

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

ZAKIA ABHAT, *Applicant*

vs.

**MACY'S WEST STORES, INC.;
ZURICH AMERICAN INSURANCE, adjusted by
SEDGWICK CLAIMS MANAGEMENT SERVICES. *Defendants***

**Adjudication Numbers: ADJ13532502
Sacramento District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.¹

Defendant seeks reconsideration of the "Findings and Award" (F&A) issued on October 1, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that defendant failed its burden of proving apportionment and issued a permanent disability award of 59%.

Defendant argues that the apportionment opinion of the qualified medical evaluator constitutes substantial medical evidence.

We have not received an answer from applicant.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration and the contents of the WCJ's Report. Based on our review of the record, and for the reasons discussed by the WCJ in her report, as our Decision After Reconsideration we will affirm the WCJ's October 1, 2021 F&A.

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

FACTS

Per the reporting of the qualified medical evaluator:

Zakia Abhat is a 75-year-old right hand dominant woman, who has worked in the shoe department at Macy's as a sales associate over the past 15 years. She reports that on October 8, 2017, she was walking through the shoe department when she tripped and fell over a small mirror on the floor. She reports that she fell onto her left side.

(Joint Exhibit AA, Report of Patrick McGahan, M.D., March 23, 2021, p. 50.)

Per the WCJ's Report:

The parties went to trial and submitted the matter on the record which consisted of a single QME report by Dr. Patrick McGahan, marked as Joint Exhibit AA. A Findings and Award issued of permanent disability of 59% without apportionment less permanent disability advances and a reasonable attorney fee. In addition, there was an award of future medical treatment to cure or relieve the effects of the industrial injury to the lumbar spine, cervical spine, left shoulder, and left knee. Defendant filed a Petition for Reconsideration contending the evidence supports a finding of apportionment. . .

PARTS OF THE BODY INJURED

The parties agreed that Applicant sustained an industrial injury to the lumbar spine, cervical spine, left shoulder, and left knee. Applicant claims additional body parts of right shoulder, bilateral wrists, and right knee relating to the injury on October 8, 2017.

Right shoulder: On October 17, 2017 Applicant was seen at Kaiser where she reported falling on her left side. She complained of mild occasional sharp pain in the right shoulder. On November 8, 2017, she reported a little right shoulder pain that was less than the left shoulder. On November 17, 2017, she reported that the right shoulder was feeling better although not pain free. She described feeling a lot of limitations with the right shoulder including pain in the axilla and top of the shoulder while reaching up. She was assessed with a right shoulder strain. On November 29, 2017, she complained of bilateral shoulder pain. She indicated that the right shoulder was better and had a little pain which was not as bad as the left shoulder. She had some limitation of movement of the right shoulder such as lifting it at shoulder level but was generally able to move it more easily. She was assessed with a right shoulder sprain. On December 20, 2017, her right shoulder was unchanged and was better than the left shoulder. She was assessed with a right shoulder sprain. She went to physical therapy between December 22, 2017 and January 12, 2018 where she was assessed with a right shoulder sprain. On March 28, 2018, she was most concerned with bilateral knees and right shoulder.

At the QME exam, Applicant had full strength of the bilateral shoulders and pain with the end of range of motion. (Joint Exhibit AA)

Right knee: On October 17, 2017, she had right knee swelling that appeared to be osteoarthritis. She had tenderness with palpation. On January 19, 2018, she was assessed with derangement of posterior horn of lateral meniscus due to old tear/injury to the right knee. The assessment was reiterated many times. On March 28, 2018, Applicant complained of right knee pain at the level of six or seven out of 10. She was most concerned with her bilateral knees and right shoulder. Applicant reported that he hoped to have left knee surgery and that she had discussed options for her right knee with the surgeon as well. Applicant went to acupuncture from March 1, 2018 through April 6, 2018 where she reported right knee pain at the level of five or six out of 10. On August 28, 2018, she had x-rays of the bilateral knees due to a history of pain. The impression was of degenerative changes without acute fracture or dislocation. On November 12, 2018, she requested a knee brace for the right knee. Dr. Bernhardt indicated the right knee is a disputed body part but the right knee is suffering due to altered body mechanics and compensation for the injured left knee, but still assessed the right knee with derangement of posterior horn of lateral meniscus due to old tear/injury. On February 25, 2019, Applicant had an x-ray of the bilateral knees due to a history of pain. The impression was of a stable total left knee prosthesis and degenerative changes of the right knee. At approximately 10 visits from March 25, 2019 through September 24, 2020, she was assessed with derangement of posterior horn of lateral meniscus due to old tear/injury to the right knee. On July 2, 2019 applicant had x-ray of bilateral knees due to a history of pain. the impression was of relatively stable tricompartmental degenerative osteoarthritis of the right knee, intact left knee total knee replacement in anatomic alignment without complications, and small bilateral knee joint effusions larger on the left knee. At the QME exam, Applicant wore a right knee brace and had moderate crepitus and pain of the right knee with tenderness to palpation. (Joint Exhibit AA)

Left wrist: On October 17, 2017, Applicant complained of left wrist pain. Upon exam she had full range of motion except mild limitation on extension of the left wrist with pain. She had normal strength and sensation. She was assessed with left wrist sprain. On November 8, 2019, she complained of left wrist pain at the ulnar aspect with limited range of motion. She was assessed with left wrist sprain and given a thumb wrist brace for comfort. On November 8, 2017, an x-ray of left wrist and left hand were taken due to pain with trauma. The impression was no fracture or malalignment. On November 17, 2017, she complained of left wrist pain that was unchanged. She had mild pain on both sides of the wrist and pain at the thumb with limited range of motion. She was assessed with a left wrist sprain and instructed to continue using the thumb wrist brace for comfort. On November 29, 2017, she complained of left wrist pain and reported that it felt better with the brace. She reported pain with movement and described the pain as throughout her knuckles and finger joints when making a fist which was similar to the right but more painful and difficult on the left. She was assessed with a left wrist sprain. On

December 20, 2017, she reported left wrist pain that was a little better but still painful. She was assessed with left wrist sprain. She complained of left wrist pain and/or was assessed with a sprain at over 25 visits from January 19, 2018 and November 10, 2020. (Joint Exhibit AA)

Right wrist: There are no documented complaints regarding the right wrist before the QME evaluation beyond comparing the right wrist to the left wrist in terms of making a fist.

QME Findings: Based on the history, physical exam, imaging findings, and medical records QME Dr. McGahan found with a reasonable medical probability that Applicant sustained an industrial injury to the left wrist; a sprain, arising on October 8, 2017. (Joint Exhibit AA) The record supports a finding of an additional industrial injury to the left wrist.

Dr. McGahan found no industrial injury to the right knee, right shoulder, and right wrist. He found no documentation around the time of the injury involving the right knee, right shoulder, or right wrist and he found no mechanistic rationale for injury to these body parts because Applicant reported that she fell on her left side. (Joint Exhibit AA) The employee has the burden to prove her claim for workers' compensation benefits. *Hercules Powder Co. v. IAC* (1933) 131 Cal. App. 587. There is no finding of an industrial injury to the right knee, right shoulder, or right wrist. Before the QME evaluation, there was no finding regarding any causation for the right shoulder, the treating provider found alternate causation for the right knee of derangement of the meniscus due to an old injury, and there were no documented complaints regarding the right wrist. The record does not support a finding of an additional industrial injury to the right knee, right shoulder, and right wrist.

PERMANENT DISABILITY & APPORTIONMENT

The factors of permanent disability are based upon the QME Report by Dr. McGahan. He found 6% WPI for the cervical spine based on DRE Category II due to muscle guarding and spasms upon exam. He found 6% WPI for the lumbar spine based on DRE Category II due to tenderness to palpation and spasms. For the left shoulder, he found 10% WPI based on range of motion. He found no ratable impairment for the left wrist considering full range of motion and full strength upon exam. For the left knee, he found 20% WPI based on a fair result for a total knee replacement. (Joint Exhibit AA)

Dr. McGahan apportioned 50% of the impairment to the industrial injury of October 8, 2017 and 50% to other factors. For the cervical spine and lumbar spine he apportioned 50% to preexisting degenerative changes. He indicated that Applicant has a history of auto accident in 2011 resulting in pain of the cervical spine and lumbar spine and that imaging studies reveal preexisting pathology of multilevel degenerative disc disease. For the left shoulder, he apportioned 50% to preexisting degenerative changes based on a MRI revealing changes of the glenohumeral joint

and AC joint. For the left knee, he apportioned 50% to preexisting degenerative changes of the knee. He indicated that a total knee replacement was recommended before the industrial injury. (Joint Exhibit AA)

Dr. McGahan indicates that Applicant had a prior auto accident involving the cervical spine and lumbar spine for which she had acupuncture, and that Applicant had prior complaints of left shoulder and left knee pain. In his report, Dr. McGahan listed results of imaging studies. (Joint Exhibit AA)

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 bane). 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. McGahan fails to explain how and why half of the disability is due to preexisting degenerative changes for any of the body parts. Defendant has not met its burden of proof for apportionment.

(WCJ's Report, pp. 1-4.)

DISCUSSION

As explained in the Appeals Board's en banc decision in *Nunes I*:

The California worker's compensation system requires that, "[e]mployers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. 'Apportionment is the process employed by the Board to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.'" (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 Cal.Comp.Cases 565], quoting *Ashley v. Workers' Comp. Appeals Bd.* (1995) 37 Cal.App.4th 320, 326 [43 Cal.Rptr. 2d 589, 60 Cal.Comp.Cases 683].)

Section 4663(c) provides, in relevant part:

(c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was

caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.

(Lab. Code, § 4663(c).)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*), we explained:

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.

(*Id.* at p. 607.)

Accordingly, section 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use. (Lab. Code, § 4663(c); *Escobedo, supra*, at pp. 607, 611–612.) Apportionment must account for “other factors both before and subsequent to the industrial injury,” and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions. (*Ibid.*) In addition, when a physician considers all appropriate factors of apportionment but nevertheless determines that it is not possible to approximate the percentages of each factor contributing to the employee’s overall permanent disability to a reasonable medical probability, the physician has made the apportionment determination required under section 4663(c). (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535 [89 Cal. Rptr. 3d 166, 74 Cal.Comp.Cases 113, 133]; see also *James v. Pacific Bell Tel. Co.* (May 10, 2010, ADJ1357786) [2010 Cal. Wrk. Comp. P.D. LEXIS 188].)

(*Nunes v. State of California, Dept. of Motor Vehicles (Nunes I)*, (2023) 88 Cal.Comp.Cases 741, 748-749 (Appeals Board en banc).)

Defendant carries the burden of proof on apportionment. (§ 5705.) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo, supra* at pp. 611, 620-621.) To constitute substantial evidence “. . . 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.” (*Id.* at 621.) Causation of disability is not to be confused with causation of injury. (*Id.* at 611.)

Dr. McGahan’s apportionment opinion does not constitute substantial evidence because he does not adequately address the causation of applicant’s disability. Causation of disability requires an analysis based upon critical thinking. The following analysis may assist those in critically examining apportionment:

- 1) Define the injury.
- 2) Identify the causes of the injury.
- 3) Define the rated disability.
- 4) Explain how and why the rated disability exists.

The parties may wish to begin the apportionment analysis with defining the injury and the causes of the injury so that the evaluator does not then confuse the cause of injury with the cause of disability. This is a common error. For example, if applicant has osteoporosis and that condition contributes to applicant breaking a bone, osteoporosis may be a cause of the injury. However, that does not mean that osteoporosis is necessarily a basis for apportionment. The osteoporosis *must be contributing to cause the rated disability* to establish apportionment.

Next, the evaluator must define the rated disability and then explain what caused that disability. For example, applicant’s disability to the left shoulder can be defined as lost range of motion. Thus, the question to answer is: “What caused the lost range of motion in the left shoulder?” Dr. McGahan concluded, without explanation, that 50% of the cause was due to pre-existing degeneration. However, Dr. McGahan fails to answer the most important question: “Why?” This requires a critical examination of the facts of the case.

When we look at the facts reviewed by Dr. McGahan, they do not appear to support his conclusion. Dr. McGahan summarized the doctor’s first report of injury in October 2017, which included the following range of motion measurements to the left shoulder:

Left Shoulder: Tender acromioclavicular joint only and deltoid, otherwise non-tender anterior and posterior glenohumeral joint and SA region. Flexion 130 degrees with pain, extension 50 degrees, abduction 80 degrees with pain, adduction 20 degrees with pain, internal rotation to upper lumbar mild pain, external rotation 30 degrees with pain.

(Id. at p. 21.)

These measurements were taken four days after applicant's injury.

During his examination in 2021, Dr. McGahan took the following range of motion measurements upon which the disability award is based:

Left Shoulder Examination: Examination of her left shoulder reveals 110 degrees of flexion, 30 degrees of extension. She has 90 degrees of abduction and 30 degrees of adduction. She has 80 degrees of external rotation and 0 degrees of internal rotation. She has full strength with supraspinatus, infraspinatus, and subscapularis. She has painful end range of motion.

(Id. at p. 52.)

Dr. McGahan's apportionment opinion is not supported by the facts. For example, if we look at applicant's rating for shoulder extension, four days after applicant's injury, and with all her pre-existing pathology in place, applicant's extension was measured at 50 degrees, which is normal and corresponds to no impairment. Four years later, Dr. McGahan measured applicant's shoulder extension to 30 degrees, which corresponds to 1% impairment per the AMA Guides. These facts do not support the conclusion that pre-existing degeneration caused half of applicant's disability. We do not suggest that such a conclusion is not supportable; we merely state that the doctor has not supported his current apportionment opinion with an adequate explanation and citation to the facts of this case. Without a clear explanation for how and why the preexisting pathology caused the impairment, defendant did not meet its burden of proof on apportionment.

Accordingly, as our Decision After Reconsideration we affirm the WCJ's October 1, 2021 F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on October 1, 2021 by the WCJ is **AFFIRMED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 1, 2025

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

**ZAKIA ABHAT
MARCUS, REGALADO, MARCUS & PULLEY, LLP
HANNA, BROPHY, MacLEAN, McALEER & JENSEN, LLP**

EDL/mc

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