WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

CHRISTINE MCDANIEL*, Applicant*

vs.

A. TEICHERT AND SON INC.;
HELMSMAN MANAGEMENT SERVICES*, Defendants*

Adjudication Numbers: ADJ12034566, ADJ11431030, ADJ11263852

Sacramento District Office

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, and the for the reasons discussed below, we will deny reconsideration.

Preliminarily, we note that former Labor Code[1] 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.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

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

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 August 29, 2024, and 60 days from the date of transmission is Monday, October 28, 2024. This decision is issued by or on October 28, 2024, so that we have timely acted on the petition as required by Labor Code 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 August 29, 2024, and the case was transmitted to the Appeals Board on August 29, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 29, 2024.

We now turn to the merits. 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 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, we agree with the WCJ that the opinion of agreed medical evaluator (AME) Joel Renbaum, M.D., is not substantial medical evidence that supports 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, supra*, 70 Cal.Comp.Cases at p. 621 [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, supra*, 70 Cal.Comp.Cases at p. 621-622.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 22, 2024

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

CHRISTINE MCDANIEL
SMOLICH & SMOLICH
HANNA, BROPHY, MACLEAN, MCALEER & JENSEN
EMPLOYMENT DEVELOPMENT DEPARTMENT

PAG/*pm*

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.

Date of Injury:	CT through July 29, 2017
Age on DOI:	42 years old
Occupation:	Laborer
Parts of Body Injured:	Neck and Back
Identity of Petitioners:	Defendant
Timeliness:	Petition was filed timely
Verification:	Petition was verified
Date of Order:	August 2, 2024
Petitioners Contentions:	Defendant contends the WCJ fails to support their contention that Dr. Renbaum's opinion on apportionment is not supported by substantial medical evidence in the Findings and Award dated August 2, 2024. Specifically, Defendant contends that Dr. Renbaum's opinions on apportionment are substantial medical evidence based on evidence of pre-existing non-industrial medical conditions, degenerative disease, and treatment beginning in 2011.

II.
FACTS

Applicant sustained an industrial injury to the neck and back while working as a laborer during the cumulative trauma period ending July 29, 2017. After trial, an award issued of 74% permanent disability without apportionment. Applicant was also awarded a life pension, reasonable attorney fee, and future medical.

Defendant filed a Petition for Reconsideration contending Dr. Renbaum's opinions on apportionment are substantial medical evidence. Applicant filed an Answer contending the mere fact that a report addresses causation of permanent disability and makes an apportionment determination with approximate percentages does not necessarily render a report reliable. In the

Answer, Applicant further contends the physician must explain the nature of the non-industrial condition, and how and why that non-industrial condition is responsible for part of the disability pursuant to *Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 620 (en banc). Applicant contends apportionment may be denied if the physician fails to explain or support their conclusion on apportionment citing *Sharp Grossmont Hospital v. WCAB* (*Powell*) (2005) 71 Cal. Comp. Cases 85.

III.
DISCUSSION

PERMANENT DISABILITY AND APPORTIONMENT

The parties stipulated that the permanent disability is 74% if there is no apportionment. Apportionment was the primary issue at trial and is the issue raised in Defendant's Petition for Reconsideration.

The basis for apportionment must be clear; the medical-legal report must "describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion." *Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 621 (en banc).

There was documentation in the medical records of prior neck and back problems. That alone is not sufficient to support a finding of apportionment. The x-ray report of the cervical spine from January 2010 shows mild narrowing at C6-7. The x-ray report of the lumbar spine from the same day shows mild spondylosis. (Defense Exhibit A) In addition, Applicant was seen on February 2, 2011, for upper back pain wherein she described intermittent spasms since a skiing accident in 2006 and a C5/6 fracture sustained during an auto accident in 2006. (Defense Exhibit B)

For the industrial injury cumulative trauma through July 29, 2017, involving the neck and back, Applicant had an AME evaluation by Dr. Renbaum on February 7, 2019. Dr. Renbaum reviewed medical records and performed a physical examination. Dr. Renbaum diagnosed Applicant with status post-anterior cervical discectomy and fusion at C5-6, C6-7 performed in December 2017, multilevel degenerative disc disease of the cervical spine based on diagnostic studies, a lumbar strain with radicular pain, and multilevel degenerative disc disease of the lumbar spine based on an MRI. (Joint Exhibit AA)

In his report dated February 7, 2019, Dr. Renbaum addresses apportionment as follows:

> Using a reasonable degree of medical probability, it is my opinion that it is appropriate to apportion 10% of the cervical and lumbar impairment to underlying degenerative changes and the remaining 90% to the July 29, 2017 cumulative trauma and the September 29, 2017 specific work injury, which are inextricably intertwined. (Joint Exhibit AA)

Regarding apportionment, Dr. Renbaum provides no rational as to why appointment is appropriate. He fails to describe how degenerative changes factor into the impairment finding. Furthermore, he simply states a conclusion about the cumulative trauma and specific injury being inextricably intertwined without any explanation.

Dr. Renbaum performed a re-evaluation on March 11, 2021, for which he reviewed medical records and performed a physical examination. Regarding apportionment, he states as follows:

> With respect to the issue of apportionment, I have again considered Labor Code section 4663 and 4664.
>
> It remains my opinion that it is appropriate to apportion 10% of the patient's cervical spine and lumbar spine impairment to underlying degenerative changes and 90% to the July 29, 2017 specific injury and the industrial cumulative trauma injury to September 29, 2017, which are inextricably intertwined." (Joint Exhibit CC)

In this subsequent report, Dr. Renbaum reiterates his apportionment finding but again fails to provide any reasoning in support of his conclusion.

On February 9, 2023, Applicant received another re-evaluation performed by Dr. Renbaum. Dr. Renbaum refers to his prior report and maintains his findings on apportionment. Then Dr. Renbaum notes that he is informed by defense counsel that the report is unratable. Dr. Renbaum states based on the proximity between the cumulative trauma and the specific injury, he cannot parse out the apportionment with greater degree of specificity without being speculative. (Joint Exhibit DD) This does not contain any elaboration upon the basis for his apportionment findings.

Dr. Renbaum was deposed on June 19, 2023, wherein he testified in pertinent part as follows: Dr. Renbaum acknowledges references to neck and back problems previously in 2011 but indicates Applicant was working without treatment to her neck or back. When Defendant contends the industrial apportionment should be to the cumulative trauma instead of the specific injury, Dr. Renbaum states he does not care if Applicant is agreeable also. Dr. Renbaum states Applicant

became employed in July 2013 and was previously seen in May 2013, 2011, and 2010 for neck and back problems so he would need to do apportionment for symptoms preexisting employment. Dr. Renbaum indicates Applicant had neck and back complaints in 2016 and a specific injury in September 2017 resulting in CT scans of her neck and back. Dr. Renbaum indicates Applicant was working a vigorous job successfully and lost hand strength and had neck and back problems. Dr. Renbaum notes that Applicant received a diagnosis and surgery quickly thereafter. Dr. Renbaum finds apportionment regarding the cervical spine to be appropriate based on the x-ray report from January 2010. Dr. Renbaum acknowledges that Applicant had neck and back problems before being employed. Dr. Renbaum indicates Applicant then worked successfully for four years without restrictions. Dr. Renbaum agreed with Defendant that the apportionment should be higher than 10% and raised the non-industrial apportionment to 20%. Dr. Renbaum indicates he was okay apportioning 80% to the cumulative trauma for now based on the assumption that there was no injury to the neck and back during the specific injury when Applicant fell into the trench. Dr. Renbaum indicates if that is an acceptable history, and it is accepted by both sides, then he is okay saying that although he does not know if it is an acceptable opinion. Dr. Renbaum indicates he voiced his opinion of 80% apportionment to the cumulative trauma to help the parties reach a settlement and that it is not exactly his opinion. (Joint Exhibit EE)

During his deposition, proposes 80% apportionment to the cumulative trauma and 20% to a pre-existing condition contingent upon an assumption that Applicant sustained no injury to the neck or back during the specific injury and in order to help facilitate settlement. This does not appear to be based on reasonable medical probability but established in qualifications. Regarding the 80/20 apportionment division, Dr. Renbaum even states "It's not necessarily exactly my opinion, but I'm willing to have that opinion."

As described above, Dr. Renbaum fails to portray in detail the nature of apportionment. Dr. Renbaum does not explain how the prior neck and back problems are responsible for part of the current impairment. Initially, Dr. Renbaum only states his apportionment finding of 10% preexisting and 90% industrial to the specific and cumulative trauma injuries. Then Dr. Renbaum reiterates his apportionment finding in later reports without further explaining the support for his opinion. In a subsequent report, Dr. Renbaum indicates he cannot parse out the apportionment between the two industrial injuries without being speculative. Finally, during his deposition, Dr. Renbaum testifies the non-industrial apportionment should be higher and assigns 20% without further explanation. Dr. Renbaum further testifies that he is okay with apportioning 80% to the cumulative trauma injury assuming the specific injury did not involve the neck and back and to help the parties reach a settlement. Dr. Renbaum indicates this is not exactly his opinion. This is not substantial medical evidence. Applicant is entitled to an award of permanent disability without apportionment.

IV.
RECOMMENDATION

For the reasons stated above, it is respectfully recommended that Defendant's Petition for Reconsideration be denied.

DATE: August 29, 2024

Ariel Aldrich
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE