WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CLEMON SHELTON, *Applicant*

vs.

CITY OF LOS ANGELES, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ9685747
Van Nuys 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 dated May 13, 2022, the Workers' Compensation Arbitrator ("WCA") found that applicant, while employed during the period November 2, 1998 through July 2, 2013 as a custodian by the City of Los Angeles, Department of Airports, sustained injury arising out of and incurring in the course of employment to his lumbar spine, cervical spine, both shoulders, right wrist, both knees hearing, left wrist, psyche and sleep and did not sustain an industrial gastrointestinal injury. The WCA also found that the injury resulted in permanent disability of 84%, after apportionment, that the permanent disability rating is based on "applicant's Whole Person Impairment [being] combined using the CVC [Combined Values Chart] and not by adding the disabilities in accordance with [*Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ den.)]," and that applicant's attorney is entitled to reasonable attorney fee of $30,000.00, "to be commuted over the life of the Award."

Applicant filed a timely petition for reconsideration of the WCA's decision. Applicant contends that the WCA erred in combining rather than adding applicant's orthopedic and hearing disabilities pursuant to *Athens Administrators v. Workers' Comp. Appeals Bd.* (2013) 78

[1] Deputy Commissioner Anne Schmitz signed the Opinion and Order Granting Petition for Reconsideration dated October 11, 2022. Deputy Commissioner Schmitz is not available to participate in this matter. A new panel member has been substituted in her place.

Cal.Comp.Cases 213 [writ den.] ("*Kite*"), that adding the disabilities is supported by the medical opinion of Dr. Salkinder, the Agreed Medical Evaluator ("AME") in otolaryngologic medicine concerning applicant's hearing loss, that the WCA erred in not seeking clarification from Dr. Salkinder, that the WCA erred in applying 25% non-industrial apportionment to applicant's bilateral knee disability, and that applicant's attorney should be allowed a fee equivalent to 15% of "the total benefits contained in the award."

The Appeals Board did not receive an answer from defendant.

The WCA submitted a Report and Recommendation ("Report").[2]

Based on our review of the record and applicable law, we conclude that the WCA must revisit the issue of whether applicant's hearing loss and bilateral knee disabilities should be added or combined, according to the principles set forth in the Appeals Board's recent en banc decision *Vigil (Sammy) v. County of Kern* (2024) 89 Cal.Comp.Cases 686 ("*Vigil*"). The WCA also may revisit the issue of non-industrial apportionment of applicant's bilateral knee disability, consistent with *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc]. Further, the WCA concedes error on the issue of attorney's fees. We will affirm the uncontested parts of the WCA's decision, amend it consistent with the above conclusions, and we will return this matter to the WCA for further proceedings and new decision on permanent disability, apportionment, and attorney's fees.

I. RECONSIDERATION WAS TIMELY GRANTED

Only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see Cal. Code Regs., tit. 8, §§ 10320, 10330.)[3] The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the

[2] The Arbitrator's Report is adopted and incorporated only as set forth in the body of this opinion. However, we agree with the Arbitrator's Report (at 7:24-8:11) that defendant did not waive the issue of combining versus adding disabilities. (See *Johnson v. Cal. Dept. Corrections and Rehab.* (2017) 2017 Cal. Wrk. Comp. P.D. LEXIS 343.)

[3] The use of the term 'appeals board' throughout the Labor Code refers to the Appeals Board and not a DWC district office. (See e.g., Lab. Code, §§ 110, et. seq. (Specifically, § 110 (a) provides: "'Appeals board' means the Workers' Compensation Appeals Board. The title of a member of the board is 'commissioner.'").) Section 111 clearly spells out that the Appeals Board and DWC are two different entities.

petition issues, the parties may seek review under Labor Code section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.)

Former Labor Code section 5909 provided that a petition was denied by operation of law if the Appeals Board did not "act on" the petition within 60 days of the petition's filing with the 'appeals board' and not within 60 days of its filing at a DWC district office. A petition for reconsideration is initially filed at a DWC district office so that the WCJ may review the petition in the first instance and determine whether their decision is legally correct and based on substantial evidence. Then the WCJ determines whether to timely rescind their decision, or to prepare a report on the petition and transmit the case to the Appeals Board to act on the petition. (Cal. Code Regs., tit. 8, §§ 10961, 10962.)[4] Once the Appeals Board receives the case file, it also receives the petition in the case file, and the Appeals Board can then "act" on the petition.

If the case file is never sent to the Appeals Board, the Appeals Board does not receive the petition contained in the case file. On rare occasions, due to an administrative error by the district office, a case is not sent to the Appeals Board before the lapse of the 60-day period. On other rare occasions, the case file may be transmitted, but may not be received and processed by the Appeals Board within the 60-day period, due to an administrative error or other similar occurrence. When the Appeals Board does not review the petition within 60 days due to irregularities outside the petitioner's control, and the 60-day period lapses through no fault of the petitioner, the Appeals Board must then consider whether circumstances exist to allow an equitable remedy, such as equitable tolling.

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co. v. Indus. Acc. Com*. (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2

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[4] Petitions for reconsideration are required to be filed at the district office and are not directly filed with the Appeals Board. (Cal. Code Regs., tit. 8, § 10995(b); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."].) Although the Appeals Board and the DWC district office are separate entities, they do not maintain separate case files; instead, there is only ***one*** *case file*, and it is maintained at the trial level by DWC. (Cal. Code Regs., tit. 8, § 10205.4.)

When a petition for reconsideration is filed, the petition is automatically routed electronically through the Electronic Adjudication Management System (EAMS) to the WCJ to review the petition. Thereafter, the entire case file, *including the petition for reconsideration*, is then electronically transmitted, i.e., sent, from the DWC district office to the Appeals Board for review.

Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd. (Lutz)* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok*, *supra* 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.[5]

In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of Labor Code section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced, especially in light of the fact that the Appeals Board had repeatedly assured the petitioner that it would rule on the merits of the petition. (*Id.*, at p. 1108.)

Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) The touchstone of the workers' compensation system is our constitutional mandate to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., art. XIV, § 4.) "Substantial justice" is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers' compensation system must focus on the *substance* of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 ["No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division."].)

With that goal in mind, all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States

[5] Labor Code section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) If a timely filed petition is never considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity not within the control of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque, supra* 1 Cal.3d 627, 635.) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d 753.)

Substantial justice is not compatible with such a result. A litigant should not be deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control. This is doubly true when the Appeals Board's action in granting a petition for reconsideration has indicated to the parties that we will exercise jurisdiction and issue a final decision on the merits of the petition, and when, as a result of that representation, the petitioner has forgone any attempt to seek judicial review of the "deemed denial." Having induced a petitioner not to seek review by granting the petition, it would be the height of injustice to then leave the petitioner with no remedy.

In this case, it appears the WCA issued the Findings and Award on May 13, 2022 and applicant filed a timely petition on May 27, 2022. However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of applicant's petition until August 19, 2022. Further, according to EAMS, it appears the case file was not transmitted to the Appeals Board until August 24, 2022. Although the Appeals Board failed to act on applicant's petition within 60 days of its filing - through no fault of the parties - the Appeals Board granted the petition on October 11, 2022, within 60 days of becoming aware of it. In doing so, we sent a clear signal to the parties of our intention to exercise jurisdiction and issue a final decision after reconsideration. It appears that neither party expressed any opposition to this course of action, and it also appears clear from the fact that neither party sought judicial review of our grant of reconsideration that both parties have acted in reliance on our grant.

Under the circumstances, the requirements for equitable tolling have been satisfied in this case. Accordingly, our time to act on defendant's petition was equitably tolled until 60 days after August 19, 2022. Because we granted the petition on October 11, 2022, our grant of

reconsideration was timely, and we may issue a decision after reconsideration addressing the merits of the petition.

The fact that applicant filed a petition for reconsideration of an Arbitrator's decision rather than a WCJ's decision does not change the analysis set forth above.

WCAB Rule 10995 provides that if the arbitrator does not rescind the order, decision or award within 15 days of receiving the petition for reconsideration, the arbitrator is required to forward an electronic copy of their report and the complete arbitration file within 15 days after receiving the petition for reconsideration pursuant to WCAB Rule 10995(c)(3). (Cal. Code Regs., tit. 8, § 10995(c)(1)-(3).) WCAB Rule 10914 requires the arbitrator to make and maintain the record of the arbitration proceeding, which must include the following:

> (1) Order Appointing Arbitrator;
>
> (2) Notices of appearance of the parties involved in the arbitration;
>
> (3) Minutes of the arbitration proceedings, identifying those present, the date of the proceeding, the disposition and those served with the minutes or the identification of the party designated to serve the minutes;
>
> (4) Pleadings, petitions, objections, briefs and responses filed by the parties with the arbitrator;
>
> (5) Exhibits filed by the parties;
>
> (6) Stipulations and issues entered into by the parties;
>
> (7) Arbitrator's Summary of Evidence containing evidentiary rulings, a description of exhibits admitted into evidence, the identification of witnesses who testified and summary of witness testimony;
>
> (8) Verbatim transcripts of witness testimony if witness testimony was taken under oath.
>
> (9) Findings, orders, awards, decisions and opinions on decision made by the arbitrator; and
>
> (10) Arbitrator's report on petition for reconsideration, removal or disqualification.
>
> (Cal. Code Regs., tit. 8, § 10914(c).)

In this case, the WCA issued the Findings and Award on May 13, 2022. However, it appears that filing of the arbitration file in EAMS was not completed as required by WCAB Rule 10995, until August 24, 2022.

The Appeals Board may not ignore due process for the sake of expediency. (*Barri v. Workers' Comp. Appeals Bd.* (2018) 28 Cal.App.5th 428, 469 [83 Cal.Comp.Cases 1643] [claimants in workers' compensation proceedings are not denied due process when proceedings are delayed in order to ensure compliance with the mandate to accomplish substantial justice]; *Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805] [all parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions].) "Even though workers' compensation matters are to be handled expeditiously by the Board and its trial judges, administrative efficiency at the expense of due process is not permissible." (*Fremont Indem. Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971 [49 Cal.Comp.Cases 288]; see *Ogden Entertainment Services v. Workers' Comp. Appeals Bd.* (*Von Ritzhoff*) (2014) 233 Cal.App.4th 970, 985 [80 Cal.Comp.Cases 1].)

The Appeals Board's constitutional requirement to accomplish substantial justice means that the Appeals Board must protect the due process rights of every person seeking reconsideration. (See *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd.* (1999) 74 Cal.App.4th 928, 936 [64 Cal.Comp.Cases 986] ["essence of due process is . . . notice and the opportunity to be heard"]; *Katzin v. Workers' Comp. Appeals Bd.* (1992) 5 Cal.App.4th 703, 710 [57 Cal.Comp.Cases 230].) In fact, "a denial of due process renders the appeals board's decision unreasonable..." and therefore vulnerable to a writ of review. (*Von Ritzhoff*, *supra*, 233 Cal.App.4th at p. 985 citing Lab. Code, § 5952(a), (c).) Thus, due process requires a meaningful consideration of the merits of every case de novo with a well-reasoned decision based on the evidentiary record and the relevant law.

As with a workers' compensation administrative law judge (WCJ), an arbitrator's decision must be based on admitted evidence and must be supported by substantial evidence. (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Meaningful review of an arbitrator's decision requires that the "decision be based on an ascertainable and adequate record," including "an *orderly identification* in the record of the evidence submitted by a party; and *what evidence is admitted or denied admission*." (*Lewis v. Arlie Rogers & Sons* (2003) 69 Cal.Comp.Cases 490, 494, emphasis in original.) "An organized

evidentiary record assists an arbitrator in rendering a decision, informs the parties what evidence will be utilized by the arbitrator in making a determination, preserves the rights of parties to object to proffered evidence, and affords meaningful review by the Board, or reviewing tribunal." (*Id.*; see also *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753 [a full and complete record allows for a meaningful right of reconsideration].)

Therefore, until the record of proceedings was complete in this case, we were unable to complete our review.

II. THE MERITS – THE ARBITRATOR MUST REVISIT THIS CASE

The Report of the Arbitrator provides a detailed overview of the relevant facts, as follows:

> The above-captioned matter was set for Arbitration before Mark L. Kahn, Arbitrator, on March 3, 2022.
>
> The parties reached Stipulations, Issues, admitted Exhibits into evidence and testimony was taken and the parties agreed to submit the matter on the present record.
>
> The applicant was evaluated by the following physicians whose reports were relied on the Arbitrator in coming to his conclusions:
>
> Soheil Aval, M.D., Agreed ADR panel QME in orthopedic surgery.
> Nina Patel, M.D., ADR panel QME otolaryngologic.
> Stanley Majcher, M.D., ADR panel QME internal medicine.
> Barbara Justice, M.D., ADR panel QME in psychiatry
> K. C. Salkinder, M.D., ADR panel QME otolaryngologic.
>
> The Arbitrator found the applicant had the following Whole Person Impairments before apportionment, application of Labor Code §4660.1 and use of the CVC.
>
> Psychiatric a 15% Whole Person Impairment based on the medical reports of Barbara Justice, M.D., ADR panel QME in psychiatry.
>
> Sleep disorder a 13% Whole Person Impairment based on the medical reports of Stanley Majcher, M.D., ADR panel QME internal medicine.
>
> All orthopedic disability based on the medical reports of Soheil Aval, M.D., Agreed ADR panel QME in orthopedic surgery
>
> Cervical spine a 15% Whole Person Impairment.
> Right shoulder a 7% Whole Person Impairment.
> Left shoulder a 4% Whole Person Impairment

> Right wrist a 4% Whole Person Impairment.
> Left wrist a 0% Whole Person Impairment
> Lumbar spine a 12% Whole Person Impairment.
> Right knee a 20% Whole Person Impairment.
> Left knee a 20% Whole Person Impairment.
>
> Hearing loss a 19% [Whole Person Impairment] based on medical report of K. C. Salkinder, M.D., ADR panel QME otolaryngologic.
>
> The Arbitrator found that, pursuant to Labor Code §4660.1, the applicant was not entitled to an increased impairment rating for psychiatric and sleep dysfunction.
>
> The Arbitrator found applicant's Whole Person Impairment[s]…shall be combined using the CVC and not by adding the disabilities in accordance with the *Kite* case.
>
> The Arbitrator found apportionment as follows:
>
> Cervical spine, bilateral shoulders, and bilateral wrist 85% to the continuous trauma and [15]% to pre-existing underlying degenerative changes.
>
> Lumbar spine, 10% of the permanent disability was apportioned to pre-existing degenerative disc disease 90% to the continuous trauma.
>
> Right knee and left knee 25% apportioned pre-existing factors and 75% to the continuous trauma.
>
> Hearing loss is a 19% Whole Person Impairment apportioned 95% to industrial causes.
>
> The Arbitrator issued rating instructions for a permanent disability rating based on the above findings.
>
> On March 1, 2022, Roxanne Massey issued a permanent disability rating based on the Arbitrator's instructions resulting in an 84% permanent disability rating after apportionment, applying Labor Code §4660.1 and using the CVC.

Responding to applicant's contention that his orthopedic and hearing disabilities should be added pursuant to *Kite, supra*, the Arbitrator states in his Report:

> In this case, the facts show that K. C. Salkinder, M.D. in his otolaryngologic report on page 19 states, based on *Kite*, the hearing impairment that was identified should be considered as a separate impairment and is not

> overlapping with orthopedic impairments. Therefore, the impairment should be added.
>
> Dr. Aval, the QME in orthopedic surgery, in his deposition of December 20, 2018, at page 10 testified that he came to the rating based on a bilateral knee replacement Whole Person Impairment using a strict interpretation of the guides.
>
> When asked on page 12 of his deposition if he felt the bilateral knee impairment should be added based on the synergistic effect or should they be combined together, he indicated that the standard method of combining was appropriate. He indicated the applicant had beneficial effects from knee replacements and has a normal gait. He did not see any reason to justify adding instead of combining disabilities.
>
> In the opinion of the Arbitrator, the sentence on adding the disabilities in the report of Dr. Salkinder is not substantial evidence.
>
> The *Kite* case requires that the physician set forth how and why not applying the CVC does not accurately reflect the applicant's permanent impairment and adding the disabilities more accurately reflects the applicant's permanent impairment.
>
> Dr. Salkinder never opined that adding the disabilities would more accurately reflect applicant's permanent impairment. The physician gave a mere conclusion [that] the disabilities should be added without explanation of how and why the orthopedic and hearing loss disabilities should be added. In the opinion of the Arbitrator, the opinion of Dr. Salkinder that the hearing loss and orthopedic disabilities should be added is no based on substantial evidence.

However, we conclude that the Arbitrator must revisit his analysis of whether the hearing loss and orthopedic disabilities should be combined or added, in light of the Appeals Board's recent en banc opinion in *Vigil (Sammy) v. County of Kern* (2024) 89 Cal.Comp.Cases 686. Therein the Board held that the Combined Values Chart ("CVC") in the Permanent Disability Rating Schedule ("PDRS") may be rebutted, and impairments may be added, where the applicant establishes the impact of each impairment on the activities of daily living (ADLs) and either (a) there is no overlap between the effects on ADLs as between the body parts rated, or (b) there is overlap but the overlap increases or amplifies the impact on the overlapping ADLs.

In this case, Dr. Aval, the AME in orthopedics, provided an extensive list of applicant's ADLs in his report of May 18, 2018:

> Mr. Shelton describes moderate difficulties with brushing and washing his hair, bathing and showering, preparing meals, brushing his teeth, and swallowing his food. He notes moderate difficulty with lifting and carrying a gallon of milk. He has moderate to severe difficulty lifting and carrying more than 20 pounds. He is unable to lift or carry more than 50 pounds. He describes moderate to severe difficulty with bending and twisting his neck, bending and twisting his back, and lifting his arms overhead. He is unable to push, pull, kneel, squat, or crawl. He has moderate difficulty climbing stairs and ladders and with typing/writing. He has moderate difficulty sitting more than 1 hour with moderate to severe difficulty sitting more than 2 hours. He is unable to sit more than 4 hours. Mr. Shelton describes moderate difficulty with standing or walking more than 1 hour with moderate to severe difficulty standing or walking more than 2 hours. He is unable to stand or walk more than 4 hours.
>
> Mr. Shelton describes difficulties with sexual function, difficulty with sleeping, loss of hearing, speech problems, stomach upset/nausea, depression, and anxiety.
>
> (Joint Exhibit C, exhibit p. 3.)

In his report of March 10, 2021, however, Dr. Aval provided only a brief list of applicant's restrictions and ADLs:

> The patient denies any difficulty with self-care activities. There is moderate pain with lifting or carrying more than 20 pounds, as well as with bending or twisting of his neck, lifting his arms overhead, and climbing stairs. He is unable to kneel, squat, or crawl. There is moderate pain with sitting, standing, or walking for more than one hour with the pain becoming moderate to severe after two hours. He sleeps about four to five hours per night and reports interrupted sleep due to pain, depression, and anxiety. He feels tired during the day due to lack of sleep and takes naps.
>
> (Joint Exhibit C, p. 3 of Dr. Aval's 3/10/21 report.)

We note that the first prong in applicant's burden of proof under *Vigil* is to establish the impact of each impairment on his activities of daily living, but here there are substantial differences in Dr. Aval's recording of applicant's ADLs in the two reports referenced above. Therefore, we conclude that the Arbitrator must obtain a supplemental report from Dr. Aval to ascertain the impact of applicant's orthopedic impairment on his ADLs. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc].) Similarly, the Arbitrator must obtain a supplemental report from Dr. Salkinder to ascertain the

impact of applicant's hearing impairment on his ADLs. This is because Dr. Salkinder never reported on applicant's ADLs in the first place.

Once the two physicians update their reports on the impact of the orthopedic impairment and the hearing impairment on applicant's ADLs, the Arbitrator can determine whether applicant has established that there is either no overlap between the effects on ADLs as between the body parts rated or there is overlap but the overlap increases or amplifies the impact on the overlapping ADLs. On the latter issue, Dr. Aval and Dr. Salkinder may each provide an opinion as to whether any ADLs that are found to be overlapping increase or amplify the impact on those ADLs, from the perspective of their areas of expertise – Dr. Aval from an orthopedic perspective and Dr. Salkinder from an otolaryngologic perspective. In our view, this avoids the Arbitrator's concern that an opinion offered by a physician outside the physician's area of expertise is not substantial evidence, as asserted in *Bradley v. Cal. Dept. of Corrections* (2022) 2022 Cal. Wrk. Comp. P.D. LEXIS 26. (Accord, *Whitman v. County of Los Angeles* (2022) 2022 Cal. Wrk. Comp. P.D. LEXIS 302 [tinnitus impairment properly combined with hernia, skin, vision and orthopedic impairments]; compare *Rascon v. Bay Cities Paving & Grading* (2023) 2023 Cal. Wrk. Comp. P.D. LEXIS 222 [tinnitus, headaches, dizziness, cognitive dysfunction and psyche impairments properly added to spinal impairments].)[6]

Turning to the issue of apportionment, applicant complains that the Arbitrator erred in following Dr. Aval's 25% non-industrial apportionment of applicant's bilateral knee disability. Applicant relies upon *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] ("*Hikida*"). In *Hikida*, the injured employee sustained industrial injury in the form of carpal tunnel syndrome, and she underwent surgery to alleviate that condition. The surgery was unsuccessful and resulted in the injured employee developing chronic regional pain syndrome ("CRPS"). The CRPS left her permanently and totally disabled. On one hand, the Agreed Medical Evaluator ("AME") concluded that the permanent and total disability was entirely due to the injured employee's new CRPS condition. On the other hand, the AME found apportionment based on his opinion that 10% of the disability resulting from the original carpal tunnel syndrome condition was non-industrial. The Court of Appeal framed the issue as "whether

[6] Although Appeals Board panel decisions are citable and may be considered to the extent their reasoning is deemed persuasive, they are not binding authority. (*Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Board en banc).)

an employer is responsible for both the medical treatment and *any disability arising directly from unsuccessful medical intervention, without apportionment*." (*Hikida, supra,* 12 Cal.App.5th at 1260, italics added.) Although the Court answered yes to that specific question, the Court further explained in pertinent part: "Nothing in the 2004 legislation [broadening application of apportionment] had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment *and the consequences of medical treatment without apportionment*." (*Hikida, supra,* 12 Cal.App.5th at 1263, italics added.)

In the more recent case of *County of Santa Clara v. Workers' Comp. Appeals Bd.* (2020) 49 Cal.App.5th 605, 615 [85 Cal.Comp.Cases 467] ("*Justice*"), a different Court of Appeal took a narrow view of the scope of *Hikida's* applicability, stating: "*Hikida* precludes apportionment *only where* the industrial medical treatment is the *sole cause* of the permanent disability." (Italics added.)

While we express no final opinion in this case, it appears the Arbitrator is correct in observing that according to Dr. Aval, the bilateral knee replacement received by applicant on an industrial basis is not the sole cause of permanent disability. This tends to weigh against application of the *Hikida* principle.

Nevertheless, we are persuaded that the Arbitrator should revisit the question of whether Dr. Aval's 25% non-industrial apportionment of applicant's bilateral knee disability is substantial evidence as defined in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc]:

> [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, Dr. Aval discussed apportionment of applicant's bilateral knee disability in his report of March 10, 2021, as follows:

> Regarding [applicant's] knees, there is 25% apportioned to pre-existing factors, noting a history of prior knee injury and advanced degenerative changes with 75% apportioned to the cumulative trauma injury.

Although Dr. Aval discussed applicant's pre-existing knee problems in his prior reports of January 6, 2015, March 25, 2015, January 5, 2016, and May 8, 2018, review of those reports seem to show that applicant only had bilateral knee pain (as compared to disability) before he began working for the City of Los Angeles, that he sustained a knee injury playing basketball in 2008, and that he had surgery only to his right knee in 2009. (Aval report of January 5, 2016, p. 14.) Dr. Aval did not have medical records documenting the pre-existing and/or non-industrial knee problems. Although the degenerative changes in applicant's knees are documented, it is not clear that Dr. Aval described in detail the exact nature of the apportionable bilateral knee disability or that the doctor clearly set forth the basis for his opinion per *Escobedo*. The Arbitrator should revisit this issue and he may develop the record as deemed necessary or appropriate to address and resolve it.

In reference to the issue of attorney's fees, the Arbitrator provides the following discussion in his Report, wherein he concedes error:

> The Arbitrator made an error in awarding the fee to applicant's attorney.
>
> Applicant's attorney is entitled to a fee of 15% of all additional temporary disability awarded, 15% of permanent disability including 15% on the life pension and COLA.
>
> Therefore, the Arbitrator recommends that reconsideration be granted and the matter be referred back to the Arbitrator to issue a new decision awarding applicant's attorney a 15% attorney fee, based on the present value of the permanent disability, COLA and life pension.

> The Arbitrator would need to have the exact amount of the present value of the Award calculated by the disability evaluation specialist.
>
> Therefore, reconsideration should be granted on the issue of amount of applicant's reasonable attorney fees and the issue remanded to the Arbitrator to issue a new decision on that issue based on the commuted value of all benefits including the amount of permanent disability life pension and COLA.

Based on the above recommendation, we agree that the Arbitrator should revisit the issue of attorney's fees in conjunction with the other issues of permanent disability and apportionment discussed before. We express no final opinion on any of those issues. When the Arbitrator issues a new decision on them, any aggrieved party may seek reconsideration as provided in Labor Code sections 5900 *et seq*.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award dated May 13, 2022 is **AFFIRMED,** except paragraphs (B) and (C) of the Award are **RESCINDED AND DEFERRED,** and Findings 9, 10, 11 and 13 are **RESCINDED AND REPLACED** by the following new Findings 9, 10, 11 and 13:

FINDINGS

9. The issue of adding versus combining applicant's permanent impairments is deferred pending further proceedings and new determination by the Arbitrator, with jurisdiction reserved to the Arbitrator.

10. The issue of apportionment is deferred pending further proceedings and new determination by the Arbitrator, with jurisdiction reserved to the Arbitrator.

11. The issue of overall permanent disability is deferred pending further proceedings and new determination by the Arbitrator, with jurisdiction reserved to the Arbitrator.

13. The issue of attorney's fees is deferred pending further proceedings and new determination by the Arbitrator, with jurisdiction reserved to the Arbitrator.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that this matter is **RETURNED** to the Arbitrator for further proceedings and new decision on the outstanding issues, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/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.

CLEMON SHELTON
LARSON, LARSON & DAUER, ALC
CITY ATTORNEY, CITY OF LOS ANGELES
MARK L. KAHN, ARBITRATOR
4600BOEHM

JTL/*ara*

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