Ernie Gallegos, Applicant v. Groth Brothers Chevrolet, Auto Dealers Compensation of California, adjusted by Corvel, Defendants

W.C.A.B. No. ADJ8134312—WCAB Panel: Commissioners Razo, Lowe, Zalewski (dissenting)

Workers' Compensation Appeals Board (Board Panel Decision)

2016 Cal. Wrk. Comp. P.D. LEXIS 455

Opinion Filed September 15, 2016

DISPOSITION: [*1] The July 21, 2016 Petition for Reconsideration is *granted*, the July 5, 2016 Findings and Award is *rescinded*, and the matter is *returned* to the trial level for a new award of permanent disability following Dr. McIvor's apportionment as provided by the WCAB's order and for a new final decision.

CORE TERMS: apportionment, knee, disability, surgery, pre-existing, replacement, right knee, degenerative, reconsideration, industrial injury, pathology, medical records, lateral, medical evidence, writ denied, tear, unapportioned, hip, workers' compensation, osteoarthritis, moderate, menisci, plateau, tibial, medial, medical opinion, medical probability, injured worker, prior injury, pathological condition

HEADNOTES

Permanent Disability-Apportionment-WCAB, in split panel opinion,

rescinded WCJ's award of 42 percent permanent disability, without apportionment, for applicant auto mechanic's 11/19/2008 admitted industrial injury to his right knee, when WCAB panel majority concluded that opinion of orthopedic qualified medical evaluator Robert McIvor, M.D., constituted substantial evidence to support apportionment of applicant's permanent disability to pre-existing degenerative knee condition because pre-existing condition contributed to applicant's need for total knee replacement, and that, contrary to WCJ's reasoning, Dr. McIvor's apportionment determination was legally valid apportionment to nonindustrial, pre-existing pathology, even where total knee replacement procedure excised pre-existing pathology; while Commissioner Zalewski agreed with panel majority that apportionment to pre-existing condition [*2] that leads to total knee replacement may be appropriate, she dissented from majority's determination that Dr. McIvor's reporting constituted substantial evidence as described in *Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc opinion), to support apportionment in this case, because Commissioner Zalewski opined that Dr. McIvor did not provide adequate reasoning to support his apportionment findings. [See generally Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05[1]-[3], 8.06[1], [4], [5], 8.07[1]; Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40–7.42; The Lawyer's Guide to the AMA *Guides* and California Workers' Compensation, Ch. 9.]

COUNSEL: For applicant-Gleason & Camacho

For defendants-Lenahan, Lee, Slater & Pearse

OPINION BY: Commissioner Jose H. Razo

OPINION

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant, Groth Brothers Chevrolet, by and through its insurer, Auto Dealers Compensation of California, seeks reconsideration of the Findings and Award, issued July 5, 2016, in which a workers' compensation administrative law judge (WCJ) awarded applicant 42% permanent disability, without apportionment, for [*3] his admitted November 19, 2008 industrial injury to his right knee while employed as an auto mechanic by Groth Brothers Chevrolet. The WCJ found the apportionment determination of the panel Qualified Medical Evaluator (QME) "is not legally consistent with current statutory and decisional authority and there is no legal basis for apportionment of Applicant's permanent disability award." The WCJ also found applicant did not sustain industrial injury to his low back, left knee or psyche. Applicant was also awarded further medical treatment for his right knee.

Defendant contends the WCJ erred in failing to follow the apportionment determination of Dr. Robert McIvor, the QME in orthopedics, who attributed 50% of applicant's permanent disability to his pre-existing knee condition. Defendant argues that the fact that applicant's pre-existing knee problems contributed to his need for a total knee replacement justifies Dr. McIvor's apportionment of his current permanent

disability.

Applicant has filed an Answer to defendant's Petition, and the WCJ has prepared a Report and Recommendation on Petition for Reconsideration in which he recommends that defendant's Petition be denied.

For the reasons **[*4]** set forth below, we will grant defendant's Petition for Reconsideration, rescind the Findings and Award and return this matter to the trial level for a new permanent disability rating based upon Dr. McIvor's apportionment determination.

II.

Applicant sustained an admitted injury to his right knee and claimed injury to his left knee, low back, and psyche on November 19, 2008, while employed as an auto mechanic by Groth Brothers Chevrolet.

Dr. McIvor performed an initial QME evaluation on May 3, 2012, taking a history that applicant injured his right knee on November 19, 2008, when kicking at trash that had not been cleared from around the vehicle on which he was working, resulting in severe pain.

Prior to that injury, applicant had fractured his right tibia playing softball in 2000, and sustained injury to his bilateral knees from a slip and fall at work in December of 2007, requiring an arthroscopic partial meniscectomy on the right knee in February of 2008.

As a consequence of his industrial injury, applicant underwent a second surgery on May 20, 2009. The surgery, which was not successful, revealed what Dr. McIvor characterized as considerable degenerative changes in the right knee. **[*5]** An MRI in November 2009, revealed more degenerative changes and applicant was then referred for a total knee replacement, which took place on July 14, 2010. Dr. McIvor reported:
Unfortunately, once again, there was only partial recovery with considerable lingering problem. He had abundant physical therapy after the surgery, but he simply could not bend the knee normally.

Dr. McIvor reported that, while one physician found applicant to be permanent and stationary as of August 25, 2011, another stated that a revision knee replacement "would be essential." Dr. McIvor indicated that applicant remained off work on temporary total disability status, noting applicant's continuing complaints of constant sharp pain, and inability to squat, kneel, climb or walk over uneven ground.

Dr. McIvor agreed that applicant was in need of further surgery, but if applicant was not so inclined, Dr. McIvor found him to be permanent and stationary with a 30% whole person impairment. With regard to apportionment, Dr. McIvor stated:
I would agree that there would be some apportionment to the earlier surgery and injury in the year 2007; I would put that figure at 10 percent. 90 percent would be on the basis of the **[*6]** more recent episode of 11.19.08

Dr. McIvor reiterated this apportionment determination on August 1, 2013, stating

that 10% apportionment to his prior injury was based upon the "considerable wear and tear change, along with torn menisci."

Dr. McIvor re-evaluated applicant on January 27, 2014, and after reviewing additional medical records and applicant's deposition testimony, he changed his opinion on non-industrial apportionment. His medical record review showed applicant had surgery with hardware implanted after the 2000 tibia fracture, and an MRI in 2003 revealed "post traumatic changes of the lateral tibial plateau, macerated appearance of the lateral meniscus, medial meniscus tear, and full thickness chondromalacia of the lateral patellar facet cartilage." An x-ray from December 2007, revealed "moderate tricompartmental osteoarthritis and small joint effusion," while a January 2008 MRI of the right knee revealed "moderate osteoarthritis with tears of the medial and lateral menisci, old tibial plateau deformity." As a result of his review of applicant's additional medical records, Dr. McIvor altered his apportionment determination, stating:
As far as the apportionment having to do **[*7]** with the right knee injury, after reviewing the additional medical records, I would now put it at a 50/50 level on the pre-existing status of the knee with multiple injuries and procedures vs. the relationship of the specific injury on 11.19.08. In other words, 50 percent to the actual injury in 2008 and 50 percent to the pre-2008 status. The medical records were quite considerable with ongoing problems.

On this record, the WCJ concluded in his Opinion on Decision that Dr. McIvor's opinions regarding apportionment, while "medically reasonable, are not legally valid as Applicant herein underwent a total knee replacement, thus eliminating any effect that the past knee problems might play in Applicant's present P.D. picture. Upon this record, no apportionment can be found."

II.

Defendant contests the WCJ's determination that applicant is entitled to an unapportioned award of permanent disability, arguing that Dr. McIvor's apportionment determination is valid in light of his conclusion that applicant's long history of problems with his right knee contributed to the need for his knee replacement surgery.

We concur with defendant that Dr. McIvor's apportionment determination is legally valid **[*8]** apportionment to non-industrial pre-existing pathology, even where the total knee replacement procedure excises the pre-existing pathology. (See *Williams v. Workers' Comp. Appeals. Bd*. (2009) 74 Cal.Comp.Cases 88 [writ denied]; *Malcolm v. Workers' Comp. Appeals. Bd*. (2008) 73 Cal.Comp.Cases 1710 [writ denied]; *Gunter v. Workers' Comp. Appeals. Bd*. (2008) 73 Cal.Comp.Cases 1699 [writ denied]; *Markham v. Workers' Comp. Appeals. Bd*. (2007) 72 Cal.Comp.Cases 265 [writ denied].)

In *Markham, supra*, an Appeals Board panel majority rescinded an unapportioned award of 72% permanent disability after an injured worker received a total knee replacement, finding the WCJ erred in failing to follow the apportionment determination of the Agreed Medical Examiner who found that the need for knee surgery was caused by both the industrial injury and by pre-existing pathology from prior injuries.

Similarly, in *Williams, supra*, an Appeals Board panel found apportionment to pre-existing knee pathology was required after the injured worker received a total knee replacement. The panel noted that when the medical evidence establishes that a combination of factors results in the need for surgery and consequent **[*9]** permanent disability, causation of the permanent disability rests on all the factors, even the pathology removed by the surgery, and apportionment to all of the relevant factors is required by Labor Code section 4663.

Again, in *Malcolm, supra,* an Appeals Board panel held there must be apportionment to pre-existing osteonecrosis in the right hip, notwithstanding hip replacement surgery, as it was the pathological condition that weakened the bone and led to the injury and the subsequent need for the hip surgery.

Here, Dr. McIvor's detailed reporting of the degenerative condition of applicant's right knee provides a substantial basis to conclude that but for applicant's pre-existing pathology, applicant would not have needed the knee replacement surgery or the resulting level of permanent disability. Dr. McIvor cited to the medical records which "were quite considerable with ongoing problems" that revealed applicant had "moderate osteoarthritis with tears of the medial and lateral menisci, old tibial plateau deformity."

Contrary to the WCJ s view, apportionment to pre-existing degenerative conditions that ultimately require total joint replacement is indicated where the medical evidence **[*10]** establishes the pre-existing condition results in the need for surgery.

Accordingly, we will grant reconsideration, rescind the Findings and Award and return this matter to the WCJ to follow Dr. McIvor's apportionment determination and issue a new permanent disability award.

For the foregoing reasons,

IT IS ORDERED that the July 21, 2016 Petition for Reconsideration is **GRANTED**, and as our Decision After Reconsideration, the Findings and Award, issued July 5, 2016, is **RESCINDED**, and the matter shall be **RETURNED** to the trial level for a new award of permanent disability following Dr. McIvor's apportionment as provided herein, and for a new final decision.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Jose H. Razo

I concur,

Commissioner Deidra E. Lowe

I dissent,

Commissioner Katherine Zalewski

DISSENT BY: Commissioner Katherine Zalewski

DISSENT

DISSENTING OPINION

I dissent. I would affirm the WCJ's award of permanent disability without apportionment. While I agree with the majority that apportionment to a pre-existing pathological condition that leads to a total knee replacement may be appropriate, it was not adequately established in this instance. As convincingly argued in applicant's Answer, Dr. McIvor's reporting **[*11]** does not meet the minimum standard for apportionment.

As held in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (en banc), for a medical opinion on apportionment 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.

"For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.

"And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately **[*12]** 50% of the disability." (*Escobedo*, 70 Cal.Comp.Cases at 621–622.)

Dr. McIvor's opinions on apportionment, whether his initial 10/90 or his subsequent 50/50 formulation, do not provide the necessary explanation of "how and why" the pre-existing degenerative condition was responsible for the level of permanent disability applicant suffers post-total knee replacement surgery. In each of the cases relied upon by the majority, the medical evidence supporting apportionment after a total joint replacement surgery clearly articulated the reasoning underlying the physician's apportionment determination. Here, Dr. McIvor merely states his conclusion as to the percentage contribution of the pre-existing condition without providing any of the necessary reasoning to support his opinion. In fact, a thorough reading of his reports fails to reveal any statement that applicant's knee replacement surgery was necessitated by his pre-existing degenerative condition or that his apportionment determination was based upon reasonable medical probability. These problems in the medical evidence preclude reliance upon Dr. McIvor's apportionment determination and support the unapportioned award of permanent disability.

WORKERS' **[*13]** COMPENSATION APPEALS BOARD

Commissioner Katherine Zalewski