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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT KLINE, *Applicant,* vs. **BURBANK UNIFIED SCHOOL DISTRICT, Permissibly Self-Insured,** *Defendant.*	**Case No. ADJ9035268** **(Van Nuys 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 June 15, 2016, wherein it was found that, while employed as a food service driver on August 4, 2011, applicant sustained industrial injury to his right knee, right shoulder, right elbow and low back, causing permanent disability of 57%.

Defendant contends that the WCJ erred in finding permanent disability of 57%, arguing that the WCJ should have incorporated the apportionment determination of qualified medical evaluator orthopedist Antoine Roberts, M.D. into the permanent disability rating. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will deny defendant's Petition because, as explained in the WCJ's Report, Dr. Roberts' opinions regarding apportionment do not constitute substantial medical evidence. We agree with the WCJ that defendant did not carry its burden of proving apportionment because Dr. Roberts did not adequately explain his opinions regarding apportionment. We incorporate the WCJ's Report in this regard. However, we do not incorporate the passage in the WCJ's Report regarding how apportionment is not appropriate because prior surgeries or wear were "upon a joint that is no longer present" (Report at p. 4) and that the "total removal of the degenerated knee from applicant's body and its replacement with a plastic joint was an intervening event that broke the chain of proximate causation between preexisting degenerative changes, which have been surgically removed, and current disability" (Report at pp. 4-5).

We need not reach this issue since we deny the Petition on the other grounds discussed by the WCJ in his Report. Thus, we adopt and incorporate the WCJ's Report, with the exception of the third whole paragraph on page 4 (commencing with "Defendants objected to...") through the second whole paragraph on page 5 (commencing with "Dr. Roberts did not address...").

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of June 15, 2016 is hereby **DENIED.**

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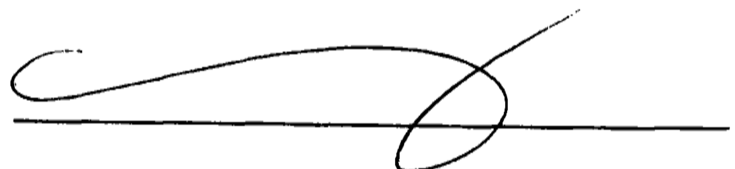
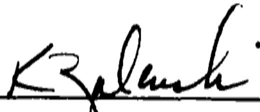


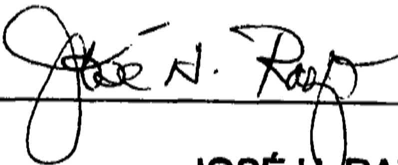
MARGUERITE SWEENEY

I CONCUR,



KATHERINE ZALEWSKI

I DISSENT (See Attached Dissenting Opinion)



JOSÉ H. RAZO

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEP 0 6 2016

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

ROBERT KLINE
LEWIS, MARENSTEIN, WICKE, SHERWIN & LEE
FLOYD, SKEREN & KELLY

DW:oo

DISSENTING OPINION OF COMMISSIONER JOSE H. RAZO

I respectfully dissent. I would have granted defendant's Petition, rescinded the Findings and Award of June 15, 2016, and returned this matter to the trial level so that applicant's permanent disability could be rated incorporating Dr. Roberts' apportionment determination. Unlike my colleagues in the majority, I believe that, taking the totality of Dr. Roberts' reporting and testimony, Dr. Roberts sufficiently explained his opinions regarding apportionment. Additionally, although my colleagues in the majority did not reach the issue, the WCJ was incorrect in holding that apportionment is inappropriate because prior surgeries or wear were "upon a joint that is no longer present" (Report at p. 4) and that the "total removal of the degenerated knee from applicant's body and its replacement with a plastic joint was an intervening event that broke the chain of proximate causation between preexisting degenerative changes, which have been surgically removed, and current disability (Report at pp. 4-5).

Preliminarily, although my colleagues did not reach the issue, I reject the WCJ's conclusion that apportionment of the right knee disability is inappropriate because the applicant underwent a total knee replacement as a result of both his industrial injury and preexisting conditions in his knee. Under Labor Code section 4663, "the WCAB must find what percentage of the permanent disability was directly caused by the injury and what percentage was caused by other factors." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 [Appeals Bd. en banc].) The Supreme Court has explained that "the new approach to apportionment [since the April 19, 2004 adoption of Senate Bill 899] is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries, not disregard of them." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72 Cal.Comp.Cases 565].)

Although the WCJ stated that the total knee replacement broke the chain of causation between preexisting degenerative changes and applicant's current disability, the provision of medical treatment does not constitute an intervening cause serving to completely break the chain of causation between the non-industrial factors leading to the injured worker's surgery and applicant's resultant permanent disability. Indeed, almost every injured worker in the workers' compensation system receives medical

treatment between his or her injury and the time that the injured worker becomes permanent and stationary. If medical treatment received after an injury is held to break the causative chain of disability, then no permanent disability would ever be subject to apportionment. Clearly this is a result neither compelled by the language of Labor Code section 4663, nor intended by the Legislature in promulgating it.

Additionally, while I agree with my colleagues that the "Apportionment" section of the two reports in evidence is conclusory and uses boilerplate language, when Dr. Roberts' reporting and deposition testimony is read as a whole, there is more than enough to substantiate his apportionment determination. Applicant had a significant history of right knee problems predating his August 4, 2011 injury. He underwent arthroscopic surgery on his right knee on June 4, 1999 (November 12, 2014 report at p. 20), and again on December 7, 2007 (November 12, 2014 report at p. 24). Dr. Roberts testified that as far back as 1999, applicant had grade 2 to 3 chondromalacia, and that a chondroplasty was performed that removed tendon tissue, which was evidence of preexisting degenerative changes. (December 17, 2014 deposition at pp. 37-38). By 1999, applicant's knee was "right in the midzone of osteoarthritis before it needs to have a total joint replacement." (September 23, 2015 deposition at p. 9.) And that the "removal of loose pieces of cartilage from the joint [in 1999 and in 2007] means that cartilage is disintegrating and coming off the bone which is synonymous with advanced osteoarthritis." (September 23, 2015 deposition at pp. 10-11.) Dr. Roberts testified that applicant would have "absolutely" needed a total knee replacement at some point absent the industrial injury. (September 23, 2015 deposition at p. 11.) Dr. Roberts also testified that an MRI taken after the August 4, 2011 looked more like "a progression of the knee from the prior – prior surgeries" than a result of a new trauma. Dr. Roberts testified that apportionment was indicated because "his knee is already arthritic and didn't progressively become arthritic as a result of this injury. (September 23, 2015 deposition at p. 11.)

With regard to the back, Dr. Roberts testified that applicant sustained degenerative changes as a result of changes to his gait as a result of left ankle difficulties going back to the early 1990s (December 17, 2014 deposition at p. 35) and that degenerative changes in applicant's back reflected in an MRI preexisted the injury (December 17, 2014 deposition at p. 36).

As of the adoption of Senate Bill 899, effective April 19, 2004, pursuant to Labor Code section 4663(a), apportionment of permanent disability is now based on causation. Although prior to Senate Bill 899, it was improper to apportion to pathology or asymptomatic prior conditions, now such apportionment is proper. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 926-927 [71 Cal.Comp.Cases 1687].)

In *Gatten*, the Court of Appeal reversed a WCAB finding of no apportionment, and found, in accordance with an independent medical examiner's report, that 20% of the injured worker's permanent disability was caused by non-industrial factors. The medical evidence supporting apportionment in *Gatten* was the physician's review of an MRI showing degenerative disc disease. The *Gatten* court held that apportionment was proper even though the applicant was asymptomatic prior to the industrial injury, writing that, "[t]he doctor made a determination based on his medical expertise of the approximate percentage of permanent disability caused by [the] degenerative condition [in] applicant's back. [Labor Code] [s]ection 4663, subdivision (c), requires no more." (*Gatten*, 145 Cal.App.4th at p. 930.)

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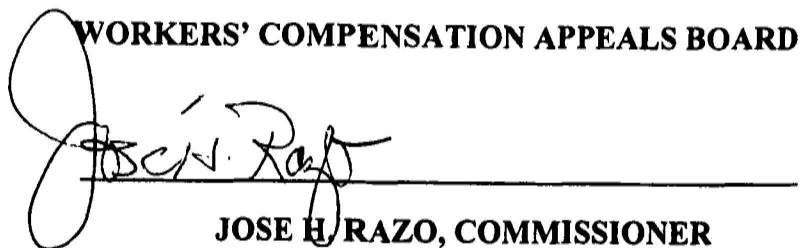
Similarly, here, Dr. Roberts made a determination based on his medical expertise after an adequate examination and after review of the relevant medical record. Dr. Roberts adequately discussed apportionment to the right knee and the back. With regard to the right knee, given applicant's documented history of two surgeries prior to the industrial injury, even if Dr. Roberts' discussion was concise, it would still pass muster under *Gatten*. Here Dr. Roberts made a determination based on applicant's extensive prior history to the same body part and review of diagnostic tests. Like in *Gatten*, Labor Code section 4663 requires no more. Accordingly, I respectfully dissent.



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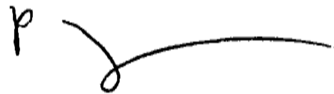

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LC § 5412. The date of injury in cases of occupational diseases or cumulative injuries is that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.

LC § 5500.5. (a) Except as otherwise provided in Section 5500.6, liability for occupational disease or cumulative injury claims filed or asserted on or after January 1, 1978, shall be limited to those employers who employed the employee during a period of four years immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first. Commencing January 1, 1979, and thereafter on the first day of January for each of the next two years, the liability period for occupational disease or cumulative injury shall be decreased by one year so that liability is limited in the following manner:

For claims filed or **asserted on or after:**	The period shall be:
January 1, 1979	three years
January 1, 1980	two years
January 1, 1981 and thereafter	one year

In the event that none of the employers during the above referenced periods of occupational disease or cumulative injury are insured for workers compensation coverage or an approved alternative thereof, liability shall be imposed upon the last year of employment exposing the employee to the hazards of the occupational disease or cumulative injury for which an employer is insured for workers compensation coverage or an approved alternative thereof.

Any employer held liable for workers compensation benefits as a result of another employer s failure to secure the payment of compensation as required by this division shall be entitled to reimbursement from the employers who were unlawfully uninsured during the last year of the employee s employment, and shall be subrogated to the rights granted to the employee against the unlawfully uninsured employers under the provisions of Article 1 (commencing with Section 3700) of Chapter 4 of Part 1 of Division 4.

If, based upon all the evidence presented, the appeals board or workers compensation judge finds the existence of cumulative injury or occupational disease, liability for the cumulative injury or occupational disease shall not be apportioned to prior or subsequent years; however, in determining the liability, evidence of disability due to specific injury, disability due to nonindustrial causes, or disability previously compensated for by way of a findings and award or order approving compromise and release, or a voluntary payment of disability, may be admissible for purposes of apportionment.

(b) Where a claim for compensation benefits is made on account of an occupational disease or cumulative injury which may have arisen out of more than one employment, the application shall state the names and addresses of all employers liable under subdivision (a), the places of employment, and the approximate periods of employment where the employee was exposed to the hazards of the occupational disease or cumulative injury. If the application is not so prepared or omits necessary and proper employers, any interested party, at or prior to the first hearing, may request the appeals board to join as defendant any necessary or proper party. If the request is made prior to the first hearing on the application, the appeals board shall forthwith join the employer as a party defendant and cause a copy of the application together