**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**CHARLOTTE UTSEY, *Applicant***

**vs.**

**NATIONAL COURIER SYSTEMS; and SUPERIOR NATIONAL INSURANCE, in liquidation, administered by CALIFORNIA INSURANCE GUARANTEE ASSOCIATION; CITY OF OAKLAND, permissibly self –insured, administered by JT2 INTEGRATED RESOURCES, *Defendants***

**Adjudication Numbers: ADJ3762315 (OAK 0266269), ADJ946031 (SFO 0394259), ADJ17114655**
**Oakland District Office**

# OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings and Award of May 19, 2023, the Workers' Compensation Administrative Law Judge ("WCJ") issued findings in three case numbers:

In ADJ946031, the WCJ found that on November 2, 1994, applicant, while employed as a courier by National Courier Systems, then insured by Superior National Insurance, in liquidation and administered by California Insurance Guarantee Association ("CIGA"), sustained industrial injury to her neck, back, bilateral knees, bilateral wrists, right elbow, right ankle, left foot, bilateral arms, and bilateral shoulders.

In the other two case numbers, the WCJ found that on May 4, 1999 (ADJ3762315) and during the cumulative trauma period through May 9, 1999 (ADJ17114655) applicant, while employed as a control parking technician by the City of Oakland ("Oakland"), sustained industrial

[1] Commissioner Marguerite Sweeney signed the Opinion and Decision After Reconsideration dated June 21, 2022. Deputy Commissioner Anne Schmitz signed the Opinion and Order Granting Petition for Reconsideration dated August 7, 2023. Commissioner Sweeney is no longer a member of the Appeals Board, and Deputy Commissioner Schmitz is unavailable to participate in this matter. New panel members have been substituted in place of the prior panel members.

injury to her lumbar spine, bilateral shoulders, bilateral knees, bilateral wrists, right elbow, bilateral arms, right ankle, and left foot.

Concerning the three injuries, the WCJ also found that "as a result of all of applicant's alleged dates of injury, applicant is 100% permanently totally disabled without apportionment," and that "the City of Oakland is designated as administrator of this Award. Any claims for contribution are deferred with WCAB jurisdiction reserved."

Oakland filed a timely petition for reconsideration of the Findings and Award of May 19, 2023. Oakland contends that apportionment between the injuries, five years apart and at two different employers, is mandated by *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113 ("*Benson*"). Oakland alleges that such apportionment is supported by Dr. Mandell, the Agreed Medical Evaluator ("AME") in orthopedics, who apportioned liability equally between the injuries based on reasonable medical probability, and that Dr. Mandell's opinion is substantial evidence because he performed a comprehensive medical evaluation and explained each of the distinct industrial and non-industrial factors. Finally, Oakland alleges that "the opinion of the WCJ results in administrative chaos where CIGA and the City of Oakland have no basis to determine liability for payment of the award if apportionment between the injuries cannot be determined."

Applicant filed an answer.

The WCJ submitted a Report and Recommendation ("Report").

We have considered the allegations of Oakland's petition for reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated below and in the WCJ's Report, which we adopt and incorporate to the extent set forth in the attachment to this opinion,[2] we will affirm the Findings and Award of May 19, 2023.

We further note that the WCJ did not err in rejecting the apportionment opinion of Dr. Mandell, who served as the AME in this matter. Although an AME's opinion ordinarily is followed because the AME has been chosen by the parties for that physician's expertise and neutrality (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114]), it is the WCAB, and not the AME, who is the ultimate trier-of-fact. (See *Klee v. Workers' Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519, 1522 [54 Cal.Comp.Cases

[2] We do not adopt or incorporate the second paragraph on page seven and the final two paragraphs on page eight of the WCJ's Report.

251]; *Robinson v. Workers' Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792–793 [52 Cal.Comp.Cases 419]; *Johns-Manville Products Corp. v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740, 753 [43 Cal.Comp.Cases 1372].) Accordingly, the WCAB is not bound by the opinion of an AME; rather, its only obligation is to give consideration to the AME's opinion. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Austin*) (1993) 16 Cal.App.4th 227, 241 [58 Cal.Comp.Cases 323].)

**BACKGROUND**

The proceedings that resulted in the Findings and Award of May 19, 2023 were conducted by the WCJ in response to our Opinion and Decision After Reconsideration of June 21, 2022. In that decision, we noted that the permanent and total disability resulting from applicant's injuries may be subject to apportionment in two ways: (1) between the industrial injuries; and (2) by virtue of non-industrial "other factors" under Labor Code section 4663. In light of the then-existing medical opinion of Dr. Mandell, we directed the WCJ to revisit and clarify her approach in resolving the issue of apportionment in these cases, noting that the WCJ previously had disallowed apportionment based on non-industrial factors and had disallowed apportionment of disability between the various injuries. We also noted that the WCJ's issuance of a joint Award against both of applicant's employers, National Courier Systems and the City of Oakland, without apportioning liability between them, was contrary to *Benson,* and that the WCJ had rejected apportionment between injuries notwithstanding Dr. Mandell's attempt to do so in his deposition of December 15, 2017. (Joint Exhibit 102.) Finally, we noted that the WCJ apparently applied the "*Benson* exception" (physician cannot parcel out causation percentages for each injury) without referring to evidence that the effects of applicant's industrial injuries are "inextricably intertwined," and that the WCJ must revisit the issue of apportionment to resolve these outstanding issues. We stated that the WCJ may further develop the medical record on the issue of apportionment as she deemed necessary or appropriate.

Upon return of this matter to the trial level after our June 21, 2022 decision, Dr. Mandell's deposition was taken on September 8, 2022. On April 4, 2023, the deposition was admitted into the record (Joint Exhibit 103), and this matter was submitted for decision by the WCJ. As noted before, the WCJ found in the Findings and Award of May 19, 2023 that the injuries sustained by applicant on November 2, 1994 (ADJ946031), May 4, 1999 (ADJ3762315) and by way of cumulative trauma through May 9, 1999 (ADJ17114655), together resulted in permanent and total

disability, with no apportionment to non-industrial factors under Labor Code section 4663 and no apportionment of disability between the three injuries pursuant to *Benson*.

## DISCUSSION

### I. DR. MANDELL'S OPINION ON APPORTIONMENT

Dr. Mandell authored medical reports dated March 22, 2017, April 29, 2017, December 11, 2018 and February 16, 2019 (compiled in Joint Exhibit 101). Dr. Mandell also had his deposition taken on December 15, 2017 and on September 8, 2022. (Joint Exhibits 102 and 103, respectively.) Dr. Mandell provided opinions on apportionment in his March 22, 2017 report and in his two depositions.

In reference to non-industrial "other factors" under section 4663(c), Dr. Mandell, in his March 22, 2017 report, apportioned 25% of applicant's lower extremity disability to her non-industrial obesity; the doctor also apportioned 10% of applicant's right knee disability to "prior problems" dating back to the 1970s. (Mandell report dated 3/22/17, pp. 10-13.) The doctor did not specify whether the 10% apportionment to prior right knee problems is overlapped by the 25% apportionment to obesity for applicant's lower extremity disability.

In his December 15, 2017 deposition, Dr. Mandell repeated the above apportionment percentages and did not change them from his March 22, 2017 report. (Joint Exhibit 102, pp. 24-26.) Later in the same deposition, Dr. Mandell approached the issue of apportionment of disability resulting from applicant's obesity by first apportioning overall disability between the three injuries - 33% to the 1994 specific injury, 47% to the 1999 specific injury, and 20% to the 1999 cumulative trauma injury; this was followed by the doctor's testimony that one-half of the 47% (attributable to the 1999 specific injury) was caused by "non-industrial conditions." (Joint Exhibit 102, pp. 27-29.) When Dr. Mandell's apportionment of 25% of applicant's *lower extremity* disability to her obesity, as expressed in his March 22, 2017 report, is compared to the doctor's December 15, 2017 deposition testimony that one-half of 47% of applicant's *overall* disability caused by the 1999 specific injury is due to "non-industrial conditions," it is unclear whether the doctor's apportionment percentages are in sync, lending doubt to this aspect of his opinion.

In his September 8, 2022 deposition, upon questioning by Oakland's attorney, Dr. Mandell repeated the apportionment opinion in his March 22, 2017 report, i.e., 25% of applicant's lower extremity disability is due to non-industrial obesity and 10% of applicant's right knee disability is due to "prior problems" dating back to the 1970s. Without explanation, however, Dr. Mandell

testified that those same apportionment percentages applied to applicant's bilateral shoulder disability, left elbow disability and carpal tunnel disability. (Joint Exhibit 103, pp. 9:5-13:5.)

In a lengthy colloquy with Oakland's attorney, Dr. Mandell ultimately changed his apportionment opinion concerning applicant's lower extremity disability:

> Q. […] in your reports previously, [you] just sort of looked at each individual body part and tried to apportion out liability -- but then you get into problems involving overlap and all of those sort of things.
>
> And so I was sort of hoping, if you were able to, to sort of look at her -- her overall impairment as a function of 100 percent of her body and apportion out between those four factors, the two [sic] work-related injuries and the two nonindustrial conditions, being her right knee and her obesity, and just sort of provide an opinion on apportionment in terms of a percentage among those four factors just -- just based on your understanding of the claim over the years that you have been providing your opinions.
>
> A. Well, I -- you're asking me to rely on my training, experience, judgment, and skill in looking at all of this. I could probably do that. Let me just think about this. I would say 5 percent to the prior problems before or, let's say -- yeah before 1989. I'd say 20 percent obesity, and I'd say the remainder would be equally divided between the 1994 and 1999 injuries.
>
> Q. Okay. And, Doctor, just because I would feel more comfortable if you used the magic words, would you be able to hold that opinion to a reasonable medical probability?
>
> A. I have to think of how to phrase this. The answer is to that is "just barely yes."
>
> (Joint Exhibit 103, pp. 13:13-20:13.)

In testifying that he would apportion "5 percent to the prior [right knee] problems before…1989…20 percent [to] obesity, and the remainder would be equally divided between the 1994 and 1999 injuries," it appears that Dr. Mandell opined that 75% of applicant's *overall* permanent and total disability is industrial. This is inconsistent with the opinion in the doctor's March 22, 2017 report that 25% of applicant's *lower extremity* disability (alone) is due to her alleged non-industrial obesity; it also appears to be inconsistent with the doctor's December 15, 2017 deposition testimony that one-half of 47% of the *overall* disability attributable (only) to the 1999 specific injury is non-industrial.

Upon questioning by CIGA's attorney, Dr. Mandell testified that the cumulative trauma ending in 1999 played no role in applicant's overall disability, but the doctor acknowledged the difficulty of apportioning disability between the three injuries:

> Q. But then [the cumulative trauma] doesn't play any factor in terms of the overall disability; is that correct?
>
> A. Well, *when you mix it all into one big batch, it's kind of hard to separate everything out*. As I said, it's a close call, but, yes, it doesn't play any role in the final grand look of the scheme of things.
>
> (See Joint Exhibit 103, pp. 21:11-22:14, italics added.)

In Dr. Mandell's deposition of September 8, 2022, he also was questioned by applicant's attorney about applicant's right knee problems and plantar fasciitis in the early 1990s, before the 1994 and 1999 specific industrial injuries. Though Dr. Mandell testified that applicant's right knee surgery in 1989 "played a role" in the doctor's determination of non-industrial impairment, this determination was not supported by any medical records pertaining to that surgery. (Joint Exhibit 103, pp. 24-25.)

In reference to applicant's non-industrial obesity, Dr. Mandell testified that obesity contributed to the arthritic condition of applicant's lower extremities, low back, and carpal tunnel syndrome. However, Dr. Mandell answered "no" when asked if his review of MRIs of applicant's low back showed arthritic changes that the doctor would attribute to her obesity; the doctor gave the same answer when asked about a September 8, 1999 MRI of applicant's right ankle, after the second industrial injury of May 4, 1999. Referring to an MRI of applicant's right knee taken on March 27, 2002, Dr. Mandell's testimony concerning whether this MRI showed arthritic changes was inconclusive. However, the doctor admitted that the time between applicant's 1994 and 1999 injuries and Dr. Mandell's "involvement" in this case in 2017 represented "a significant time period for arthritis to develop in these body parts…especially since there was some trauma to those body parts." (Joint Exhibit 103, pp. 26:20-29:23.)

Returning to the issue of low back arthritis, Dr. Mandell testified that he was not aware of any such changes having occurred by 1997. (Joint Exhibit 103, p. 30.) Dr. Mandell's review of an October 31, 2006 MRI of applicant's lumbar spine showed arthritic changes (post-dating industrial back surgery); the doctor testified that based on his training, experience, judgment, and skill, the arthritic changes resulted from "her industrial injuries and obesity." In this part of his

deposition, Dr. Mandell did not specify any percentages for apportionment of industrial and non-industrial disability. Dr. Mandell gave similar testimony about a February 27, 2006 MRI of applicant's left knee, which showed arthritic changes about seven years after the 1999 industrial injuries. Asked whether the arthritic changes were due to "obesity and not from overuse because of the right knee injury or other industrial problems," Dr. Mandell testified that the changes were "partly due to obesity," but not "all due to obesity. There are other factors there as well." (Joint Exhibit 103, pp. 30:16-32:6.) Here again, Dr. Mandell did not specify industrial and non-industrial apportionment percentages.

**II. DR. MANDELL'S OPINION ON APPORTIONMENT IS INSUBSTANTIAL**

It is undisputed that applicant is permanently and totally disabled. However, two issues of apportionment must be addressed. The first issue is whether any part of the disability is due to non-industrial "other factors" under Labor Code section 4663(c). The second issue is whether there is a legal basis to apportion disability between the three industrial injuries found by the WCJ. If so, separate Awards are required for each injury, pursuant to *Benson.* On both issues, defendants bear the burden of proof. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc], the Board outlined the following requirements for substantial evidence of apportionment:

> "[I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. (*Ashley v. Workers' Comp. Appeals Bd.*, *supra*, 37 Cal.App.4th at pp. 326-327; *King v. Workers' Comp. Appeals Bd.*, *supra*, 231 Cal.App.3d at pp. 1646-1647; *Ditler v. Workers' Comp. Appeals Bd.*, *supra*, 131 Cal.App.3d at pp. 812-813.)
>
> Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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.
>
> (*Escobedo*, *supra,* 70 Cal.Comp.Cases at 621.)

In this case, we noted above that in his September 8, 2022 deposition, Dr. Mandell seems to have settled on the conclusion that 75% of applicant's overall permanent and total disability is industrial, leaving a balance of 25% apportionment to non-industrial other factors under section 4663(c). However, the reliability of the doctor's percentages is undercut by the fact that he apparently changed his opinion from his March 22, 2017 report that 25% of applicant's lower extremity disability, considered alone, is due to non-industrial obesity. (This earlier formulation suggests that non-industrial apportionment should be something less than 25% if the disability of all body parts is considered.)

On page seven of her Report, the WCJ stated that it was speculative of Dr. Mandell to apportion to obesity without comparing applicant's weight before the industrial injuries to her weight after the industrial injuries. However, the fact that the weight used by Dr. Mandell to determine applicant's obesity was measured long after her last injury in 1999, instead of contemporaneously with the injury, does by itself invalidate apportionment to obesity provided there are other valid reasons for such apportionment. This is because the nature of the non-industrial condition is assessed at the time of the physician's evaluation, not retroactively. As discussed in *Escobedo*, "if [for instance] 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 50% of the disability." (70 Cal.Comp.Cases at 621, italics added.)

In this case, however, the lack of "how and why" is where Dr. Mandell's apportionment opinion falls short. Dr. Mandell failed to explain how and why applicant's obesity and her prior right knee problems were causing permanent disability at the time of his evaluations in March 2017 and December 2018; the doctor also failed to explain how and why those conditions are responsible for 25% of applicant's permanent and total disability. These flaws are compounded by the fact that to begin with, Dr. Mandell failed to describe in detail the exact nature of the apportionable disability resulting from applicant's obesity and her prior right knee problems. The required description of apportionable disability also was lacking with respect to the other injured body parts, i.e., the neck, the low back and the upper extremities.

We further observe that although Dr. Mandell repeatedly framed his apportionment opinion in terms of reasonable medical probability, the lack of consistency in his opinion suggests it is

founded in speculation. For instance, in testifying that he would apportion five percent of applicant's permanent disability to her "prior [knee] problems before 1989" and twenty percent to obesity, with the remainder equally divided between the 1994 and 1999 injuries, Dr. Mandell hedged that he was "just barely" able to reach this conclusion. When the doctor did provide some reasoning for his conclusions, it was general in nature. Questioned by applicant's attorney in his September 8, 2022 deposition, Dr. Mandell testified, "it's just the medical science that the vast majority of people do develop arthritis from obesity." Yet the doctor conceded: "There are some exceptions. It's not a hundred percent."

In the same deposition, it also was established that Dr. Mandell's apportionment of five percent of applicant's disability to knee problems before 1989 was not supported by any medical records dating back to that time. (*Hegglin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 (36 Cal.Comp.Cases 93) [medical opinions are not substantial evidence if based upon inadequate medical histories].) Dr. Mandell did testify that he reviewed two second-hand medical reports from two doctors dating back to 2005. Those reports referred to a non-industrial fall in 1973 wherein applicant injured her right knee and was in a cast for six weeks, another injury in 1978 (body part unspecified), another right knee injury in 1987, and increased symptoms in the medial joint in applicant's right knee in 1992. Dr. Mandell further testified that the above history was consistent with his opinions and findings on apportionment, as expressed in the same deposition. (Joint Exhibit 103, Mandell deposition of 9/8/22, pp. 36:23-38:10.) However, this testimony does not cure the flaw in Dr. Mandell's apportionment opinion that he never described in detail the exact nature of the apportionable disability resulting from applicant's prior right knee problems; the doctor failed to explain how and why applicant's prior right knee problems were causing permanent disability at the time of his evaluations in March 2017 and December 2018; and the doctor failed to explain how and why the prior right knee problems and applicant's obesity are responsible for 25% of her permanent disability.

Turning to the issue of apportionment pursuant to *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113], therein the Court of Appeal held that pursuant to Senate Bill 899 enacted in 2004, the law of apportionment mandates that multiple injuries ordinarily require separate awards of permanent disability. However, the Court also discussed an exception to this rule, stating that "there may be limited circumstances…when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate

percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified." (170 Cal.App.4th at 1560.)

Relevant to the foregoing "*Benson* exception," applicant's attorney questioned Dr. Mandell in his September 8, 2022 deposition, as follows:

> Q. The -- the combined disability of all of [applicant's] injuries, are they so inextricably intertwined as to make the apportionments that you're coming up with to be suspect when you combine them?
>
> A. I'm thinking. Like I said before, this is just barely medically probable; so, yes, there's some basis for making it suspect. But I think that what I said is correct and medically probable. Just barely.
>
> Q. And that's for the -- the apportionment per body region I guess is how we ended up going on this, huh?
>
> A. Yes.
>
> Q. Okay. For -- for the -- when Mr. Kerry [Oakland's attorney] was asking you about possible division overall, that's really become one where you're not -- not ready to -- you're not able to give a viable opinion? Is that what I'm understanding?
>
> A. No. No. I think the opinion I gave is viable but just barely.
>
> (Joint Exhibit 103, pp. 35:5-35:23.)

CIGA's attorney also questioned Dr. Mandell on the same topic:

> Q. […] And the only other question I have is going to the 5 percent, the 20 percent, and then the 75 percent apportionment divided by -- between the 1994 and 1999 injuries.
>
> Is there any apportionment to the cumulative trauma injury that we were talking about earlier?
>
> A. No.
>
> Q. Okay. And why would that not be when a cumulative trauma did affect some body parts?
>
> A. As I was going over this stuff yesterday, it occurred to me that she wasn't really doing very much. The cumulative trauma I was referring to was after

she went back to work -- or after her 1999 injury, she continued to work for a little while, but she was doing very light work and not full-time and all those sorts of stuff. So the cumulative trauma probably didn't play much of a role.

[…]

Q. […] So the cumulative trauma contributed 10 percent to the cervical disability and 10 percent to the lumbar disability; is that correct?

A. Separately. Yes.

Q. But then it doesn't play any factor in terms of the overall disability; is that correct?

A. Well, when you mix it all into one big batch, it's kind of hard to separate everything out. As I said, it's a close call, but, yes, it doesn't play any role in the final grand look of the scheme of things.

(Joint Exhibit 103, pp. 21:11-22:14.)

Thus it was Dr. Mandell's testimony that the cumulative trauma though May 9, 1999 contributed ten percent to applicant's cervical disability and ten percent to her lumbar disability, but the cumulative trauma played no role in applicant's overall disability. The latter statement does not follow from the former statement. What does ring true and substantial is Dr. Mandell's testimony that "it's kind of hard to separate everything out." We understand Dr. Mandell to have testified that from a medical standpoint, it is virtually impossible to apportion disability between applicant's three industrial injuries. For instance, Dr. Mandell testified that such apportionment was "just barely" medically probable, to the extent that there was "some basis for making it suspect." With Dr. Mandell himself expressing doubts and reservations about his opinion, we conclude it does not rise to the level of substantial evidence sufficient to support apportionment of disability between the three industrial injuries. (See *Christiansen v. Facey Med. Found.* (2024) 2024 Cal. Wrk. Comp. P.D. LEXIS 2.) In addition, we note that the absence of specific testimony from Dr. Mandell that the disabilities caused by the three injuries are "inextricably intertwined" is not a basis to conclude it is legally possible to apportion them and thus to require separate awards pursuant to *Benson*. (See *Avila-Gonzalez v. Barrett Bus. Servs.* (2009) 2009 Cal. Wrk. Comp. P.D. LEXIS 444.)

In concluding our opinion, we address Oakland's allegation that if there is no basis to apportion disability between the three injuries then there can be no basis to apportion liability between Oakland and CIGA, who adjusts applicant's claim of specific injury on November 2, 1994. Although we express no final opinion, the notion that liability cannot be apportioned seems to be incorrect, because Dr. Mandell briefly testified about this issue in his December 15, 2017 deposition. (See Joint Exhibit 102, pp. 30-31.) The issue may require further development of the record, which Oakland and CIGA are free to do in contribution proceedings. (See *Roseville Community Hosp. & Ins. Co. of North America v. Workers' Comp. Appeals Bd.* (*Garcia*) (1991) 56 Cal.Comp.Cases 13 (writ den.) [rather than delay benefits, defendants should raise the issue of degrees of liability through separate contribution proceedings].) In any event, we reject as premature Oakland's contention that liability cannot be apportioned between Oakland and CIGA. The WCJ designated Oakland as the administrator of the Award, but the WCJ deferred the issue of contribution. There is no final order on apportionment of liability between Oakland and CIGA, so Oakland's petition for reconsideration is premature concerning this issue. (*Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].)

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of May 19, 2023 is **AFFIRMED.**

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

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

**I DISSENT. (See attached Dissenting Opinion.)**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**MARCH 29, 2024**

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

**CHARLOTTE UTSEY**
**FETTNER & LEMMON INC.**
**HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP**
**MULLEN & FILIPPI**

**JTL/*ara***

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

**DISSENTING OPINION OF COMMISSIONER RAZO**

I dissent. As further discussed below, I am persuaded that the WCJ's decision is based upon several factual and legal misunderstandings. Therefore, I would rescind her decision and replace it with a decision on permanent disability and apportionment that follows the opinion expressed by Dr. Mandell in his deposition of September 8, 2022. Dr. Mandell apportioned five percent of applicant's permanent disability to lower right extremity disability resulting from multiple right knee injuries before the first industrial injury of November 2, 1994. (Lab. Code, § 4663(c).) Dr. Mandell apportioned an additional twenty percent to disability resulting from applicant's obesity after the industrial injuries. (*Ibid*.) Further, Dr. Mandell apportioned one-half of the industrial permanent disability to the specific injury of November 2, 1994 and one-half to the specific injury of May 4, 1999. This apportionment requires two separate awards, one for compensation of the former injury and one for compensation of the latter injury. (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113].)

In evaluating Dr. Mandell's opinion on apportionment, the WCJ apparently believed that the doctor had to be scientifically certain about his apportionment findings. This was legal error on the part of the WCJ, as the correct standard for substantial medical evidence is reasonable probability. This was made clear by our Supreme Court in *McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 416-417 [33 Cal.Comp.Cases 660]:

> …We have held "reasonable or "probable" causal connection will suffice; it is to be distinguished from the merely "possible." (*Travelers Ins. Co. v. Industrial Acc. Com.* (1949) 33 Cal.2d 685, 687 [203 P.2d 747].) As we stated in *Travelers Ins. Co*., intellectual candor may at times require expert testimony in terms of mere probability. (See also *Bethlehem Steel Co. v. Industrial Acc. Com., supra,* 21 Cal.2d 742, 747; *Pacific Emp. Ins. Co. v. Industrial Acc. Com., supra,* 19 Cal.2d 622, 627, 629.) For that reason alone we cannot demand that experts be more certain, particularly when industrial causation itself need not be certain, but only "reasonably probable." […]

Further, although the WCJ stated that she applied the requirements of substantial evidence laid out in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc], I believe the WCJ applied an even more exacting standard, again requiring Dr. Mandell to be medically certain about his apportionment findings. This was legal error on the part of the WCJ. As explained by the Court of Appeal in *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687], Labor Code section 4663(c) requires

no more than that the reporting physician make an apportionment determination, based on his or her medical expertise, of the approximate percentage of permanent disability caused by the non-industrial condition.

In my view, it is clear that Dr. Mandell did so in his deposition of September 8, 2022. As set forth in the majority's opinion, Dr. Mandell testified that based on his training, experience, judgment, and skill, he would apportion five percent of applicant's permanent disability to her right knee problems before 1989 and twenty percent to obesity, with the remainder of permanent disability equally divided between the 1994 and 1999 injuries. Dr. Mandell also testified that his opinion was based upon reasonable medical probability. The doctor's digression into testimony that his opinion was "just barely" in the realm of reasonable medical probability represents mere verbal surplusage; it does not detract from the specific apportionment percentages the doctor provided, which were properly based upon his training, experience, judgment, and skill.

It is also worth noting that Dr. Mandell's apportionment opinion has the added virtue of making intuitive sense. Applicant had three injuries with two different employers, with the second two injuries occurring five years after the first injury and involving a different occupation. It makes sense that the disabilities resulting from these disparate injuries must be subject to legal apportionment. Further, in reference to applicant's non-industrial obesity, this condition is well-documented in the medical records. Dr. Mandell's explanation for five percent apportionment of disability to applicant's obesity is supported by the medical fact that obesity places greater strain on the body parts involved in applicant's industrial injuries. In addition, applicant's pre-existing right knee disability is confirmed by the medical records that were available for Dr. Mandell's review. Upon questioning by Oakland's attorney, Dr. Mandell testified in reference to his own report of March 22, 2017, the March 1, 2005 report of Dr. Fessinger, and the September 28, 2005 report of Dr. Renbaum:

> Q. All right. Do you see that he refers to a nonindustrial fall in 1973 which injured her right knee which was casted for six weeks?
>
> A. I do see that. Yes.
>
> Q. All right. Do you see that he also refers to another injury she had in 1978?
>
> A. Yes.

Q. All right. Do you see that he also summarizes an injury she had in 1987 to her right knee when she fell down stairs?

A. Yes.

Q. All right. And do you see under the heading "Discussion" in that report, he says that she has had multiple nonindustrial injuries dating as far back as 1973 and she developed increased symptomatology in the medial joint line of her right knee in 1992?

A. I see that.

Q. All right. And do you see on page 14 of your summary of your report -- of your report that Dr. Renbaum, in his report dated September 28, 2005, also refers to those incidents in his title Past Medical History?

A. Yes.

Q. All right. And even though you were not able to review reports going back to the 1970s and 1980s, do you have any reason to discount or disagree with the findings from Dr. Fessinger and Dr. Renbaum about her condition and those injuries?

A. No.

Q. All right. And they -- are those -- is that history that they've described sort of consistent with your opinions and your findings regarding apportionment today?

A. Yes.

(Joint Exhibit 103, pp. 37:2- 38:10.)

Thus, the fact that applicant had significant, pre-existing problems with her right knee is well-documented even though records from the 1970s and 1980s were not available for direct review by Dr. Mandell.

In my view, Dr. Mandell amply explained the industrial and non-industrial causes of applicant's permanent disability and the percentage of disability attributable to each injury, all to a degree of reasonable medical probability. Further, when all of Dr. Mandell's reports and depositions are considered together, it is clear that his opinion is not speculative but based on the facts, applicant's medical history, her medical records, and on the doctor's evaluations and exams. I would rescind the WCJ's decision and replace it with a decision that finds twenty-five percent of

applicant's overall disability to be non-industrial, and that includes two separate awards of permanent disability with equal apportionment between the two specific injuries of 1994 and 1999, consistent with *Benson.*

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**MARCH 29, 2024**

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

**CHARLOTTE UTSEY**
**FETTNER & LEMMON INC.**
**HANNA, BROPHY, MACLEAN, MCALEER & JENSEN, LLP**
**MULLEN & FILIPPI**

**JTL/*ara***

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

## REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

Defendant for the City of Oakland filed a timely petition for reconsideration from my determination that applicant, Charlotte Utsey, was permanently totally disabled and that disability cannot be apportioned between two industrial injuries and non-industrial conditions. Applicant filed a response.

## INTRODUCTION

Applicant has filed three claims. Her first claim occurred on November 2, 1994 while she was employed by National Courier systems. Applicant's second claim occurred on May 4, 1999 while she was employed by the City of Oakland. After being evaluated by Dr. Mandell, applicant also filed a claim for a cumulative trauma injury till her last day of employment with the City of Oakland, the date being May 9, 1999.

On November 2, 1994, applicant was involved in a motor vehicle accident in which she injured her neck and back. On May 4, 1999 applicant stepped off a curb, injuring her right ankle and Achilles tendon area. In addition to the specific injuries, Dr. Mandell after issuing numerous reports and being deposed concluded that part of applicant's disability for her cervical and lumbar spine was caused by cumulative trauma until applicant stopped working in 1999 hence a claim for cumulative trauma was also pled.

This matter has been tried before where it was determined that applicant's overall disability was 100%. The only issue left to be determines is whether any portion of the 100% disability should be apportioned between the November 2, 1994 date of injury, the May 4, 1999 date of injury, the cumulative trauma as well as nonindustrial causes.

After the first trial it was my determination that all of the injuries were inextricably intertwined hence there was no apportionment. I found that a single award for 100% disability should issue. The defendants appealed my decision.

The Appeals Board determined after the first petition for reconsideration was filed that the record needed further development on whether Dr. Mandell's report was substantial medical evidence on apportionment. The file was returned to me for further proceedings.

The parties, at my request returned to Dr. Mandell and deposed him on September 8, 2022.

After reviewing the 2022 deposition I again concluded that Dr. Mandell's report was not substantial medical evidence on the issue of apportionment and again found that applicant was entitled to on single 100% permanent disability award.

Defendant for the city of Oakland has appealed my finding.

## DISCUSSION

In order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. Medical reports 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 or examinations or on incorrect legal theories. Medical opinions are not substantial evidence if they are based on surmise, speculation or conjecture. A medical report is not substantial evidence unless it offers the reasoning behind the physician's opinion, not merely his or her conclusions. (See *Place v. WCAB* (1970) 35 CCC 525, 529; *Hegglin v. WCAB* (1971) 36 CCC 93, 97, *Granado v. CAB* (1968) 33 CCC 647, 653; *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687, 1691).

It has long been settled that a medical opinion is not substantial evidence if it rests on surmise, speculation or conjecture. In order for a medical opinion to be considered substantial evidence, it must be supported by a factual or medical basis; it cannot be based on unwarranted conclusions or assumptions. (See *Hegglin v. WCAB* (1971) 36 CCC 93; *Bracken v. WCAB* (1989) 54 CCC 349; *Guerra v. WCAB* (1985) 50 CCC 270; *John A. Roebling's Sons Co. v. IAC (Bundshu)* (1918) 36 Cal. App. 10; *William Simpson Construction Co. v. IAC* (1925) 74 Cal. App. 239; *Hartford Accident & Indemnity Co. v. IAC (Houlihan)* (1934) 140 Cal. App. 482; *Children's Hospital Society of Los Angeles v. IAC (Boulware)* (1937) 22 Cal. App. 2d 365; *Brown v. IAC* (1941) 6 CCC 103; *Simmons Co. v. IAC (Tringale)* (1945) 10 CCC 235; *Industrial Indemnity Co. v. IAC (Gabbert)* (1949) 14 CCC 35.; *Gamberg v. IAC* (1934) 138 Cal. App. 424; *County of Sacramento v. WCAB (Brooks)* (2013) 78 CCC 379; *Rasmussen v. City of Petaluma*, 2016 Cal. Wrk. Comp. P.D. LEXIS 621 *Strauss v. State of California, Department of Corrections and Rehabilitation*, 2021 Cal. Wrk. Comp. P.D. LEXIS 33).

A medical opinion may not have an accurate medical history if the doctor has not reviewed all of the medical reports. (See *Kyles v. WCAB* (1987) 52 CCC 479).

Dr. Mandell addresses apportionment from two different perspectives; apportionment per body part and apportionment as a whole.

Dr. Mandell when apportioning per body part, apportions to the November 2, 1994 date of injury, the May 4, 1999 date of injury, to cumulative trauma thru last date worked, a 1970s non-industrial knee injury and obesity.

For her neck injury from the 1994 motor vehicle accident Dr. Mandell apportioned 90% to the motor vehicle accident and 10% to cumulative trauma. (Mandell deposition transcript September 8, 2022, page 9 lines 9-13).

For the upper extremity injuries which included her shoulders as well as her carpal tunnel, Dr. Mandell stated that the injuries were a direct result of her lower limb problems due to limping around and the need to use a walker or cane. (Mandell deposition transcript September 8, 2022, page 10, lines 8-12).

Since he apportioned the lower limb problems as 10% caused by the right knee problems in the 1970s, 25% caused by obesity and the rest caused by the May 4, 1999 injury, the bilateral upper limb impairment was apportioned the same way. (Mandell deposition transcript September 8, 2022, page 10, lines 15-21).

The bilateral knees Dr. Mandell apportioned as 10% to the 1970s problem, 25% to obesity and the remaining to the 199 date of injury. (Mandell deposition transcript September 8, 2022, page 12, lines 5-9). The right ankle as well as the left foot neuroma were all apportioned the same way. (Mandell deposition transcript September 8, 2022, page 12, lines 11-15).

For the lumbar spine injury Dr. Mandell apportioned 45% to the 1994 injury, 45% to the 1999 injury as a compensable consequence of limping around, with the remainder to cumulative trauma. (Mandell deposition transcript September 8, 2022, page 12, lines 23-25 and page 13 lines 1-5).

Since applicant is permanently totally disabled, defendant asked Dr. Mandell to apportion based on applicant as a whole, instead of apportioning body part by body part. Dr. Mandell, when apportioning applicant as a whole apportioned 5% to the problems from the 1970s, 20% to obesity and the rest he divided equally between the 1994 and the 1999 dates of injuries. No apportionment at all to cumulative trauma.

Dr. Mandell never explained why when looking at applicant as a whole, the apportionment to the 1970s injury went from 10% to 5%, why obesity now contributed only 20% instead of 25%. When asked why he was no longer apportioning to cumulative trauma he said "it occurred to me that she wasn't really doing very much after she went back to work after the 1999 date of injury." (Mandell deposition transcript September 8, 2022, page 21, lines 15-25).

In order for Dr. Mandel's report to be considered substantial medical evidence for apportionment, he needed to explain why he apportioned the way he did. During his deposition Dr. Mandell never explains why he changes the apportionment he found when the applicant is treated as a whole from what he found when he was apportioning body part by body part.

As for the 1970s apportionment, Dr. Mandell has no medical record to rely upon to find legal apportionment. During deposition Dr. Mandell admitted that he reviewed no records from the 1970s regarding applicant's injuries. He never saw the operative report from the alleged 1980s right knee injury. He did not know whether the 1980s right knee injury was successful or whether there was any disability associated with the 1970s injury or the 1980s surgery. ((Mandell deposition transcript September 8, 2022, page 23, lines 3-18). Although Dr. Mandell did review some medical reports from 2005 which summarized the issues from the 1980s and the 1970s there is no indication that any report Dr. Mandell reviewed from 2005 actually reviewed any records from the 1970s or the 1980s.

Since Dr. Mandell reviewed no medical reports from the injury he apportioned 5% of the disability to, his apportionment finding is not legal.

As for the apportionment to obesity, Dr. Mandell states that applicant is obese because in 2017 she weighed 232 pounds and was five-foot-four. She had a body max index more than 30. (Mandell deposition transcript September 8, 2022, page 14, lines 2-7).

[…]

Apportionment between the two actual dates of injuries is more complex.

The court in *Benson v Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113] stated that "there may be limited circumstances….when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified." (170 Cal.App.4th at 1560). A *medical* opinion that does not rise to the level of *medical probability*, but only presents a possibility of causation, may not be the basis for an award. **Substantial medical evidence** means "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971). The physician's medical opinion must set forth the how and why and the facts and reasoning (not just his or her conclusions/opinions) that justify the opinion. 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. See *Escobido v Marshalls* (2005) 70 Cal. Comp. Cases 604.

We have two specific dates of injuries each of which pertain to a different body part. Because of the way Dr. Mandell conducts his evaluation and writes his reports, he intermingles the two injuries. The upper extremity is caused by the lower extremity problems according to Mandell and the low back problems are caused by the lower extremities. Although for some body parts when he apportions separately per body part he only implicates one or the other date of injuries but when he looks at the applicant as a totality of disability he apportions equally between the dates of injuries.

[…]

## RECOMMENDATION

I recommend the Petition for Reconsideration filed by defendant be ***DENIED***.

DATE: 08/03/2023

**Lilla J Szelenyi**
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE