14, 2013. (*Id.*)

Applicant saw QME Dr. Michael Kearns for an evaluation in otolaryngology on March 21, 2018. Dr. Kearns found industrial injury to applicant’s hearing loss and noted applicant “has a long history of occupational noise exposure in his long career as a commercial painter.” (Joint Exhibit BB, p.7.)

On October 18, 2021, the parties proceeded to trial on the issues of temporary disability, permanent and stationary date, permanent disability, apportionment, occupation and group number, need for further medical treatment, liability for self-procured medical treatment, liens, and attorney fees. The issues of liability for self-procured medical treatment and the Med-Legal Photocopy lien were deferred. (Minutes of Hearing and Summary of Evidence (MOH/SOE), dated October 18, 2021, p. 8:4-22.) The WCJ heard applicant’s testimony and the parties submitted post-trial briefs. The matter was submitted for decision on November 18, 2021.

On December 1, 2021, the WCJ issued a F&A wherein the WCJ found, in relevant part, that applicant, while employed as an industrial painter by F.D. Thomas, Inc., sustained industrial injury to his left eye in ADJ9174557 (specific injury) and also sustained industrial injury to his cervical spine, lumbar spine, right shoulder, bilateral knees, and bilateral hearing loss in ADJ9174544 (cumulative trauma injury). The WCJ found that applicant’s specific injury resulted in a period of TTD commencing August 14, 2013 to and including September 14, 2013 and that applicant’s cumulative trauma injury resulted in a period of TTD commencing September 15, 2013 to and including September 13, 2015. The WCJ further found applicant entitled to PD of 14% for the specific injury and 92% for the cumulative trauma injury after apportionment. Future medical treatment was awarded for the left eye, cervical spine, lumbar spine, right shoulder, bilateral knees, and bilateral hearing. (F&A, p.2.)

## DISCUSSION

It is well established that any award, order, or decision of the Appeals Board, including decisions by WCJs, must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, an expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and examination, and must set forth reasoning to support the expert conclusions reached. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citations)" (*Gatten, supra*, at p. 928.) "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation)" (*Kyle v. Workers' Comp. Appeals Bd (City and County of San Francisco)* (1987) 195 Cal.App.3d 614, 621.)

On the other hand, there must be some solid basis in the medical report for the doctor's ultimate opinion; the Appeals Board may not blindly accept a medical opinion which lacks a solid underlying basis, and must carefully judge its weight and credibility. (*National Convenience Stores v. Workers' Comp. Appeals Bd. (Kesser)* (1981) 121 Cal.App.3d 420, 426 [46 Cal.Comp.Cases 783].) In other words, the Appeals Board must look to the underlying facts of a medical opinion to determine whether or not that opinion constitutes substantial evidence, and accordingly, the expert's opinion is no better than the facts on which it is based. (*Turner v. Workers' Comp. Appeals Bd.* (1974) 42 Cal.App.3d 1036, 1044 [39 Cal.Comp.Cases 780].)

Here, the WCJ awarded applicant a PD award of 92% in ADJ9174544, the cumulative trauma injury. (F&A, p. 2.) In the Opinion, the WCJ rated the total PD to 92% based on the

impairments found by AME Dr. Abelow and QME Dr. Kearns. Dr. Abelow found impairments for the cervical spine, lumbar spine, bilateral shoulders, and the bilateral knees. Dr. Kearns found impairment for the bilateral hearing. However, there is a lack of substantial evidence to support the WCJ's finding of 26% PD for the left shoulder. Although AME Dr. Abelow had found 6% whole person impairment (WPI) for the left shoulder, he opined "with reasonable medical probability, that 100% is due to prior industrial injury to the left shoulder and elbow requiring left shoulder surgery and left elbow surgery, prior to working for F.D. Thomas and Mr. Villalobos receiving a \$100,000 settlement, and the natural progression of those problems. It is my opinion, with reasonable medical probability, that 100% of the permanent disability to the left shoulder and left elbow is due to a prior industrial injury to the left shoulder and left elbow prior to working for F.D. Thomas." (Applicant Exhibit 1, p.22.) Moreover, the WCJ did not find the applicant sustained injury arising out of and in the course of employment to his left shoulder in the F&A. (F&A, p.1.) However, when calculating the total PD for the cumulative trauma injury, the WCJ included an 11% WPI for the left shoulder which rates to 26% PD. (Opinion, p.6.) The WCJ did not offer any explanation as why she rated the left shoulder using an 11% WPI when the AME Dr. Abelow had found 6% WPI for the left shoulder. Moreover, the WCJ did not explain why she included the left shoulder impairment in the rating for the cumulative trauma injury when AME Dr. Abelow found 100% of the left shoulder impairment to be due to the prior industrial injury. (Applicant Exhibit 1, p.22.) The present record lacks substantial medical evidence to find impairment for the left shoulder as part of the cumulative trauma injury. There is also no evidence that the parties stipulated to the left shoulder as being accepted and that the left shoulder was ever a disputed body part. (MOH/SOE, p.2.) Thus, the finding of PD for the left shoulder must be rescinded and the final PD for the cumulative trauma injury is 89%.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the decision of December 1, 2021 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

**FINDINGS OF FACT**

In ADJ9174544

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10. Applicant is entitled to temporary disability beginning August 18, 2013 to and including August 16, 2015 at the weekly rate of \$1,066.72 with credit to defendant for the 28 days of overlap.
11. In ADJ9174544, applicant is entitled to permanent disability of 89% after apportionment.

**AWARD**

In ADJ9174544

**AWARD IS MADE** in favor of JUAN VILLALOBOS against ZURICH AMERICAN INSURANCE COMPANY of:

1. Temporary disability beginning August 18, 2013 to and including August 16, 2015 at the weekly rate of \$1,066.72 less a reasonable attorney fee. Credit to be applied by the defendant for the 28 days of overlap.

2. Permanent disability of 89%, equivalent to 737.25 weeks of indemnity payable at the rate of \$290 per week, in the total sum of \$213,802.50 to commence on August 17, 2015, less a reasonable attorney fee payable to Smolich & Smolich, and less credit for permanent disability advances paid, if any. Plus, a life pension thereafter at the rate of \$247.38 per week less attorney's fees payable to Smolich & Smolich. The parties are to obtain a commutation from DEU to determine the exact amount of attorney fees based on 15% of the permanent disability and life pension awarded herein, to be commuted from the award, and subject to 3% for future State Average Weekly Wage increases.

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**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**



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

**September 29, 2025**

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

**JUAN VILLALOBOS  
SMOLICH & SMOLICH  
LAW OFFICE OF DOUGLAS G. MCKAY**

**JL/abs**

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

**REPORT AND RECOMMENDATION**  
**ON PETITION FOR RECONSIDERATION**

**I**

<u>Date of Injury:</u>	ADJ9174557: August 14, 2013 ADJ9174544: CT through August 14, 2013
<u>Age on DOI:</u>	59 years old
<u>Parts of Body Injured:</u>	ADJ9174557: left eye ADJ9174544: cervical spine, lumbar spine, right shoulder, bilateral knees, and bilateral hearing loss
<u>Timeliness:</u>	Petition was filed timely
<u>Verification:</u>	Petition was verified
<u>Date of Order:</u>	December 1, 2021
<u>Petitioner Contentions:</u>	Defendant contends the Board acted without or in excess of its powers by the order, decision, or award, the evidence does not justify the findings of fact, and the findings of fact do not support the order, decision, or award. Specifically, Defendant disputes the findings regarding permanent disability and temporary disability. Defendant contends Applicant is limited to 104 weeks of temporary disability for the two dates of injury because the temporary disability should run concurrently. In addition, Defendant contends further apportionment is supported.

**II**

**FACTS**

The parties agreed Applicant sustained an industrial injury on August 14, 2013 to the left eye in ADJ9174557 and a cumulative trauma period through August 14, 2013 to the cervical spine, lumbar spine, right shoulder, bilateral knees, and bilateral hearing loss in ADJ9174544. The parties agreed Applicant's earnings warranted indemnity rates of the maximum for temporary disability and permanent disability, and that there is a need for future medical care.

The cases went to trial on the issues of temporary disability, permanent and stationary date, permanent disability, apportionment, occupational group number, and attorney fees. The issues of self-procured medical treatment and liens were deferred.

After trial it was found that Applicant's occupational group number is 482 for bridge structural steel painter and a reasonable attorney fee is 15% of the permanent disability and retro temporary disability. In ADJ9174557, it was found that Applicant became permanent and stationary on September 14, 2013 and is entitled to temporary disability from August 14, 2013 through September 14, 2013 and permanent disability of 14% without apportionment. In ADJ9174544, it was found that Applicant became permanent and stationary on July 16, 2020 and is entitled to temporary disability from September 15, 2013 through September 13, 2015 and permanent disability of 92% after apportionment.



### III **DISCUSSION**

#### **PERMANENT AND STATIONARY DATE**

Applicant claims a permanent and stationary date of July 16, 2020 based on Dr. Abelow and Defendant claims August 13, 2014 based on Dr. Moses.

#### ***ADJ9174557 -Left Eye***

Applicant saw ophthalmologist Dr. Philip Edington for a QME evaluation on January 31, 2018. Applicant complained of blurry vision in the left eye near and far as well as light sensitivity, occasional double vision, and a ghost image in the left eye. Dr. Edington diagnosed Applicant with status post corneal foreign body of the left eye with corneal scar. Dr. Edington opined that Applicant became permanent and stationary on September 14, 2013 after approximately one month because Applicant had reached a plateau. (Joint Exhibit AA)

In ADJ9174557, the record supports a finding of a permanent and stationary date of September 14, 2013.

#### ***ADJ9174544 - Cervical Spine, Lumbar Spine, Right Shoulder, Bilateral Knees, Bilateral Hearing***

Applicant saw orthopedic surgeon Dr. Max Moses for an AME evaluation on August 13, 2014. Applicant complained of pain involving his neck, right shoulder, left elbow, bilateral knees, and low back as well as difficulty seeing. Dr. Moses performed an examination and diagnosed Applicant with a cervical strain/sprain, right shoulder impingement with the need to rule out a rotator cuff tear, recurrent left medial epicondylitis, low back strain/sprain, and bilateral knee arthritis with the need to rule out internal derangement. Dr. Moses noted asymmetrical limitations in range of motion of the cervical spine, x-rays from 2014 showing degenerative osteophytes at C4-5, C5-6, and straightened cervical curvature. Dr. Moses found positive Neer and Hawkins signs for the right shoulder with weakness and marked limitations in range of motion. Dr. Moses found grip strength weakness of the left elbow, medial epicondylitis based on x-rays, possible tendinosis, and a prior debridement and repair of the left common extensor and left flexor tendon in 2007. Dr. Moses found muscle guarding of the lumbar spine with limited range in motion. For the knees, Dr. Moses found antalgic gait, bilateral crepitus, and bilateral limitations in range of motion, as well as severe degenerative joint disease bilaterally based on x-rays from 2014. Dr. Moses found Applicant permanent and stationary because surgery was not anticipated. (Joint Exhibit CC)

Subsequently, Applicant had bilateral knee surgeries and Dr. Moses was replaced by orthopedic surgeon Dr. Stephen Abelow as AME. Applicant saw Dr. Abelow for an evaluation on July 16, 2020. Applicant complained of pain in the neck, right shoulder, upper back, mid back, low back, bilateral knees, and left elbow. Dr. Abelow performed a medical record review through June 2020 and radiology tests through 2019, and examined Applicant. Dr. Abelow diagnosed Applicant with cervical spine pain and cervical disc disease based on a 2014 x-ray, left shoulder impingement with rotator cuff tear and osteoarthritis of the AC joint based on a 2019 MRI, history of left shoulder surgery, history of bilateral lateral epicondylitis with elbow surgery, low back sprain with chronic pain and the need to rule out lumbar disc disease, right knee end stage osteoarthritis post

right total knee arthroplasty in May 2019 and post manipulation under anesthesia in October 2019, left knee end stage osteoarthritis post left total knee arthroplasty in October 2018, and severe degenerative joint disease of the bilateral knees based on 2014 x-rays. Dr. Abelow found Applicant to be permanent and stationary on July 16, 2020 based on reasonable medical probability. (Applicant Exhibit 1)

Applicant also saw Dr. Michael Kearns for a QME evaluation in otolaryngology on March 21, 2018. Applicant complained of bilateral hearing problems since about 2008. He reported that it was mild and then became a big problem about five years ago. He reported a temporary decrease in hearing and ringing after loud noise exposure at work such as after sitting next to a compressor or using a needle gun for an extended period. Dr. Kearns found Applicant to be permanent and stationary because the past noise exposure was unlikely to lead to further decline in hearing. (Joint Exhibit BB)

The finding of Dr. Abelow is more persuasive than that of Dr. Moses because Dr. Moses qualified his finding of permanent and stationary status on the fact that surgery was unanticipated and then Applicant had surgery. Furthermore, Dr. Moses ceased provided medical-legal services and the parties agreed to use Dr. Abelow as an AME. In ADJ9174544, the record supports a finding of a permanent and stationary date for all body parts of July 16, 2020.

### TEMPORARY DISABILITY

Applicant claims temporary disability for the period of August 18, 2013 through July 16, 2020 per AME Dr. Abelow. Defendant paid no temporary disability.

#### ***ADJ9174557-Left Eye***

In his report, Dr. Edington indicated that Applicant had a foreign body in his left eye that was removed after several days resulting in a scar with some blurred vision and occasional double vision. Dr. Edington opined that Applicant was unable to return to his usual and customary duties for approximately one month from August 14, 2013 through September 14, 2013. (Joint Exhibit AA) At trial, Applicant testified credibly that his last day of work was August 14, 2013, he was laid off, and he was informed that F.D. Thomas no longer had any work for him. There was no rebuttal witness or evidence of an offer of return to work.

Based upon Applicant's credible testimony and the QME report of Dr. Edington (Joint Exhibit AA), the record supports a finding that Applicant is entitled to temporary disability for the period beginning August 14, 2013 to and including September 14, 2013 payable at the rate of \$1,066.72 per week. The parties stipulated that Applicant's earnings warranted the maximum temporary disability rate.

#### ***ADJ9174544 - Cervical Spine, Lumbar Spine, Right Shoulder, Bilateral Knees, Bilateral Hearing***

In his report, Dr. Abelow indicated that Applicant had difficulties with activities of daily living including dressing and bathing himself, hearing, standing or sitting for more than 30 minutes,

walking more than one block, and lifting or carrying more than 10 pounds. Dr. Abelow found Applicant to be totally temporarily disabled from August 18, 2013 through July 16, 2020 when he became permanent and stationary. (Applicant Exhibit 1)

Dr. Kearns opined that Applicant did not lose time from work due to his ears or hearing. (Joint Exhibit BB)

The Findings and Award allowed for consecutive temporary disability beginning on September 15, 2013 however based upon *Foster v. WCAB* (2008) 73 Cal. Comp. Cases 466 and the AME report of Dr. Abelow (Applicant Exhibit 1), the record supports a finding that Applicant is entitled to temporary disability for the period beginning August 18, 2013 for 104 weeks through and including August 16, 2015, payable at the rate of \$1,066.72 per week. There is some concurrent temporary disability between the two days of injury and therefore Defendant is entitled to credit for the 28 days of overlap.

### PERMANENT DISABILITY AND APPORTIONMENT

#### ***ADJ9174557-Left Eye***

Dr. Edington performed a medical record review, exam, and testing, and diagnosed Applicant with status post corneal foreign body of the left eye with corneal scar. Dr. Edington found the eye injury to be industrial with 5% WPI based on subjective complaints and testing scores for visual acuity and diplopia. Dr. Edington found the impairment was caused by the industrial injury without apportionment to nonindustrial factors. (Joint Exhibit AA)

The findings of Dr. Edington rate as follows:

Left Eye                      12.01.00.00 - 5[1.4]7 - 482I – 11 - 14%

The factors of permanent disability are based upon the QME report of Dr. Edington which supports a finding that Applicant is entitled to a permanent disability award of 14%, equivalent to 46.25 weeks of indemnity payable at the rate of \$230.00 per week, in the total sum of \$10,637.50 less a reasonable attorney fee and less credit for permanent disability advances paid.

#### ***ADJ9174544 - Cervical Spine, Lumbar Spine, Right Shoulder, Bilateral Knees, Bilateral Hearing***

Dr. Abelow found impairment of 8% WPI for the cervical spine based on DRE Category II, 8% WPI for the lumbar spine based on DRE Category II, 11% WPI for the right shoulder based on range of motion, 6% WPI for the left shoulder based on range of motion, 20% WPI for the right knee based on a total knee replacement with fair results, 20% WPI for the left knee based on a total knee replacement with fair results. (Applicant Exhibit 1)

Dr. Kearns performed an audiology exam and diagnosed Applicant with mild to severe sloping sensorineural hearing loss of the right ear, mild to profound sloping mixed hearing loss of the left ear with subjective mild tinnitus and a perforation in the left tympanic membrane. Dr. Kearns

found 11% WPI based on unaided bilateral hearing impairment. (Joint Exhibit BB)

The findings of Dr. Kearns and Dr. Abelow rate as follows:

Bilateral Hearing	.49(11.01.01.00 - 11 [1.4] 15 - 482H - 19 - 24) 12
Cervical Spine	15.01.01.00 - 8 [1.4] 11 - 482J - 18 - 23
Lumbar Spine	15.03.01.00 - 8 [1.4] 11 - 482J - 18 - 23
Right Shoulder	16.02.01.00 - 11 [1.4] 15 - 482I - 21 - 26
Left Shoulder	16.02.01.00- 11 [1.4] 15 - 482I- 21 - 26
Right Knee	17.05.10.08 - 20 [1.4] 28 - 482J - 39 - 47
Left Knee	17.05.10.08 - 20 [1.4] 28 - 482J - 39 - 47
Combined Value	47 c 47 c 26 c 26 c 23 c 23 c 12 = 92%

The basis for apportionment must be clear; the medical-legal report must "describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion." *Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 621 (en banc). This means that the medical-legal report must explain the nature of the non-industrial factor, and how and why the non-industrial factor is responsible for part of the disability. *Id.* at 622.

Dr. Abelow indicated that Applicant had been working for F.D. Thomas since May 2008 and had a prior left elbow and left shoulder surgery for which he received a \$100,000.00 settlement. Dr. Abelow apportioned 80% of the disability for the cervical spine, right shoulder, bilateral knees, and back, to the cumulative trauma through August 14, 2013 with the remaining 20% to nonindustrial multilevel disc disease and normal activities of daily living including activities of personal hygiene and recreation. (Applicant Exhibit 1) There is no analysis demonstrating how or why prior injuries to the left upper extremity, disc disease, or activities of daily living are responsible for disability to the cervical spine, right shoulder, bilateral knees, and back. This is insufficient to support a finding of apportionment.

Dr. Kearns apportioned 51% to presbycusis and 43% to the occupational cumulative noise exposure of which 40% is attributable to F.D. Thomas, and 6% to the perforated membrane. Dr. Kearns reasoned that he would expect a 63-year old man to have a degree of four- frequency pure-tone average decline. Dr. Kearns reasoned that Applicant reported his noise exposure as being more severe while working for F.D. Thomas. (Joint Exhibit BB) There is no analysis demonstrating how or why the perforated membrane or prior occupational cumulative noise exposure is responsible for disability due to hearing loss. The record only supports a finding of apportionment to presbycusis/age related hearing loss.

The factors of permanent disability are based upon the findings of Dr. Abelow and Dr. Kearns, which support a finding that Applicant is entitled to a permanent disability award of 92%, equivalent to 785.25 weeks of indemnity payable at the rate of \$290.00 per week, in the total sum of \$227,722.50 less credit for permanent disability advances paid, plus a life pension thereafter at the rate of \$247.38 per week. The reasonable attorney fee is deducted from the permanent disability award and life pension.

Defendant raises an anti-merger argument and Labor Code section 3208.2 however Defendant accepted a specific injury and a cumulative trauma consistent with the findings of Dr. Edington, Dr. Kearns, and Dr. Abelow, and the injuries are addressed separately. Section 3208.2 states as follows:

When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

#### IV

#### **RECOMMENDATION**

For the reasons stated above, it is respectfully recommended that Defendant's Petition for Reconsideration be denied except to amend the award in ADJ9174544 to change the period of temporary disability to August 18, 2013 through and including August 16, 2015, payable at the rate of \$1,066.72 per week with credit to Defendant for the 28 days of overlap.

DATE: **January 10, 2022**

**Ariel Aldrich**  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE