

Gary Shadoan, Applicant v. San Diego Community College, PSI, administered by Corvel, Defendants

W.C.A.B. No. ADJ1796905 (SDO 0354062)—WCJ Charles W. Ellison II (SDO); WCAB Panel: Commissioners Lowe, Razo, Zalewski (concurring, but not signing)

Workers' Compensation Appeals Board (Panel Decision)

2015 Cal. Wrk. Comp. P.D. LEXIS 448

Opinion Filed July 7, 2015

NOTICE: CAUTION: This decision has not been designated a "significant panel decision" by the Workers' Compensation Appeals Board. Practitioners should proceed with caution when citing to this panel decision and should also verify the subsequent history of the decision. WCAB panel decisions are citeable authority, particularly on issues of contemporaneous administrative construction of statutory language [see [Griffith v. WCAB \(1989\) 209 Cal. App. 3d 1260, 1264, fn. 2, 54 Cal. Comp. Cases 145](#)]. However, WCAB panel decisions are not binding precedent, as are en banc decisions, on all other Appeals Board panels and workers' compensation judges [see [Gee v. Workers' Comp. Appeals Bd. \(2002\) 96 Cal. App. 4th 1418, 1425 fn. 6, 67 Cal. Comp. Cases 236](#)]. While WCAB panel decisions are not binding, the WCAB will consider these decisions to the extent that it finds their reasoning persuasive [see [Guitron v. Santa Fe Extruders \(2011\) 76 Cal. Comp. Cases 228, fn. 7 \(Appeals Board En Banc Opinion\)](#)]. LexisNexis editorial consultants have deemed this panel decision noteworthy because it does one or more of the following: (1) Establishes a new rule of law, applies an existing rule to a set of facts significantly different from those stated in other decisions, or modifies, or criticizes with reasons given, an existing rule; (2) Resolves or creates an apparent conflict in the law; (3) Involves a legal issue of continuing public interest; (4) Makes a significant contribution to legal literature by reviewing either the development of workers' compensation law or the legislative, regulatory, or judicial history of a constitution, statute, regulation, or other written law; and/or (5) Makes a contribution to the body of law available to attorneys, claims personnel, judges, the Board, and others seeking to understand the workers' compensation law of California.

DISPOSITION: [*1] The Petition for Reconsideration is *denied*.

CORE TERMS: knee, apportionment, replacement, surgery, pre-existing, disability, pathology, medial, reconsideration, industrial injury, degenerative, bone, writ denied, workers' compensation, surgical procedure, arthroplasty, compartment, aggravation, arthritis, medical evidence, osteoarthritis, overturned, causation, hip, appeals board, applicant's disability, specific injury, degenerative changes, meniscectomy, necessitated

HEADNOTES

Permanent Disability-Appportionment-WCAB affirmed WCJ's finding that 50 percent of permanent disability incurred by applicant printer operator with 8/20/2004 admitted left knee injury was apportionable to preexisting

degenerative condition under [Labor Code § 4663](#), and rejected applicant's contention that apportionment was precluded by removal of preexisting pathology due to total knee replacement surgery, when WCAB recognized split of authority on issue, but ultimately reasoned that, although total knee replacement surgery removed applicant's preexisting pathology, original *cause of applicant's disability* resulting in need for total knee replacement was due to both industrial injury *and* aggravation of underlying degenerative conditioning, thereby justifying apportionment between those two causes of disability. [See generally [Hanna, Cal. Law of Emp. Inj. and Workers' Comp. 2d §§ 8.05\[1\]-\[3\], 8.06\[5\]](#); Rassp & Herlick, California Workers' Compensation Law, Ch. 7, §§ 7.40, 7.41.]

COUNSEL: For applicant-Law Offices of John Kiwan

For defendants-Eldon Floyd & Associates

OPINION BY: Commissioner Deidra E. Lowe

OPINION

ORDER DENYING PETITION FOR RECONSIDERATION

We have **[*2]** considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) 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, we will deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

Commissioner Deidra E. Lowe

I concur,

Commissioner Jose H. Razo

Commissioner Katherine Zalewski (concurring, but not signing)

* * * *

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

Gary Shadoan, born _____ while employed on August 20, 2004 as a printer operator, at San Diego, California, by San Diego Community College District permissibly self-insured, administered by Corvel San Diego sustained injury arising out of and in the course of employment to his left knee.

After trial, the Workers' Compensation Judge (WCJ) issued his Findings and Award on April 30, 2015, finding among other things, that apportionment was applicable.

Applicant **[*3]** has filed a timely and verified Petition for Reconsideration as to the issue of the finding of apportionment.

Applicant contends:

1. That, by the Findings and Award, the Appeals Board acted without or in excess of its powers, and
2. That the evidence does not justify the Findings of Fact.

FACTS

Applicant sustained an admitted specific Injury to his left knee, occurring on August 20, 2004.

Applicant was seen by William Adsit, M.D. as his primary treating physician, whose first report and exam was on October 1, 2004 (exhibit H). At page 4, he noted that "radiographs show osteoarthritis of both knees...he does have loss of the medial joint space of the left knee with a bone-on-bone appearance on the medial compartment."

Dr. Adsit performed a partial medial meniscectomy to applicant's left knee on October 26, 2004 (exhibit G).

Dr. Adsit declared applicant permanent and stationary in his March 7, 2005 report (exhibit F). At page 3, he lists the findings from the October 5, 2004 MRI of applicant's left knee: "Moderate to severe degenerative changes, anterior cruciate ligament tear, findings suspicious for medial meniscus tear." Dr. Adsit apportioned applicant's disability "...100 percent to his preexisting **[*4]** condition...."

Applicant changed to Thomas Harris, M.D. as his treating physician who first reported on March 1, 2011 (exhibit D). At page 4, he noted the same October 5, 2004 MRI findings as set forth above. At page 5, he states that the X-rays of the left knee revealed "...severe medial joint space narrowing and degenerative changes." Dr. Harris recommended referral to a joint replacement specialist for a total left knee arthroplasty.

Richard Greenfield, M.D. was selected as the joint replacement specialist who reported on June 17, 2011 (exhibit E), at page 4:

1. "Preexisting history of degenerative arthritis of the left knee.
2. Left knee trauma 8/20/04, producing tearing of the medial meniscus and flaring of the underlying degenerative joint disease.
3. Post left knee arthroscopic surgery with debridement of the medial meniscus.
4. Progressive degenerative osteoarthritis of the left knee with increased symptomatology." [↑](#)

FOOTNOTES

¹ Dr. Greenfield performed the total left knee replacement surgery on November 1, 2012 (exhibit 5)

Dr. Harris declared applicant permanent and stationary with 15% whole person impairment in his September 3, 2013 report (exhibit C). At page 7 he notes: "It has been previously **[*5]** determined that Mr. Shadoan's left knee is 100% pre-existing in nature, due to the bone on bone findings at the time of his initial evaluation, via plain film radiographs."

Following a review of the July 28, 2014 PQME report of Tami Auerbach, D.C. and re-review of medical records, Dr. Harris altered his opinion and assessed apportionment of 50% due to preexisting pathology or conditions and 50% due to the industrial injury of August 20, 2004.

After trial, the WCJ issued his Findings and Award with permanent disability based on the parties' stipulation and assessed 50% apportionment to applicant's pre-existing condition.

DISCUSSION

Applicant's petition for reconsideration sets forth his contention that since the pre-existing pathology is no longer present due to the total knee replacement, there can be no apportionment to the pre-existing condition.

This issue of whether treatment that results in the removal of a pre-existing pathology or condition negates any apportionment to the same has been before the WCAB on several occasions, with mixed results.

As noted by applicant's petition, the initial cases pertaining to this issue support his contention. What is interesting is that the cases **[*6]** involving this issue revolve around a total knee or hip replacement having been performed.

Pursuant to [Labor Code § 4663](#), apportionment of permanent disability shall be based on causation. Apportionment may now be attributed to pathology and asymptomatic prior conditions provided there is substantial medical evidence that the other factors have caused permanent disability. ([Yeager Construction v. Workers' Comp. Appeals Bd. \(Gatten\) \(2006\) 71 Cal.Comp.Cases 1687](#); [Escobedo v. Marshalls \(2005\) 70 Cal.Comp.Cases 604](#) (en banc).)

In [City of Concord v. Workers' Comp. Appeals Bd. \(Steinkamp\) \(2006\) 71 Cal.Comp.Cases 1203](#) (writ denied), the WCAB panel found no apportionment as the permanent disability was caused by the knee replacement and that there were no "other factors" causing permanent disability.

In the panel decision, [Kien v. Episcopal Homes Foundation \(2006\) 34 Cal. Workers' Comp. Rptr. 228](#), the appeals board affirmed the WCJ award, concluding that

because no degenerative arthritis remained after the total knee replacement surgery, no "other factors" existed, therefore no apportionment.

However, in *Markham v. Workers' Comp. Appeals Bd.* (2007) Cal.Comp.Cases 265 (writ denied), the panel [*7] majority overturned the WCJ's denial of apportionment. The panel concluded that because the knee replacement surgery was necessitated by both the industrial injury and by "other factors" in the form of pre-existing pathology, apportionment was appropriate to the "other factors." ²

FOOTNOTES

² Commissioner Caplane dissented, finding no basis for apportionment because the pathology was removed.

In *Gunter v. Workers' Comp. Appeals Bd.* (2008) 73 Cal.Comp.Cases 1699 (writ denied), the panel again overturned the WCJ's finding, and assessed 50% apportionment to pre-existing osteoarthritis, when the medical evidence established that the combination of the industrial injury and the pathology, that was removed by the knee replacement surgery, caused applicant's need for surgery and permanent disability.

That same year, in *Malcom v. Workers' Comp. Appeals Bd.* (2008) 73 Cal.Comp.Cases 1710 (writ denied) a divided panel with Commissioner Caplane again dissenting found apportionment to pre-existing pathology consistent with the medical reporting, because applicant's hip replacement surgery was a result of both her pre-existing osteonecrosis in her hip and her industrial injury.

In *Williams v. Workers' Comp. Appeals Bd.* (2009) 74 Cal.Comp.Cases 88, at page 94, [*8] the panel majority concluded that: "We agree with the majority in *Markham* that, when the medical evidence establishes that a combination of factors results in the need for surgery and consequent permanent disability, causation of the permanent disability lies with all the factors, even pathology removed by the surgery; and Labor Code section 4633 (sic) requires apportionment to those factors." ³

FOOTNOTES

³ This case went to the WCAB on reconsideration twice. The first time, Commissioner Caplane dissented, again finding no basis for apportionment because the pathology was removed. The second time she submitted a concurring opinion acknowledging that the WCJ had no discretion to make a finding of no apportionment because of the September 20, 2007 opinion and order, still noting her position though that apportionment to pre-existing arthritis was improper as it

had been removed by the surgery.

In *Campos v. The Vons Companies* (2010) Cal. Wrk. Comp. P.D. LEXIS 402, the panel overturned the WCJ's finding of no apportionment, and determined that applicant's knee replacement surgery did not preclude apportionment when the need for the surgery was due, at least in part to pre-existing arthritis.

Here, the [*9] WCJ found Dr. Harris' August 14, 2014 opinion on apportionment was substantial evidence and based in terms of reasonable medical probability: "An injured employee who suffers an aggravation of a pre-existing disease or underlying condition has sustained a new injury. An aggravation causes a temporary or permanent increase in disability, creates a new need for medical treatment, or requires a change in the exiting (sic) course of treatment...."

I do believe that Mr. Shadoan sustained a new injury involving the aggravation of pre-existing disease or underlying condition. Clearly Mr. Shadoan had a pre-existing pathology or condition which cannot be denied, since his initial radiographs performed on October 1, 2004 revealed bone on bone appearance within the medial compartment. Additionally, at the time of his surgical procedure of October 26, 2004 he was found to have 'exposed bone involving the majority of the articular surfaces of the patella and femoral trochlea, the medial compartment was remarkable for exposed bone involving the majority to the articular surfaces of the femoral condyle, it also involving most of the medial portion of the medial tidal plateau.'

Mr. Shadoan's surgical procedure [*10] performed less than two months following his injury revealed a complete loss of cartilage within a majority of the medial and patellofemoral compartments. It has been suggested that the medial meniscectomy accelerated the degenerative process within Mr. Shadoan's knee requiring the need for a total knee replacement. However, from the records reviewed it appears the damage, or acceleration, was already present at the time of the meniscectomy procedure....

From the records provided to me, Mr. Shadoan was not seeking medical treatment for his left knee prior to the August 8, 2004 industrial injury. He obviously sustained a new industrial injury involving the aggravation of underlying pre-existing pathology or condition, to such a degree that he required two surgical procedures.

It is within *reasonable medical probability* that Mr. Shadoan sustained a new injury to the left knee and that 50% left knee disability was caused by his industrial accident of August 20, 2004 and the remaining 50% is due to pre-existing pathology or conditions. I have come to this conclusion given the extensive evidence of pre-existing pathology found months following his industrial injury along with the fact he already [*11] underwent a total knee arthroplasty on the unaffected extremity. If Mr. Shadoan did not fall on August 20, 2004 there is still a high probability (50%) that he would eventually require a total knee arthroplasty. Likewise, absent the fall of August 20, 2004 Mr. Shadoan would have not required to seek treatment, require work restriction, disability, or undergo two surgical procedures." ⁴ (italic emphasis in original)

FOOTNOTES

[4](#) Exhibit A, Dr. Harris 8/14/2014 report, pp. 9–10 (not numbered on report)

As set forth in the Opinion on Decision:

"Based on the more credible, supported and substantial medical report of Thomas Harris, M.D. dated August 14, 2014, it is found that applicant's disability is fifty percent (50%) due to his industrial injury of August 20, 2004, and is fifty percent (50%) due to non-industrial factors. Dr. Harris credibly concluded that because applicant's knee replacement surgery was necessitated equally by both the industrial injury of August 20, 2004 and the progression of the underlying degenerative changes... 'both factors are equally (50/50) responsible for the need for treatment and subsequent total knee arthroplasty, you cannot have one without the other.'" [5](#)

FOOTNOTES

[5](#) Exhibit A, **[*12]** Dr. Harris 8/14/2014 report, pg. 10–11 (not numbered on report)

The specific injury caused some of the disability prior to surgery. The physicians opined that the specific injury aggravated the underlying degenerative condition. The *cause of the disability* resulting in a need for further treatment consisting of a total knee replacement surgery was due to both the aggravated underlying degenerative condition and the specific injury. Thus, the causation of the disability was due to both industrial and non-industrial factors. In order to treat both conditions, a total knee replacement was required. Although the total knee replacement surgery removed one of the causes of applicant's disability that led to the need for the replacement knee surgery, it was still a cause of the disability that necessitated the need for the radical knee replacement surgery.

RECOMMENDATION

Based on the foregoing, it is respectfully recommended that applicant's petition for reconsideration be denied.

Alternatively, it is respectfully recommended that reconsideration be granted in light of the differing decisions, and that the matter be referred for an en banc decision.

Charles W. Ellison II

Workers' Compensation Administrative **[*13]** Law Judge

Dated: May 29, 2015