WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ESTHELA RAMIREZ, ***Applicant***

vs.

CREATIVE MONTESSORI LEARNING CENTER;
EVEREST NATIONAL INSURANCE, adjusted by SEDGWICK, ***Defendants***

Adjudication Number: ADJ10519245
San Jose District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the July 25, 2024 Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as an aide/substitute teacher on June 15, 2016, sustained industrial injury to her cervical spine, thoracic spine, lumbar spine, right shoulder, and in the form of headaches. The WCJ found in relevant part that applicant sustained permanent disability subject to nonindustrial apportionment, and that applicant was entitled to future medical care to the head/headaches, but not to the thoracic spine or bilateral knees.

Applicant appears to contend that the F&A has abrogated her right to receive future medical treatment to cure or relieve from the effects of her industrial injuries, and that she did not receive effective counsel from her attorney.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be dismissed for failure to state facts in support of the requested relief, or in the alternative, denied on the merits.

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the WCJ with respect thereto. Based on our review of the record, and for the reasons discussed below, we will grant the petition, rescind the F&A, and substitute new findings of fact that applicant sustained 72 percent permanent disability, that there is no basis for nonindustrial

apportionment, and deferring the issues of the weekly rate of payment and attorney fees. We will then return this matter to the WCJ for calculation of attorney fees and for the issuance of a supplemental award regarding the weekly rate of payment.

FACTS

Applicant claims to have sustained injury to her cervical spine, lumbar spine, right shoulder, head, thoracic spine, and bilateral knees while employed as an aide/substitute teacher by defendant Creative Montessori Learning Center on June 15, 2016. Defendant admits injury to the cervical spine, lumbar spine and right shoulder, and disputes injury to all other body parts.

The parties have selected Tulsidas Gwalani, M.D., as the Qualified Medical Evaluator (QME). Dr. Gwalani has issued two medical-legal reports.

On April 4, 2018, the parties proceeded to trial, framing issues of, in relevant part, injury to the head, thoracic spine and bilateral knees, permanent disability, and apportionment. The WCJ heard testimony from the applicant and ordered the matter continued.

On August 1, 2019, the WCJ conducted further trial proceedings and heard additional testimony from applicant. The WCJ ordered the matter submitted as of August 26, 2019.

On August 23, 2019, the WCJ ordered the submission deferred, noting that applicant's exhibits had not been filed.

On August 29, 2019, the WCJ ordered development of the record pursuant to Labor Code[1] section 5701 and noted the need to further address the issue of applicant's neurological complaints. The WCJ appointed Robert Weinmann, M.D., as the regular physician in neurology.

On June 19, 2024, the parties returned to trial, and the WCJ admitted into evidence reporting from regular physician Dr. Weinmann, as well as various treating reports. The WCJ heard additional testimony from applicant and ordered the matter submitted for decision the same day.

On July 25, 2024, the WCJ issued her F&A, determining in relevant part that applicant had sustained injury to the cervical spine, thoracic spine, lumbar spine, right shoulder and in the form of headaches, resulting in 62 percent permanent disability after applying apportionment as described by QME Dr. Gwalani and regular physician Dr. Weinmann. (Findings of Fact Nos. 1 & 8.) The WCJ further determined that applicant was entitled to future medical treatment to the cervical spine, lumbar spine and right shoulder. (Finding of Fact No. 4.)

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

On August 14, 2024, applicant filed a Petition for Reconsideration with an attached letter, detailing applicant's contentions. Applicant appears to contend that the F&A has abrogated her right to receive future medical treatment to cure or relieve from the effects of her industrial injuries, and that she did not receive effective counsel from her attorney. (Supplemental Letter to Petition for Reconsideration, filed August 14, 2024, at p. 1.)

Defendant's Answer responds that applicant's answer fails to show sufficient cause for the Workers' Compensation Appeals Board (WCAB) to overrule the findings of the WCJ. (Answer, at p. 4:5.)

The WCJ's Report observes that following trial, applicant dismissed her attorney and is proceeding in propria persona. The WCJ acknowledges that applicant filed a timely, verified Petition for Reconsideration, and concurrently filed a letter addressed to the WCJ that appears to contain the specific grounds asserted for reconsideration. However, "there is no reference to an attachment, the letter is not listed on the proof of service as to the Petition, and it appears from Defendant's Answer that Defendant does not have the letter." (Report, at p. 3.) With respect to the grounds for reconsideration described in the letter to the court, the WCJ notes that applicant's right to future medical care has not been settled, and instead remains "open" and ongoing, subject to utilization review. (*Ibid*.) With respect to applicant's complaints of improper behavior on the part of the attorneys involved in the matter, the WCJ avers no knowledge of unethical conduct. Thus, the WCJ recommends we deny the petition for failure to state sufficient facts and evidence to support reconsideration, or that we deny the petition on the merits.

DISCUSSION

I.

Former 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.

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 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 26, 2024, and the next business day that is 60 days from the date of transmission is October 25, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on the next business day after October 25, 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. 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 26, 2024, and the case was transmitted to the Appeals Board on August 26, 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 August 26, 2024.

[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.

II.

Turning to applicant's Petition, we observe that the unrepresented applicant has filed a pre-printed form petition that specifies the statutory grounds for reconsideration and includes a space in which petitioner is instructed to set forth "a statement of facts upon which petitioner relies and a discussion of the law applicable thereto." (Petition for Reconsideration, filed August 14, 2024, at p. 1.) The discussion section is blank. However, on the same day the Petition was filed, applicant also filed a letter addressed to the WCJ, noting that applicant is "filing a Petition [for] Reconsideration to request to stop settlement my case for Stipulated Award." (Supplemental Letter to Petition for Reconsideration, dated August 12, 2024, at p. 1.) The letter describes the applicant's basis for seeking reconsideration of the July 25, 2024 F&A. However, other than the fact that the document is date-stamped as received by the San Jose District Office on the same day as the Petition for Reconsideration, we are unable to determine if the document was attached to the Petition or served on the parties. The document is not accompanied by proof of service and is not verified.

The WCJ's Report observes that "[t]he letter appears to be the grounds/justification for the Petition for Reconsideration, but there is no reference to an attachment, the letter is not listed on the proof of service as to the Petition, and it appears from Defendant's Answer that Defendant does not have the letter." (Report, at p. 3.)

We note, however, that upon receipt of a document that may constitute ex parte contact from a party, the WCJ is obligated to take certain actions. WCAB Rule 10410 (Cal. Code Regs., tit. 8, § 10410(b), provides that "[w]hen the Appeals Board or a workers' compensation judge receives an ex parte letter or other document from any party in a case pending before the Appeals Board or the workers' compensation judge, the Appeals Board or the workers' compensation judge shall serve copies of the letter or document on all other parties to the case with a cover letter explaining that the letter or document was received ex parte in violation of this rule." Here, the timely service by the WCJ of copies of the letter or document received from applicant pursuant to Rule 10410 along with an explanatory cover letter would have served to partially remediate any due process concerns raised by the lack of clarity as to whether the letter attachment was served on all parties. However, the Electronic Adjudication Management System (EAMS) FileNet does not reflect such notice.

On the other hand, the WCJ's Report provided defendant with notice of the existence of applicant's supplemental letter to the Petition. In addition, the WCJ's Report recites and responds to each of applicant's contentions in detail. And while defendant retains the right to file a petition setting forth good cause for the Appeals Board to approve the filing of supplemental pleadings responsive to the contents of applicant's supplemental letter,[3] the defendant has not done so in this instance. We are also mindful that "the workers' compensation system 'was intended to afford a *simple* and *nontechnical* path to relief,'" (*Elkins v. Derby* (1974) 12 Cal.3d 410, 419 [39 Cal.Comp.Cases 624] (italics added), and that "informality of pleading in proceedings before the Board is recognized and courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. (*Rubio v. Workers' Comp. Appeals Bd.* (1985) 165 Cal.App.3d 196, 200–01 [50 Cal.Comp.Cases 160]; *Liberty Mutual Ins. Co. v. Workers' Comp. Appeals Bd.* (1980) 109 Cal.App.3d 148, 152-153 [45 Cal.Comp.Cases 866].) We will therefore address the merits of the applicant's Petition, as set forth in the accompanying letter of explanation.

Applicant's supplemental letter to the Petition for Reconsideration expresses concern that her right to future medical treatment is being settled and objects to the F&A on that basis. We write to reiterate the WCJ's observation that applicant's right to future medical treatment remains open and has not been "settled." The award entitles applicant to seek medical treatment at employer expense for the specified body parts to cure or relieve from the effects of her industrial injuries, both now and in the future.[4] While the award of ongoing medical treatment continues to be subject to the requirement that it be medically necessary, as determined by Utilization Review (Lab. Code, § 4610) and Independent Medical Review (Lab. Code, §4610.5), the applicant's right to future medical care has not been terminated by the WCJ's decision.

With respect to the body parts for which future medical treatment is afforded, the Findings of Fact reflect defendant's stipulation that there is a need for future medical care to the cervical spine, lumbar spine and right shoulder. (Finding of Fact No. 4.) The WCJ also finds that "there is

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[3] WCAB Rule 1094(b) provides, "[a] party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading."

[4] Labor Code section 4600(a) provides, in relevant part: "Medical, surgical, chiropractic, acupuncture, licensed clinical social worker, and hospital treatment, including nursing, medicines, medical and surgical supplies, crutches, and apparatuses, including orthotic and prosthetic devices and services, that is reasonably required to cure or relieve the injured worker from the effects of the worker's injury shall be provided by the employer. In the case of the employer's neglect or refusal reasonably to do so, the employer is liable for the reasonable expense incurred by or on behalf of the employee in providing treatment."

a need for further medical care to the head/headaches but there is no evidence of need for further medical care to the thoracic spine." (Finding of Fact No. 9.)

However, the January 16, 2017 report of QME Dr. Gwalani includes a diagnosis of a sprain/strain injury to the thoracic spine, albeit not resulting in whole person impairment. (Ex. 3, Report of Tulsidas Gwalani, M.D., dated January 16, 2017, at p. 16.) In the report's discussion of future medical treatment, the QME opines that applicant will need to undertake a home exercise program including range of motion, stretching, and strengthening of the cervical, *thoracic* and lumbar spine regions and the right shoulder. (*Id.* at p. 20.) The QME further indicates applicant will require 12 sessions of annual physical therapy to the neck, *mid-back* and low back and right upper extremity to maintain optimum functional levels and to avoid deconditioning. (*Ibid*.) Thus, the record provides evidence of the need for future medical care, including the thoracic spine. We will grant reconsideration to amend Findings of Fact No. 9 to list all of the body parts for which applicant is entitled to future medical care, including those stipulated by the defendant, and also the thoracic spine as reflected in the QME reporting.

Following the grant of reconsideration, the Appeals Board has the authority to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. As we observed in *Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, fn. 7 [2006 Cal. Wrk. Comp. LEXIS 35, 51-17] (Appeals Board en banc), section 5906 provides that "[u]pon the filing of a petition for reconsideration . . . the appeals board may, with or without further proceedings and with or without notice affirm, rescind, alter, or amend the order, decision, or award made and filed by the appeals board or the workers' compensation judge…." (Lab. Code, § 5906.) Similarly, section 5908 provides that "[a]fter . . . a consideration of all the facts the appeals board may affirm, rescind, alter, or amend the original order, decision, or award." (Lab. Code, § 5908.) Thus, it is settled law that a grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com.* (*Savercool*) (1923) 191 Cal.724, 729 [218 P. 1009] [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*Pasquotto, supra,* citing *State Comp. Ins. Fund v. Industrial Acc. Com.* (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

Here, following our independent review of the record occasioned by applicant's Petition, we are not persuaded that the apportionment to nonindustrial factors described by QME Dr. Gwalani and regular physician Dr. Weinmann constitutes substantial medical evidence.

Section 4663 sets out the requirements for the apportionment of permanent disability and provides, in relevant part, as follows:

> (a) Apportionment of permanent disability shall be based on causation.
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> (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address the issue of causation of the permanent disability.
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> (c) In order for a physician's report to be considered complete on the issue of permanent disability, it must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
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> (Lab. Code, § 4663.)

In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc) (*Escobedo*).) However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report 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 that factors other than the industrial injury at issue caused permanent disability.* (*Id.* at p. 621.) Our decision in *Escobedo* summed up the minimum requirements for an apportionment analysis as follows:

> [T]o 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.
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> 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.
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> (*Ibid.*, italics added.)

Here, the F&A awards permanent disability after apportionment of 30 percent to nonindustrial causes for the cervical spine, lumbar spine and the right shoulder as described by QME Dr. Gwalani. The January 16, 2017 report of Dr. Gwalani offers the following apportionment analysis, excerpted here in its entirety:

> There is a known work-related injury in low back in past. There is an apportionment issue in this case. With regards to L. spine with reasonable medical probability in my opinion 70% of causation of her present permanent partial disability referable to L. spine is caused by direct result of industrial injury arising and occurring in course of her employment on 06/15/16 and 30% disability was caused by factors prior to industrial injury. Apportionment of current disability is indicative. Her headache is 100% nonindustrial. She has motor vehicular accident this year injuring neck, right shoulder and right upper extremity. With reasonable medical probability, in my opinion, 70% causation of her C. spine, right shoulder and right upper extremity impairment is caused by direct result of industrial injury arising and occurring in course of her employment on 06/15/16 and 30% disability was caused by factors prior and subsequent to industrial injury. Apportionment of current disability is indicative.
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> (Ex. 3, Report of Tulsidas Gwalani, M.D., dated January 16, 2017, at p. 19.)

The QME's apportionment analysis thus begins by making reference to an unspecified injury at some point in the past. The QME does not describe in detail the nature of the prior injury, or how and why the prior injury is currently contributing to applicant's permanent disability. (*Escobedo, supra*, 70 Cal.Comp.Cases 604, 621.) Nor does the QME discuss how he arrived at the particular percentages identified. The resulting determination of 30 percent apportionment to an unidentified prior injury is conclusory, unsubstantiated in the record, and unsupported by a

reasonable medical opinion. As such, the apportionment described by the QME does not constitute substantial evidence. Insofar as the QME applies 30 percent nonindustrial apportionment to the cervical spine, the analysis is also conclusory and lacks even a rudimentary discussion of why the motor vehicle accident now contributes to applicant's permanent disability in the cervical spine and right upper extremity.

The apportionment opinion of regular physician Dr. Weinmann is similarly insubstantial. Dr. Weinmann's December 11, 2019 report offers a clinical impression of headaches with a probable etiology of post-concussion syndrome, and an "old history of probable neurocysticercosis." (Ex. 100, Report of Robert Weinmann, M.D., dated December 11, 2019, at p. 3.) The latter condition is described as "a brain infection caused by the larval form of the pork tapeworm." (*Ibid.)* The regular physician concludes that, to a reasonable medical probability, applicant's complaints arise out of industrial trauma, but also that "an argument can be made for apportionment since the patient's pre-existing medical history includes a condition known for a headache as an integral component." (*Id.* at p. 5.) Dr. Weinmann apportions "15 percent to pre-existing disease where the pre-existing disease is known to include headache as one of its characteristics." (*Ibid*.) In deposition testimony, the regular physician further elucidated his analysis, noting that he had apportioned 15 percent so as to "allow [that] neurocysticercosis is viable in some way," but that otherwise applicant's headaches were not caused by her nonindustrial infection, "it just [doesn't] happen that way." (Ex. 103, Transcript of the Deposition of Robert Weinmann, M.D., dated April 28, 2021, at p. 12:12.) However, a physician's opinion that legal apportionment is indicated because an alternative cause may be *possible* does not satisfy the minimum level of explication described in *Escobedo*, *supra*, and does not reasonably identify the "approximate percentage of the permanent disability" that was caused by the contemplated factor as mandated by section 4663. (Lab. Code, § 4663(c); *Escobedo, supra*, 70 Cal.Comp.Cases 604, 621.) Moreover, the fact that the condition is described as only a *possible* cause precludes an opinion that, to a reasonable medical probability, the prior factor or condition is currently causing permanent disability. (Lab. Code, §§ 3202.5; 4663(c); see also *McAllister v. Workmen's Compensation Appeals Board* (1968) 69 Cal.2d 408 [33 Cal.Comp.Cases 660, 664-665] ["[w]e have held 'reasonable' or 'probable' causal connection will suffice; it is to be distinguished from the merely 'possible.'].) Nor does the regular physician discuss how he arrived at the particular percentages identified. Again, we find that the apportionment analysis of the evaluating physician is not substantial evidence.

Thus, neither the QME nor the regular physician have described apportionment in accordance with correct legal principles. We therefore conclude that the evidentiary record does not support valid apportionment to nonindustrial or prior industrial factors.

The F&A awards 62 percent permanent disability after apportionment. The WCJ rated applicant's permanent disability as follows:

Cervical Spine: 70% (15.01 – 08[1.4]11 – 214(F) – 11 – 14) = 10%

T-Spine: [No ratable impairment.]

L-Spine: 70% (15.03 – 08[1.4]11 – 214(F) – 11 – 14) = 10%

Right Shoulder: 70% (16.02 – 04[1.4]06 – 214(F) – 06 – 08) = 6%

Headaches: 85% (13.01 – 32[1.4]45 – 214(H) – 51 – 59) = 50%

Excluding the invalid apportionment identified by the QME and the regular physician, applicant's disability is rated at 14 percent for the cervical spine, 14 percent for the lumbar spine, 8 percent for the right shoulder, and 59 percent for head/headaches. Combining these percentages using the combined values chart yields 72 percent permanent disability (50C14C14C8=72). We will therefore substitute new findings of fact that applicant sustained 72 percent permanent disability, and that there is no valid basis for apportionment. We will return this matter to the trial level for the WCJ to issue a supplemental award fixing attorney fees and setting the weekly rate of payment.

In summary, we agree with the WCJ that the F&A does not abrogate applicant's right to receive future medical care pursuant to section 4600. However, we conclude there is a basis in the evidentiary record to award future medical care for the thoracic spine and will grant reconsideration to amend the Award accordingly. Pursuant to our grant of reconsideration, we have further reviewed the record and have determined that the evaluating physicians have not described valid legal apportionment. We will therefore award unapportioned permanent disability of 72 percent but defer the determination of weekly benefits pending a determination of attorney fees. Accordingly, we rescind the F&A and substitute new findings of fact that applicant has sustained 72 percent permanent disability, entitling her to 465.25 weeks of indemnity plus a life pension payable thereafter at the initial weekly rate of $92.77, less attorney's fees in an amount to be determined. We will return this matter to the trial level for the determination of attorney fees, and for the issuance of a supplemental award of weekly benefits in conformity with our decision herein.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of July 25, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of July 25, 2024 is **RESCINDED** with the following **SUBSTITUTED** therefor:

1. Applicant Esthela Ramirez, while employed on June 15, 2016, as an aide/substitute teacher, occupational group number 214, in East Palo Alto, California, by Creative Montessori Learning Center, sustained an injury arising out of and arising in the course of employment to the cervical spine, thoracic spine, lumbar spine, right shoulder and head resulting in headaches.
2. The employer's workers' compensation insurance carrier on the date of injury was Everest National Insurance adjusted by Sedgwick.
3. Applicant's earnings were $424.72 per week, resulting in a temporary disability rate of $283.15 per week.
4. The evidentiary record does not establish that applicant sustained injury arising out of and in the course of employment to the bilateral knees.
5. Pursuant to reporting from IME Robert Weinmann, M.D., applicant's injury became permanent and stationary on December 11, 2019.
6. Applicant was entitled to total temporary disability indemnity from June 15, 2016 through December 22, 2016 at the rate of $283.15 per week, less credit for sums previously paid, if any.
7. The injury resulted in 72 percent permanent disability payable over 465.25 weeks, commencing December 23, 2016, less credit for sums previously paid on account thereof, less attorney's fees, plus a life pension at the initial rate of $92.77 per week. The issue of the weekly rate of payment is deferred, to be adjusted by the parties, with jurisdiction to the WCJ in the event of a dispute.
8. There is no legal basis for apportionment.
9. There is a need for further medical care for the cervical spine, thoracic spine, lumbar spine, right shoulder and head/headaches.
10. Attorney's fees are awarded based on 15 percent of the permanent disability indemnity awarded; and including 15 percent of the present value of the accrued and future life pension. Attorney's fees are to be commuted off the side of the award. Attorney's fees are

to be held in trust by defendant pending receipt of a fee split agreement and/or court order of distribution. The issue of the amount of attorney's fees is deferred, to be adjusted by the parties with jurisdiction to the WCJ in the event of a dispute.

11. The lien of the Employment Development Department was resolved by Stipulations on October 2, 2023.
12. All other issues including any claims for penalties remain specifically deferred.

AWARD

AWARD IS MADE in favor of applicant **ESTHELA RAMIREZ** and against defendant **CREATIVE MONTESSORI LEARNING,** insured by **EVEREST NATIONAL INSURANCE**, as follows:

a. Temporary disability as set forth in Findings Nos. 3 and 6.
b. Permanent disability as set forth in Findings No. 7.
c. Attorney's fees as set forth in Findings No. 10.
d. Medical care as set forth in Findings No. 9.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT (See Dissenting Opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 23, 2024

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

ESTHELA RAMIREZ
RATTO LAW FIRM
COLEMAN CHAVEZ & ASSOCIATES

SAR/abs

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

DISSENTING OPINION OF COMMISSIONER RAZO

I dissent. While I agree with my colleagues that the F&A in no way abrogated applicant's right to future medical care, I disagree with my colleague's conclusion that the apportionment described by the QME and by the regular physician was legally invalid. Following my review of the record, I conclude that the WCJ appropriately applied the uncontested apportionment identified by the evaluating physicians to arrive at a final permanent disability percentage that reflects applicant's past nonindustrial exposures, as required under section 4663(c).

QME Dr. Gwalani has evaluated applicant, conducted a clinical examination, and reviewed the relevant medical history. The QME noted applicant's motor vehicle injuries to the upper back in the year prior to the instant industrial injury, as well as the degenerative changes evident in applicant's diagnostic studies, which included preexisting lumbar spondylosis. Based on the QME's clinical experience and medical judgement, Dr. Gwalani concluded that applicant's prior injury and degenerative changes caused 30 percent of her present lumbar spine permanent disability. In addition, applicant's motor vehicle accident in the year just prior to the instant injury resulted in 30 percent apportionment, as expressed to a reasonable medical probability. (Ex. 3, Report of Tulsidas Gwalani, M.D., dated January 16, 2017, at p. 19.) Similarly, regular physician Dr. Weinmann allowed modest apportionment of 15 percent of applicant's headache disability following a careful review of the medical record, and in particular, applicant's history of "probable neurocysticercosis," a condition known to cause the same type of headaches that applicant was exhibiting at the time of her evaluation. (Ex. 100, Report of Robert Weinmann, M.D., dated December 11, 2019, at p. 3.) The regular physician reasonably acknowledged and accounted for the possibility that applicant's "head injury 'lit up' aspects of her pre-existing condition which would allow for apportionment." (*Id.* at p. 5.)

Pursuant to section 4663, "the WCAB must find what percentage of the permanent disability was directly caused by the injury and what percentage was caused by other factors." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 [Appeals Board en banc].) The Supreme Court has explained that "the new approach to apportionment [since the April 19, 2004 adoption of Senate Bill 899] is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries, not disregard of them." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72

Cal.Comp.Cases 565].) Moreover, the law on apportionment does not require medical certainty. The court of appeal underscored this point in *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687] (*Gatten*), when it concluded that the apportionment opinions of a physician cannot be disregarded as speculative when they are based on the physician's "expertise in evaluating the significance of these facts," and that insofar as the issue involves a matter of scientific medical knowledge, the Appeals Board may not substitute its judgment for that of the medical expert. (*Gatten, supra*, at p. 930.)

Accordingly, I agree with the WCJ's application of nonindustrial apportionment to the final percentages of permanent disability, as identified by both the QME and the regular physician. The opinions of both physicians clearly rest on a careful review of the medical record, and the physicians' respective scientific knowledge, clinical experience, and medical-legal expertise. As the court of appeal in *Gatten* concluded, "[t]he doctor[s] made a determination based on [their] medical expertise of the approximate percentage of permanent disability caused by degenerative condition of applicant's back. Section 4663, subdivision (c), requires no more." (*Gatten, supra*, 145 Cal.App.4th at p. 930.)

Thus, while I agree with my colleagues that the WCJ's Findings and Award does not abrogate applicant's right to future medical care, I am not persuaded that the apportionment described by the QME and the regular physician is invalid. I would affirm the decision of the WCJ, accordingly.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 23, 2024

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

ESTHELA RAMIREZ
RATTO LAW FIRM
COLEMAN CHAVEZ & ASSOCIATES

SAR/abs

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