

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

SHEILA LAMBERT, *Applicant*

vs.

**HUMAN GOOD VALLE VERDE,
permissibly self-insured, administered by
SEDGWICK, *Defendants***

**Adjudication Number: ADJ15549193
Santa Barbara District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration, the contents of the Report and the Opinion on Decision 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 and Opinion on Decision, which are both adopted and incorporated herein, and the for the reasons discussed below, we will deny reconsideration.

Preliminarily, we note that former Labor Code¹ section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

- (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
- (b)
 - (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

¹ All further statutory references are to the Labor Code, unless otherwise noted.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase “Sent to Recon” and under Additional Information is the phrase “The case is sent to the Recon board.”

Here, according to Events, the case was transmitted to the Appeals Board on July 30, 2024 and 60 days from the date of transmission is Saturday, September 28, 2024. The next business day that is 60 days from the date of transmission is Monday, September 30, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, September 30, 2024, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers’ compensation administrative law judge, the Report was served on July 30, 2024, and the case was transmitted to the Appeals Board on July 30, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 30, 2024.

The defendant has the burden of proof on apportionment. (Lab. Code, § 5705; *Pullman Kellogg v. Workers Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers’ Comp. Appeals Bd. (Kopping)* (2006) 142 Cal.App.4th 1099, 1115 [71

² WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Cal.Comp.Cases 1229]; *Escobedo v. Marshalls (Escobedo)* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc).) To meet this burden, the defendant “must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment.” (*Gay v. Workers’ Comp. Appeals Bd. (Gay)* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo, supra*, at p. 620.)

“Apportionment is a factual matter for the appeals board to determine based upon all the evidence.” (*Gay, supra*, 96 Cal.App.3d at p. 564.) Thus, the WCJ has the authority to determine the appropriate amount of apportionment, if any. The WCJ’s determination on apportionment must be based on substantial medical evidence. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 621.) Therefore, the WCJ must determine if the medical opinions regarding apportionment constitute substantial evidence. (See *Zemke v. Workmen’s Comp. Appeals Bd. (Zemke)* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

For the reasons stated in the Report and Opinion on Decision, we agree with the WCJ that the opinion of panel qualified medical evaluator (PQME) Michael Tooke, M.D., is not substantial medical evidence supporting a finding of apportionment. (*Hegglin v. Workers’ Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen’s Workers’ Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) [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].) In order to consist of substantial medical evidence on the issue of apportionment, a medical opinion

[M]ust 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.

For example, if a physician opines that approximately 50% of an employee’s back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.

And, if 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.

(Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 621-622 (Appeals Board en banc).)

Moreover, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. *(Garza v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)* Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. *(Id.)*

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 30, 2024

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

**SHEILA LAMBERT
LAW OFFICES OF ALAN H. FENTON
LAW OFFICES OF ERIC H. JACOBS**

PAG/abs

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

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I.
INTRODUCTION**

- | | | |
|----|----------------------------------|---|
| 1. | Applicant's Occupation: | Supply Clerk |
| | Age of Applicant: | [] (67) |
| | Date(s) of Injury: | August 5, 2017 through November 12, 2021 |
| | Parts of Body Injured: | Cervical spine, right shoulder, upper extremity, bilateral wrists, bilateral arms (including carpal tunnel syndrome and cubital tunnel syndrome), right thumb and right sensory radial nerve. |
| | Manner in Which Injury Occurred: | Not in dispute |
| 2. | Identity of Petitioner: | Defendant |
| | Timeliness: | The petition is timely |
| | Verification: | The petition is verified |
| | Services: | The petition was served on all parties |
| 3. | Date of Issuance of Order: | July 2, 2024 |
| 4. | Petitioner's Contention: | The WCJ erred in not finding apportionment. |

**II.
FACTS**

Applicant sustained an admitted cumulative trauma type of injury to numerous parts of her body. Michael Tooke, M.D., in the capacity of an orthopedic PQME, evaluated the applicant. Following an Opinion on Decision and Findings of Fact and Award finding applicant to be 88% permanently disabled pursuant to the findings of Michael Tooke, M.D. but rejecting his opinion on apportionment, defendant filed this instant Petition or Reconsideration.

**III.
DISCUSSION**

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures those defects.

The medical reporting and opinion submitted into evidence at trial were those of Michael Tooke, M.D. in the capacity of a PQME. Dr. Tooke authored five (5) medical reports and was deposed following the issuance of those reports.

There was a single report from the applicant's primary treating physician, Robert Ruth, MD.

Defendant does not complain about the finding of 88% permanent disability but contends the WCJ erred in not following Dr. Tooke's opinions on apportionment.

As stated in my Opinion on Decision –

On page 12 of Dr. Tooke's June 12, 2023 medical report, under the heading of **APPORTIONMENT**, Dr. Tooke opined,

“The applicant's CMC arthritis was not caused by her occupation but was aggravated to the extent that treatment was indicated. There is reasonable medical probability of 30% apportionment of causation to the pre-existing CMC arthritis, and 70% to occupational injury.

The applicant has a significant risk factor, peripheral entrapment neuropathy because she is diabetic. Additionally, she is obese, and obesity is a significant risk factor for carpal tunnel syndrome. There is reasonable medical probability of 30% apportionment of causation to the individual risk factors of obesity and diabetes and 70% to the occupational injury.

Because the chronic right shoulder/upper extremity pain is a postoperative complication it is a compensable consequence. Therefore, there is 70% apportionment of causation to the occupational injury and 30% to the pre-existing conditions, i.e., 39% WPI attributable to the work injury.”

On page 2 of his August 30, 2023 medical report, under the heading of **APPORTIONMENT**, Dr. Tooke wrote,

“Because the cervical injury is a compensable consequence, there is reasonably medically probable apportionment of causation of 70% to the occupational injury and 30% to individual non-occupational factors.

These opinions do not constitute substantial medical evidence on the issue of apportionment. You cannot apportion an injury as a compensable consequence merely because the underlying injury may be susceptible to apportionment.

Nor can you merely state the risk factors of her diabetes or weight without giving an explanation as to the how and why these factors contributed or caused the permanent disability, and why he chose a 70/30 ratio.

IV.
RECOMMENDATION

For the reasons stated, it is respectfully recommended that Defendant's Petition for Reconsideration be denied based on the arguments and merits addressed herein.

DATE: July 30, 2024

Scott J. Seiden
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

FACTS

The stipulations of the parties are accepted as fact.

EARNINGS

Applicant is claiming Average Weekly Earnings (AWE) of \$610.14. This is based on an earning capacity of seven hours per day, five days per week at an hourly rate of \$17.43. Defendant is claiming an AWE of \$291.00 based on a wage statement.

Based on the credible testimony of applicant with due regard for her demeanor as a witness, who testified when she was hired, she was advised her hours were Monday through Friday from 9:00 a.m. to 4:30 p.m. at an hourly rate of \$17.43.

It is also based on the credible testimony of Jenny Firth, a defense witness, with due regard for her demeanor as a witness, who testified confirming a document from the employer confirming her work hours were Monday through Friday from 9:00 a.m. to 4:30 p.m. at an hourly rate of \$17.43. Ms. Firth believes the applicant actually did work those hours at times.

The testimony was credible and consistent and applicant's AWE is found to be \$610.05.

TEMPORARY DISABILITY

Applicant is not seeking any additional periods of Temporary Disability, merely the difference in the amount paid by defendant and the amount awarded herein.

Applicant is entitled to the differential in the amount paid versus the amount determined hereinabove in a sum to be determined and adjusted by the parties.

PERMANENT DISABILITY

The factors of Permanent Disability set forth below are based upon the credible testimony of applicant with due regard for her credibility and demeanor as a witness and the medical reporting of Michael Tooke, M.D. in the capacity of a PQME. This was the only medical evidence submitted.

On page 11 of his June 12, 2023, medical report, under the heading of **IMPAIRMENT**, Dr. Tooke wrote,

“The primary problem is right shoulder and upper extremity pain and consequent dysfunction. The permanent impairment determined by Dr. Ruth is clearly not accurate or adequate. Refer to ADL chart above, which reveals severe impairment.

Although the applicant's right upper extremity disorder does not completely fulfil the Budapest Criteria, I believe the condition is analogous, and that it is appropriate to invoke Almaraz-Guzman to use AMA Guides, 5th Edition, Table 13-22 to estimate WPI. Her condition corresponds to Class 4, dominant hand,

40% to 60% WPI. Fifty Five percent (55%) is a reasonably medically probable accurate estimation of WPI.”

On page 2 of his August 30, 2023, under the heading of **IMPAIRMENT**, Dr. Tooke stated,

“The cervical spine disorder corresponds to cervical DRE category II, AMA Guides, 5th Edition, Table 15-5, 5% WPI. I believe that the use of the ROM method cannot be utilized because the applicant's cervical ROM is limited by pain and guarding, i.e. not structural.”

Based on the medical reporting the factors of disability rate as follows:

RIGHT SHOULDER, et al

16.02.02.00 55 [1.4] – 77 – 360G – 79 – 86

CERVICAL SPINE

15.01.00.00 8 [1.4] – 7 - 360G – 8 – 11

86 C 11 = 88

Applicant is entitled to a Permanent Disability award of 88%, equivalent to 721.25 weeks of indemnity payable at the weekly rate of \$290.00 in the aggregate amount of \$209,162.50 commencing March 10, 2023, less attorney fees as provided hereinbelow.

Following the payment of the Permanent Disability benefits, applicant is entitled to a lifetime weekly pension amount of \$216.46, less attorney fees as provided hereinbelow.

APPORTIONMENT

Based on the medical reporting of Michael Tooke, M.D., in his capacity as a PQME, there is no legal basis for apportionment.

On page 12 of Dr. Tooke’s June 12, 2023, under the heading of **APPORTIONMENT**, Dr. Tooke opined,

“The applicant's CMC arthritis was not caused by her occupation but was aggravated to the extent that treatment was indicated. There is reasonable medical probability of 30% apportionment of causation to the pre-existing CMC arthritis, and 70% to occupational injury.

The applicant has a significant risk factor peripheral entrapment neuropathy because she is diabetic. Additionally, she is obese, and obesity is a significant risk factor for carpal tunnel syndrome. There is reasonable medical probability of 30% apportionment of causation to the individual risk factors of obesity and diabetes and 70% to the occupational injury.

Because the chronic right shoulder/upper extremity pain is a postoperative complication it is a compensable consequence. Therefore, there is 70% apportionment of causation to the occupational injury and 30% to the pre-existing conditions, i.e., 39% WPI attributable to the work injury.”

On page 2 of his August 30, 2023, medical report, under the heading of **APPORTIONMENT**, Dr. Tooke wrote,

“Because the cervical injury is a compensable consequence, there is reasonably medically probable apportionment of causation of 70% to the occupational injury and 30% to individual non-occupational factors”.

Neither of these opinions by Dr. Tooke on apportionment as it relates to the body parts involved constitute substantial medical evidence.

As to the CRPS, the doctor lists risk factors but never explains the how and why the Permanent Disability is apportionable to the risk factors and what that actually caused in terms of apportionable Permanent Disability. Nor does he ever explain or justify why he used a 70/30 ratio.

As to the cervical spine, the doctor does not explain the how or the why it is a compensable consequence and why there is apportionment nor does he ever identify what the non-industrial factors are. He does not explain how or why these non-industrial factor caused apportionable Permanent Disability. Therefore, as to the cervical spine applicant is entitled to an un-apportioned award.

OCCUPATIONAL GROUP NUMBER

The following is based on the Schedule of Rating Permanent Disability for dates of injury post January 1, 2005.

Applicant is claiming an Occupation Group Number of 360. This occupation generally includes Porters and Packers.

Defendant is claiming an Occupational Group Number of 204. That is in error since there is no Group Number 204. However, I believe defendant was raising Occupational Group Number 214 since Group Number 214 generally involve clerical duties, however, the usual occupations include Educators and Retail Sales occupations.

Applicant testified she was initially hired as a receptionist but then worked as a supply clerk. Based on applicant’s testimony with due regard for her demeanor and creditability as a witness and since a supply clerk is a regularly scheduled occupation, Occupational Group Number 360 more accurately reflects the duties performed based on the testimony presented.

LIABILITY FOR SELF PROCURED MEDICAL TREATMENT

Based on the medical reporting by Michael Tooke, M.D., in his capacity as a PQME, applicant is entitled to be reimbursed for self-procured medical expenses paid out of her own pocket in an amount to be adjusted by the parties.

NEED FOR FURTHER MEDICAL TREATMENT

Based on the medical reporting by Michael Tooke, M.D., in his capacity as a PQME, applicant is entitled to future medical care on the body parts found to have been injured on an industrial basis.

ATTORNEY FEES

Based upon Workers' Compensation Appeals Board Rules of Practice and Procedure Section 10775, the guidelines for awarding attorney fees found in Policy and Procedure Manual Index Number 6.8.4, a reasonable attorney's fees is found to be \$26,759.01, which shall be commuted off of the far end of the award, payable to Alan Fenton, Esq.

Applicant's attorney is also entitled to a fee in connection with the Life Pension benefits awarded hereinabove, in the amount of \$6,867.15 to be commuted off of the side of the Award.

CREDIT FOR OVERPAYMENT OF TD

To the extent there was an overpayment of Temporary Disability after the difference is determined, defendant is entitled to a credit against any further Temporary Disability benefits paid.

DATE: July 2, 2024

Scott J. Seiden
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE