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WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

BRENDA MELTON,

Applicant,

vs.

HUGHES MARKET, permissibly self-insured,
administered by SEDGWICK CLAIMS
MANAGEMENT SERVICES,

Defendants.

Case No. ADJ3801057 (VNO 0352740)
ADJ3494506 (VNO 0354601)
ADJ3901888 (VNO 0351438)
ADJ612564 (VNO 0351436)

OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration, 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 herein, we will deny reconsideration.

It is well-settled that defendant has the burden of proof on apportionment. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099 [71 Cal.Comp.Cases 1229].) In order to constitute substantial evidence of apportionment, 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. (*E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 [Appeals Board en banc].)

The following discussion of substantial evidence in *Escobedo* is instructive for purposes of addressing apportionment in this case:

[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*

1 v. *Workers' Comp. Appeals Bd.*, *supra*, 37 Cal.App.4th at pp. 326-327;
2 *King v. Workers' Comp. Appeals Bd.*, *supra*, 231 Cal.App.3d at pp. 1646-
3 1647; *Ditler v. Workers' Comp. Appeals Bd.*, *supra*, 131 Cal.App.3d at pp.
4 812-813.)

4 Thus, to be substantial evidence on the issue of the approximate
5 percentages of permanent disability due to the direct results of the injury
6 and the approximate percentage of permanent disability due to other
7 factors, a medical opinion must be framed in terms of reasonable medical
8 probability, it must not be speculative, it must be based on pertinent facts
9 and on an adequate examination and history, and it must set forth
10 reasoning in support of its conclusions.

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

13 And, if a physician opines that 50% of an employee's back disability is
14 caused by degenerative disc disease, the physician must explain the nature
15 of the degenerative disc disease, how and why it is causing permanent
16 disability at the time of the evaluation, and how and why it is responsible
17 for approximately 50% of the disability.
18 (*Escobedo*, *supra*, 70 Cal.Comp.Cases at 621.)

17 For the reasons stated by the WCJ in the report, we find that defendant did not meet its burden of
18 proof as to apportionment. Specifically, Seymour Levine, M.D., the agreed medical examiner (AME) in
19 rheumatology does not give any explanation for his finding of 15% apportionment of the fibromyalgia
20 permanent disability. (Exhibit Y-1, Dr. Levine's 5/28/15 report, at p. 18.)

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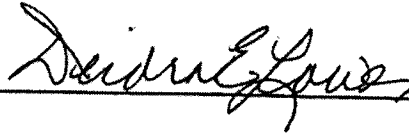
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1 For the foregoing reasons,

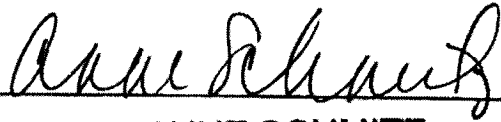
2 IT IS ORDERED that the Petition for Reconsideration is DENIED.

3 WORKERS' COMPENSATION APPEALS BOARD

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6 DEIDRA E. LOWE

7 I CONCUR,

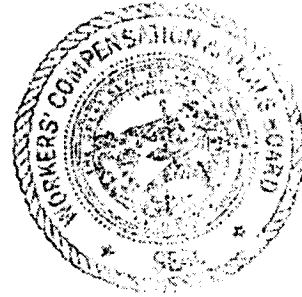
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10 DEPUTY

11 ANNE SCHMITZ

12 CONCURRING, BUT NOT SIGNING

13
14 MARGUERITE SWEENEY



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16 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

17 SEP 03 2019

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

21 BRADFORD & BARTHEL
22 BRENDA MELTON
23 LAW FIRM OF ROWEN, GURVEY & WIN

24 bea