

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **MARILYN SCHUY (formerly, MARILYN TERRY),**

5 *Applicant,*

6 **vs.**

7 **CITY OF YUBA, Permissibly Self-Insured; and**
8 **YORK RISK SERVICES GROUP, INC.,**
9 **(Claims Administrator),**

10 *Defendants.*

Case Nos. **ADJ9206874**
(Redding District Office)

**OPINION AND DECISION
AFTER RECONSIDERATION**

11 We previously granted reconsideration to further study the factual and legal issues. This is our
12 Decision After Reconsideration.

13 Defendant, the City of Yuba City (Police Department), seeks reconsideration of the Findings and
14 Award issued by the workers' compensation administrative law judge (WCJ) on November 30, 2016. In
15 that decision, the WCJ found in relevant part that applicant's stipulated cumulative injury to her low
16 back, which she sustained while employed through August 21, 2013 as a records supervisor by
17 defendant, caused 29% permanent disability without apportionment.¹

18 In its petition for reconsideration, defendant contends in substance that the WCJ should have
19 apportioned based on the opinion of William H. Ramsey, M.D., the agreed medical evaluator (AME) in
20 orthopedics, that 50% of applicant's permanent disability was caused by the non-industrial development
21 and progression of her degenerative back disease.

22 The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report)
23 recommending that her November 30, 2016 decision be affirmed. Applicant filed an answer that also
24 argued for affirmance.

25
26 ¹ When these proceedings began, applicant's legal name was "Marilyn Ann Terry." On September 8, 2017,
27 applicant's counsel submitted a letter requesting that her legal name be officially changed to "Marilyn Schuy."
Accordingly, "Marilyn Schuy" is the name we will now use. The Electronic Adjudication Management System
(EAMS) has been amended to reflect this change.

1 We have reviewed the record, the allegations of defendant's petition for reconsideration and
2 applicant's answer, and the contents of the WCJ's Report. Based on our review and for the reasons we
3 shall explain, we agree with defendant that consistent with Labor Code sections 4663 and 4664(a) and
4 the case law interpreting those sections, 50% of applicant's overall permanent disability must be
5 apportioned to non-industrial causation.

6 **I. BACKGROUND**

7 This matter was submitted for decision on an evidentiary record consisting of: (1) the transcript of
8 applicant's February 19, 2014 deposition; (2) the September 17, 2014 AME report of Dr. Ramsey; and
9 (3) the transcript of Dr. Ramsey's July 21, 2016 deposition.

10 At her deposition, applicant testified that she had no back problems and had never sought back
11 treatment prior to being hired by Yuba City. She first had back problems in around 1992, when she was
12 working for the Yuba City Police Department and they had to evacuate during a flood threat. She
13 received some back treatment at that time, but did not miss any work. Between 1992 and Thanksgiving
14 of 2011, she did not have any back complaints or receive any back treatment. In around Thanksgiving of
15 2011, however, her back started hurting and became progressively worse. Since then, the pain has never
16 gone away. She has never sustained any specific back injury either at work or outside of work. At the
17 time of her deposition, she was 5' 8" tall and weighed 260 pounds.

18 The September 17, 2014 report of Dr. Ramsey, the AME, notes that applicant started working for
19 the Yuba City Police Department in June 1990 as a dispatcher, but for the past five years has been
20 working as a records department supervisor. Her work in the records department primarily involves
21 sitting and computer work, with limited amounts of standing and walking. There are no significant
22 lifting demands. At the maximum, she sometimes lifts around 15 pounds. Dr. Ramsey observes that, at
23 the time of the examination, applicant was "significantly overweight (reported weight 250 pounds)."
24 Applicant complained of principally left-sided lower back pain. Although she said she previously had
25 some pain and numbness extending into the left calf, that has "resolved." Applicant "attributed her back
26 pain to sitting for prolonged periods of time at work with twisting activities." She also said "[s]he
27 associates symptoms with sitting or rising and sitting down again at work, but also acknowledges that

1 household activities are troublesome for her as well.”

2 Dr. Ramsey’s report referred to two objective studies of applicant’s back.

3 First, Dr. Ramsey states:

4 ... X-ray report of the lower back, 10/4/12, describes straightening of the normal
5 lordosis, otherwise normal alignment, with disc space narrowing, particularly at L4
6 and L5, with accompanying degenerative changes such as bone spurs, widespread
through the lumbar spine. Facet joint degeneration was identified at L5. ...

7 Second, Dr. Ramsey states:

8 An MRI study of the lumbar spine, dated 10/19/12, makes note of a complaint of low
9 back and left hip pain. Findings included moderate disc bulges at L4 and L5, the
10 former left, the latter right, each of them causing some foraminal encroachment
11 against local nerve tissue. Lesser disc bulges are described at the upper three lumbar
levels. Finally, reference is made to facet joint degeneration at multiple levels and a
mild or grade I anterior spondylolisthesis, L3 on L4.

12 Dr. Ramsey’s diagnostic impression was “[c]hronic, probably discogenic low back pain.” He
13 pointed out that “[d]espite her fairly advanced degenerative disease and moderate to significant disc
14 protrusions at least at two levels in the lower back, she no longer has any radicular signs or symptoms.”

15 Dr. Ramsey declared applicant to be permanent and stationary and specified whole person impairment
16 (WPI) using both the Range of Motion (ROM) method and the Diagnosis Related Estimates (DRE)
17 method of the AMA Guides.²

18 With respect to causation and apportionment, Dr. Ramsey’s September 17, 2014 AME report
19 declared:

20 Applicant has widespread degenerative disease of the lower back, a naturally
21 occurring problem which would not be caused by the nature of her work. For the most
22 part, the bulk of such changes are genetically determined. Sooner or later, such
23 problems will cause difficulties. Any number of activities become problematic
24 afterwards and likely will aggravate pain. Clearly exertional work beyond what is
25 required by her job would be difficult for her but apparently is not required in her
26 lifestyle. Prolonged immobility is characteristically annoying to persons with spinal
difficulties. Light activity is generally tolerated better, particularly when variety is
included. Thus, it is probable that her back condition has been aggravated by the
prolonged sitting required by her job over the years. Although she might very well
have discomfort presently as a consequence of the naturally occurring and
progressing degenerative disease, it is felt probable that her work activities have

27 ² The American Medical Association’s “Guides to the Evaluation of Permanent Disability,” 5th Edition.

1 either hastened this or aggravated its intensity. I conclude that her residual lower back
2 condition is apportionable 50% to the development and progression of naturally
3 occurring degenerative disease, 50% to aggravation at her place of work, ... on a
4 cumulative basis.

(AME Ramsey 9/17/14 report, at p. 9.)

5 AME Ramsey was deposed on July 21, 2016.

6 With respect to causation and apportionment of applicant's back problems, Dr. Ramsey stated the
7 following when defendant's counsel asked him to explain his opinion:

8 A Okay. Well, first of all, she has this degenerative disease in her back and it's
9 moderately advanced and at multiple levels, widespread. That is not caused by
10 activity. It has been proven pretty convincingly that it's genetic in origin. So that
11 would have happened in her life regardless of her employment.

12 Q Or her activity level?

13 A Or activity. Absent specific injuries.

14 Q Okay.

15 A Which — of which we know of none. And sooner or later those things cause pain.

16 Back pain is -- is rampant in the general population regardless of activity,
17 regardless of weight, regardless of diabetes, regardless of any number of things. Some
18 of which is from this degenerative process. Some of it is deconditioning. Some of it
19 we don't know where it comes from.

20 And then, of course, there are people that do exertional things that hurt them.
21 Now, her job is not what I would call exertional. It's an office-level, clerical-type job.

22 That would not be considered injurious unless something had happened. And we
23 have no information from Applicant or anywhere else that something did happen.

24 So what we got here is a middle-aged individual, somewhat overweight with
25 widespread degenerative disease and backache. You could argue that her job has
26 nothing to do with it.

27 The second issue is once problems like this develop activities become poorly
tolerated. That's the result of the disease, not the cause of it. And I think to some
extent that's the issue here.

1 Her job didn't cause her to have backache and degenerative disease. It was a
2 poorly tolerated job principally because of the sitting, but the sitting was bothersome.
3 If she didn't have to do that most of the day she would probably have less backache.

4 So I think the backache has aggravated the symptoms associated with her disease
5 but it didn't cause the disease.

6 And had she had a more varied job, lighter but more active — not lighter but light
7 and more active, maybe it wouldn't have been so bad.

8 So I'm saying part of it is the natural development and progression of her disease
9 and part of it is aggravation of such by work.

10 ***

11 Q And then what about her testimony or representations to you about having back
12 pain and issues for over an extended period of time all the way back to the early '90s?

13 A Well, again, back pain is rampant in the general population. Having had -- now,
14 if she had a history of ongoing back pain all that time I would give it more credence,
15 but from the records and even her testimony there was something sporadic back in the
16 '90s and it disappeared. Too far back to be significant, I think. And then early in the --
17 in the — like 2003 or something there had been some problems, probably reflective
18 of her developing degenerative disease.

19 Q Okay.

20 A These things take years to develop.

21 Q That's what I was wondering, if that history would be consistent with the
22 disease she has underlying.

23 A To some extent, yes.

24 Q Okay. Do you have — after going through the report again and having the
25 discussion today, do you have any reason to change your opinion on apportionment?

26 A Well, believe it or not, in reading through this before I got to that part of my
27 report, I was thinking I wasn't going to give her much for work at all. And then I gave
28 her 50 percent. So I kind of surprised myself a little bit there. But I'm not going to
29 change anything.

30 Q Yeah, my impression was, when I read it, that you were kind of giving her the
31 benefit of the doubt as industrial?

32 A Yes, I was.

1 (AME Ramsey 7/21/16 deposition, at 17:11-19:8 & 25:7-26:14.)

2 Later in the deposition, the following exchange between applicant's counsel and Dr. Ramsey took
3 place:

4 Q Doctor, did you see any — I know you reviewed a lot of records. Did you — and I
5 know that you considered part of this process, at least the disease process, to be, I
6 think you said, genetically induced?

7 A Yes.

8 Q And did you — were you able to discern anything in the medical records that there
9 may be some — as far as genetically what would — did she describe anything about
10 other people in her family may have this problem?

11 A I don't have any history of that. I don't know.

12 Q Okay. So would that be an important issue if there were relatives, parents, sisters,
13 brothers?

14 A Very limited help. I did some genetic studies, not relative to this case, but just part
15 of my education, and the number of combinations, permutations of the genetic code,
16 if you will, is so varied that you might see a familial tendency, but it wouldn't be
17 direct. It wouldn't necessarily be a brother or sister or mother or father, but may be in
18 a number of relatives.

19 The one place where you'll get the information you want is genetic — identical
20 people, twins, which is the basis of the conclusion I mentioned earlier that this was
21 determined to be genetic. ...

22 Q So I think that — you're stating as to the Applicant in this case, you're looking
23 at her from an isolated position, is that correct, without knowledge of what —
24 whether there may be genetic factors or not but based on just describing her as this is
25 a disease that is generally caused by — well, partly caused by genetics?

26 A Well, the conclusion of the symposium was it was overwhelmingly explained
27 by genetics.

Q But is that just a fact that there is no — there is no — it's just one of the factors
that's easy to say it's genetically caused?

A I was convinced after reading the article that everything we thought before was
wrong.

Q Okay.

1 the development and nature of Applicant's degenerative disc disease, he did not
2 explain in terms of reasonable medical probability, why some portion may or may not
3 have been caused by Applicant's 24 years of employment with the City of Yuba City
4 nor did he discuss in any depth, Applicant's specific job duties other than to opine
5 that she had "a soft office job."

6 II. DISCUSSION

7 As the WCJ recognizes, it is the defendant that has the burden of proving apportionment of
8 permanent disability. (*Pullman Kellogg v. Workers' Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d
9 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th
10 1099, 1115 [71 Cal.Comp.Cases 1229].)

11 However, Senate Bill 899 (SB 899), which became effective in 2004, enacted sections 4663 and
12 4664(a).⁴ Among other things, section 4663 states that "[a]pportionment of permanent disability shall be
13 based on causation" and section 4664(a) provides that "[t]he employer shall only be liable for the
14 percentage of permanent disability directly caused by the injury arising out of and occurring in the course
15 of employment."

16 In *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565], the
17 Supreme Court declared that sections 4663 and 4664(a) established a "new regime of apportionment
18 based on causation" (40 Cal.4th at p. 1327) and that "the new approach to apportionment is to look at the
19 current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—
20 and decide the amount directly caused by the current industrial source." (40 Cal.4th at p. 1328.)

21 In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc) (*Escobedo*),
22 the Appeals Board discussed apportionment under sections 4663 and 4664(a). *Escobedo* observed that
23 SB 899 repealed the old apportionment statutes (i.e., former sections 4663 and 4750), which had
24 precluded apportionment to pathology or asymptomatic causative factors. (70 Cal.Comp.Cases at pp.
25 614-616.) *Escobedo* concluded that, in repealing former sections 4663 and 4750 and in adopting new
26 sections 4663 and 4664(a), "the Legislature intended to expand rather than narrow the scope of legally
27 permissible apportionment." (70 Cal.Comp.Cases at p. 616.) Thus, *Escobedo* held that the language of

⁴ Section 4663 was subsequently amended in ways not relevant here.

1 section 4663(c) providing for apportionment of permanent disability caused by “other factors both before
2 and subsequent to the industrial injury, including prior industrial injuries,” allowed for apportionment not
3 only of permanent disability that could have been apportioned prior to SB 899, but also of “disability that
4 formerly could not have been apportioned (*e.g., pathology [and] asymptomatic prior conditions ...* .)”
5 (70 Cal.Comp.Cases at p. 607; see also pp. 614–617 (italics added).)

6 Applying these principles, the Board in *Escobedo* went on to conclude that the opinion of the
7 defendant’s qualified medical evaluator (QME) supported the apportionment of 50% of the applicant’s
8 overall bilateral knee disability to “preexisting non-industrial degenerative arthritis in both knees.” (70
9 Cal.Comp.Cases at p. 622.) The Board noted that the QME’s opinion was based on an adequate medical
10 history, an adequate examination, and a review of MRI and x-ray evidence. (*Id.*)

11 The Appeals Board’s conclusion in *Escobedo* that sections 4663 and 4654(a) permit
12 apportionment to disability caused by preexisting pathology or asymptomatic conditions has been
13 repeatedly endorsed by the appellate courts.

14 In *Brodie*, the Supreme Court cited to *Escobedo* and stated that “new sections 4663, subdivision
15 (a) and 4664, subdivision (a) eliminate the bar against apportionment *based on pathology and*
16 *asymptomatic causes.*” (40 Cal.4th at p. 1327 (italics added).) The Supreme Court emphasized that
17 “[t]he plain language of new section[] 4663 demonstrates [it was] intended to reverse [certain] features of
18 former sections 4663 and 4750” (40 Cal.4th at p. 1327) — including the case law that interpreted those
19 former sections to bar apportionment if, “but for” the industrial injury, the nonindustrial cause would not
20 alone have given rise to a disability. (40 Cal.4th at p. 1326.)

21 The Courts of Appeal have also consistently upheld the holding of *Escobedo* that permanent
22 disability may be apportioned to pathology or asymptomatic conditions that cause or contribute to actual
23 disability subsequent to the industrial injury.

24 In *E.L. Yeager Construction v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th
25 922 [71 Cal.Comp.Cases 1687], the Court of Appeal cited with approval to *Escobedo* (145 Cal.App.4th
26 at pp. 928-929) and held that “apportionment may be based *on pathology and asymptomatic prior*
27 *conditions.*” (145 Cal.App.4th at p. 927 (italics added).) It then concluded that the opinion of an

1 independent medical evaluator (IME) supported apportionment of 20% of the applicant's overall back
2 disability to chronic degenerative disease of his lumbar spine. The Court found that the IME had
3 conducted an adequate examination, taken an adequate history (including a history of prior low back
4 problems), and had reviewed MRI and x-ray evidence that clearly showed degenerative disc disease at
5 almost every level of the applicant's lumbar spine. (145 Cal.App.4th at p. 930.)

6 In *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78
7 Cal.Comp.Cases 751], the Court of Appeal cited to the *Brodie* principles that "[e]mployers must
8 compensate injured workers only for that portion of their permanent disability attributable to a current
9 industrial injury, not for that portion attributable to ... nonindustrial factors" and that "the new approach
10 to apportionment is to look at the current disability and parcel out its causative sources—nonindustrial,
11 prior industrial, current industrial—and decide the amount directly caused by the current industrial
12 source." (218 Cal.App.4th at p. 1142 [quoting from *Brodie, supra*, 40 Cal.4th at p. 1328].) The *Borman*
13 Court then remanded the matter to the WCAB to determine whether 40% of the applicant's hearing
14 disability should have been apportioned to congenital degeneration of the cochlea, based on the opinion
15 of the agreed medical evaluator (AME). (218 Cal.App.4th at pp. 1143-1144; see also pp. 1139-1140.)

16 In *City of Jackson v. Workers' Comp. Appeals Bd. (Rice)* (2017) 11 Cal.App.5th 109 [82
17 Cal.Comp.Cases 437], the WCJ had found, based on the opinion of the QME, that a police officer had
18 20% industrially-caused neck disability after 49% apportionment to personal history, including genetic
19 factors; the QME had noted that recent studies supported genomics/genetics/heritable issues "as a
20 significant causative factor in cervical spine disability" and noted that the applicant's father had a history
21 of back problems. (11 Cal.App.5th at pp. 113-115, 117-121.) On reconsideration, the Appeals Board
22 returned the matter to the WCJ for an unapportioned award of permanent disability. The Appeals Board
23 concluded the QME could not assign causation to genetics because that is an "impermissible immutable
24 factor[]" and that, "by relying on the employee's genetic makeup, the QME apportioned the causation of
25 the injury rather than the extent of his disability." (11 Cal.App.5th at p. 112.) The Appeals Board also
26 reasoned that "finding causation on applicant's 'genetics' opens the door to apportionment of disability
27 to impermissible immutable factors. ... Without proper apportionment to specific identifiable factors, we

1 cannot rely upon [the QME's] determination as substantial medical evidence to justify apportioning 49%
2 of applicant's disability to non-industrial factors." (11 Cal.App.5th at p. 114.)

3 The *Rice* Court, however, annulled the Appeals Board's decision and remanded the matter with
4 instructions to the Board to deny reconsideration. The Court of Appeal cited to *Escobedo* and said:
5 "[a]pportionment may now be based on 'other factors' that caused the disability, including 'the natural
6 progression of a non-industrial condition or disease, a preexisting disability, or a post-injury
7 disabling event[,] ... *pathology, asymptomatic prior conditions*, and retroactive prophylactic work
8 preclusions" (11 Cal.App.5th at p. 116 (italics added; some internal quotation marks omitted).)

9 The Court further held:

10 Precluding apportionment based on "impermissible immutable factors" would
11 preclude apportionment based on the very factors that the legislation now permits,
12 i.e., apportionment based on pathology and asymptomatic prior conditions for which
the worker has an inherited predisposition.

13 The Board[] ... indicates that it believes "genetics" is not a proper factor on which to
14 base causation. However, since 2004 it has allowed apportionment based on such a
factor, even though it may not have used the term "genetics."

15 (*Id.*)

16 Thus, in *Rice*, the Court of Appeal concluded that the QME's opinion that 49% of the injured
17 employee's neck disability was caused by "heredity, genomics, and other personal history factors" was
18 supported by substantial evidence. (*Id.*, at p. 121.)

19 All of the foregoing cases establish the principle that, under sections 4663 and 4664(a),
20 apportionment of permanent disability is mandated where substantial evidence establishes that some
21 definable percentage of that disability was caused by, among other things, pathology, an asymptomatic
22 preexisting condition, or genetic/hereditary factors.

23 Here, the September 17, 2014 AME report of Dr. Ramsey took a history that applicant's work did
24 not place great physical demands on her back, i.e., her work primarily involves sitting and computer
25 work, with limited amounts of standing and walking and no significant lifting demands. He also
26 reviewed reports of both an October 4, 2012 lower back x-ray and an October 19, 2012 MRI of the
27

1 lumbar spine showing widespread degenerative changes throughout the lumbar spine. Dr. Ramsey
2 diagnosed applicant to have “[c]hronic, probably discogenic low back pain” and “fairly advanced
3 degenerative disease and moderate to significant disc protrusions at least at two levels in the lower back.”
4 The September 17, 2014 report said that applicant’s “widespread degenerative disease of the lower back
5 [was] a naturally occurring problem which would not be caused by the nature of her work” and that
6 “[f]or the most part, the bulk of such changes are genetically determined.” Nevertheless, he added that
7 “it is probable that her back condition has been aggravated by the prolonged sitting required by her job
8 over the years.” Therefore, he said it was medically “probable” that applicant’s “residual lower back
9 condition is apportionable 50% to the development and progression of naturally occurring degenerative
10 disease, 50% to aggravation at her place of work, ... on a cumulative basis.”

11 AME Ramsey did not change this opinion at his July 21, 2016 deposition. He twice reiterated his
12 opinion that 50% of applicant’s permanent disability was due to non-industrial causation. Also, among
13 other things, he testified:

14 (1) “[S]he has this degenerative disease in her back and it’s moderately advanced and
15 at multiple levels, widespread. That is not caused by activity. It has been proven
16 pretty convincingly that it’s genetic in origin. So that would have happened in her life
17 regardless of her employment.”

18 (2) “[H]er job is not what I would call exertional. It’s an office-level, clerical-type
19 job. ... So what we got here is a middle-aged individual, somewhat overweight with
20 widespread degenerative disease and backache. You could argue that her job has
21 nothing to do with it.”

22 (3) “Her job didn’t cause her to have backache and degenerative disease. It was a
23 poorly tolerated job principally because of the sitting, but the sitting was bothersome.
24 If she didn’t have to do that most of the day she would probably have less backache.
25 So I think the backache has aggravated the symptoms associated with her disease but
26 it didn’t cause the disease. ... So I’m saying part of it is the natural development and
27 progression of her disease and part of it is aggravation of such by work.”

1 (4) “[A]lso the old argument that hard work caused this disease to develop doesn’t
2 apply to her. She didn’t participate in hard work. She has a soft office job.”

3 Furthermore, in response to questioning by applicant’s counsel, Dr. Ramsey acknowledged that he
4 “considered part of this process, at least the disease process, to be ... genetically induced” because the
5 current medical consensus is that degenerative back disease is “overwhelmingly explained by genetics.”

6 Dr. Ramsey’s opinion that 50% of applicant’s back disability was caused by her non-industrial
7 degenerative spine condition constitutes substantial evidence that is fully consistent with the
8 apportionment to causation requirements of sections 4663 and 4664(a) and the case law interpreting
9 those sections, i.e., *Rice* (allowing apportionment to permanent disability caused by genetic or congenital
10 cervical spine pathology), *Borman* (allowing applicant’s hearing disability to be apportioned to
11 congenital degeneration of the cochlea), *Gatten* (allowing apportionment to permanent disability caused
12 by pre-existing degenerative disc disease), and *Escobedo* (allowing apportionment to permanent
13 disability caused by pre-existing degenerative arthritis in both knees).

14 Accordingly, based on sections 4663 and 4664(a) and the case law, we will apportion 50% of
15 applicant’s overall 29% permanent disability to non-industrial causation. Therefore, we will amend the
16 WCJ’s November 30, 2016 Findings and Award to find that applicant has 15% permanent disability after
17 apportionment,⁵ entitling her to permanent disability indemnity in the gross sum of \$11,615.00, i.e.,
18 50.50 weeks at the rate of \$230.00 per week. Consistent with the WCJ’s November 29, 2016 decision,
19 we will also allow applicant’s attorneys a 15% fee of \$1,742.25 to be deducted from the permanent
20 disability indemnity.

21 ///

22 ///

23 ///

24 _____
25 ⁵ Applying the 50% apportionment to the November 21, 2016 rating string of the disability evaluation
26 specialist, the resulting rating is as follows:

27
$$50\% (15.03.02.00 - 19 - [1.4]27 - 112D - 23 - 29) = 15$$

Because a final permanent disability rating must be a whole number, applicant’s rating after apportionment has
been rounded up from 14.5 to 15. (See Schedule for Rating Permanent Disabilities, at pp. 6-1 — 6-5 & 1-10.)

1 For the foregoing reasons,

2 **IT IS ORDERED**, as our Decision After Reconsideration, that the Findings and Award issued by
3 the workers' compensation administrative law judge on November 30, 2016 is **AMENDED** such that
4 Findings of Fact Nos. 4 and 6 and the Award in its entirety are **STRICKEN** therefrom and the following
5 are **SUBSTITUTED** therefor:

6 **FINDINGS OF FACT**

7 ***

8 4. Applicant's injury caused permanent disability of 15% after apportionment to
9 non-industrial causation, entitling applicant to 50.50 weeks of permanent
10 disability indemnity entitling her to permanent disability indemnity payable at the
rate of \$230.00 per week in the total sum of \$11,615.00.

11 ***

12 6. The reasonable value of the services and disbursements of applicant's attorney
13 is \$1,742.25.

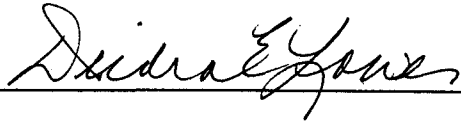
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1 **AWARD**

2 **AWARD IS MADE** in favor of **MARILYN SCHUY** (formerly Marilyn Terry)
3 against the **CITY OF YUBA CITY**, Permissibly Self-Insured (York Risk
4 Services Group, Inc., Claims Administrator) of:

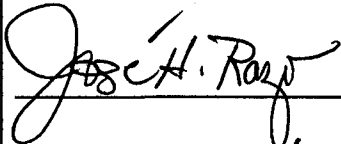
5 Permanent disability indemnity in the total amount of \$11,650.00 payable
6 forthwith, less credit to defendant for any sums heretofore paid on account thereof
7 in an amount to be adjusted by the parties with jurisdiction reserved before the
8 workers' compensation administrative law judge if a dispute arises, and less an
9 attorney's fee in the amount of \$1,742.25 which is payable forthwith to Mastagni,
10 Holstedt, a Professional Corporation, whose lien is hereby allowed in said
11 amount.

12 **WORKERS' COMPENSATION APPEALS BOARD**

13 

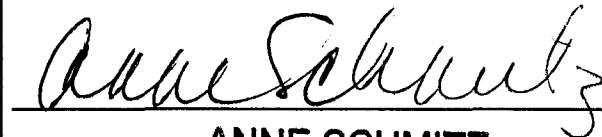
14 **DEIDRA E. LOWE**

15 **I CONCUR,**

16 

17 **JOSÉ H. RAZO**

18 **I DISSENT.** *(See Attached Dissenting Opinion.)*

19 

20 **ANNE SCHMITZ**

21 **DEPUTY**



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

23 **APR 02 2018**

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

26 **MARILYN (TERRY) SCHUY
27 LENAHAN LEE
MASTAGNI HOLSTEDT**

NPS/bea

1 history, and it must set forth reasoning in support of its conclusions. (70 Cal.Comp.Cases at p. 621.)
2 More specifically, *Escobedo* held that the physician must explain the “how and why” of his or her
3 apportionment opinion. (*Id.*)

4 *Escobedo*’s holding that a petition must adequately explain the “how and why” underlying any
5 apportionment opinion has been repeatedly endorsed by the appellate courts. (*Andersen v. Workers’*
6 *Comp. Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1381–1382 [72 Cal.Comp.Cases 389] (citing to
7 *Escobedo* and stating: “[t]he physician should show the reasoning or basis for his or her conclusions
8 [and] [t]he physician should also discuss the nature of the disease [and] why it is responsible for the
9 approximate percentage of the PD); *Gatten, supra*, 145 Cal.App.4th at pp. 927–928 (quoting with
10 approval *Escobedo*’s holding that “if a physician opines that 50% of an employee’s back disability is
11 caused by degenerative disc disease, the physician must explain the nature of the degenerative disc
12 disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it
13 is responsible for approximately 50% of the disability”); *Marsh v. Workers’ Comp. Appeals Bd.* (2005)
14 130 Cal.App.4th 906, 917, fn. 7 [70 Cal.Comp.Cases 787] (same).)

15 Here, William H. Ramsey, M.D., the agreed medical evaluator (AME) in orthopedics, opined that
16 50% of applicant’s back disability should be apportioned to her preexisting, genetically determined
17 degenerative disease.

18 Nevertheless, it is the WCAB, and not any particular physician, that is the ultimate
19 finder-of-fact on medical issues. (*Klee v. Workers’ Comp. Appeals Bd.* (1989) 211 Cal.App.3d 1519,
20 1522 [54 Cal.Comp.Cases 251] (“the [WCAB], not the physician, is the trier of fact”); *Robinson v.*
21 *Workers’ Comp. Appeals Bd.* (1987) 194 Cal.App.3d 784, 792–793 [52 Cal.Comp.Cases 419] (“the
22 Board and not the physician is the trier of fact”); *Johns-Manville Products Corp. v. Workers’ Comp.*
23 *Appeals Bd. (Carey)* (1978) 87 Cal.App.3d 740, 753 [43 Cal.Comp.Cases 1372] (“While the appeals
24 board must utilize expert medical opinion on many issues [citation omitted], it and not the physician is
25 the trier of fact”).) Therefore, the WCAB cannot abdicate its fact-finding powers to a physician—even if
26 that physician is an AME. (See *Western Growers Ins. Co. v. Workers’ Comp. Appeals Bd. (Austin)*
27 (1993) 16 Cal.App.4th 227, 241 [58 Cal.Comp.Cases 323] (the WCAB is not bound by the opinion of an

1 AME; rather, its only obligation is to give consideration to the AME's opinion); *Rodriguez v. Workers'*
2 *Comp. Appeals Bd.* (1994) 21 Cal.App.4th 1747, 1758–1759 [59 Cal.Comp.Cases 14] (the WCAB may
3 reject an AME's opinion as not constituting substantial evidence.) Instead, in assessing a physician's
4 apportionment opinion, the WCAB must assess whether the physician's reasoning supports his or her
5 conclusion. (*Granado v. Workmen's Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407; *Zemke v. Workmen's*
6 *Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798–799, 800–801 [33 Cal.Comp.Cases 358]; see also *People*
7 *v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the opinion of an expert is no better than the reasons upon
8 which it is based).)

9 I would conclude that, under the standards established by *Escobedo* and subsequent appellate case
10 law, Dr. Ramsey's apportionment opinion does not constitute substantial evidence because he does not
11 adequately explain why applicant's preexisting degenerative condition was an actual contributing cause
12 to her permanent disability at the time her industrial permanent disability became permanent and
13 stationary.

14 As pointed out by the WCJ's Report, Dr. Ramsey's September 17, 2014 report begins with the
15 conclusory statement that "[a]pplicant has widespread degenerative disease of the lower back, a naturally
16 occurring problem which would not be caused by the nature of her work." Yet, as observed by the WCJ,
17 the apportionment portion of Dr. Ramsey's report does not discuss the actual "nature of [applicant's]
18 work."

19 Dr. Ramsey's September 17, 2014 report then goes on to state that "the bulk of [applicant's]
20 degenerative] changes are genetically determined [and] [s]ooner or later, such problems will cause
21 difficulties." However, the statement that applicant's genetically determined degenerative problems
22 would cause difficulties "sooner or later" utterly fails to explain how or why the degenerative problems
23 became actual permanent disability by the time her industrial injury became permanent and stationary.

24 Dr. Ramsey's July 21, 2016 deposition testimony did not cure the defects in his September 17,
25 2014 report.

26 At his deposition, Dr. Ramsey declared that applicant's degenerative back condition "would have
27 happened [sometime] in her life regardless of her employment" and that it would have caused pain

1 “sooner or later.” Yet, these are generalized statements that failed to explain how and why the
2 degenerative condition had caused actual disability at the time her industrial injury became permanent
3 and stationary.

4 Dr. Ramsey’s deposition also makes various statements about her degenerative disease being
5 “genetic in origin,” being “genetically induced,” and being “overwhelmingly explained by genetics.”
6 However, Dr. Ramsey’s conclusion that applicant’s degenerative back disease was genetically caused or
7 related does not explain how and why, at the time applicant became permanent and stationary, 50% of
8 her disability was due to non-industrial causation. Rather, these statements merely reflect Dr. Ramsey’s
9 recognition that applicant, at some point in her life, was *at risk* for developing non-industrial back
10 disability.

11 Similarly, at his deposition, Dr. Ramsey stated that “[b]ack pain is — is rampant in the general
12 population regardless of activity, regardless of weight, regardless of diabetes, regardless of any number
13 of things” and later reiterated that “back pain is rampant in the general population.” Yet, the fact that
14 back pain may be “rampant in the general population” again fails to explain how and why applicant’s
15 degenerative back condition would have resulted in permanent disability by the time she became
16 permanent and stationary.

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1 Accordingly, I would affirm the WCJ's determination that Dr. Ramsey's opinion does not
2 constitute legally substantial evidence under the standards established by *Escobedo* and subsequently
3 endorsed by the appellate courts.

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6 ANNE SCHMITZ, Deputy Commissioner
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8 DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

9 APR 0 2 2018

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

12 MARILYN (TERRY) SCHUY
13 LENAHAN LEE
14 MASTAGNI HOLSTEDT

15 NPS/bea
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