WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RUBEN CERVANTES, *Applicant*

vs.

MILGARD MANUFACTURING; ACE AMERICAN INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ10409544
Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on April 15, 2024, finding that on February 11, 2016, while employed by defendant as a glazier (Occupational Group 370), applicant sustained injury arising out of and in the course of employment (AOE/COE), causing 81% permanent disability. The WCJ found that applicant was entitled to 609.25 weeks of permanent disability indemnity commencing November 16, 2017 and a life pension payable thereafter, with a state average weekly wage (SAWW) adjustment per Labor Code section 4659(c) to commence January 1, 2018.[1] The WCJ also determined that there was no factual basis to apportion permanent disability for applicant's cervical and lumbar spine injuries.

Defendant contends that the WCJ: 1) rated applicant's permanent disability (PD) using the incorrect Occupational Group; 2) should have apportioned PD "because the AME finds apportionment"; and 3) applied the incorrect SAWW adjustment start date.

We received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be granted for the limited purpose of correcting the start date for the SAWW adjustment.

[1] Further statutory references are to the Labor Code, unless otherwise stated.

We have considered the allegations in the Petition, the Answer, and the contents of the WCJ's Report, and we have reviewed the record in this matter. For the reasons discussed below, we will grant the Petition for Reconsideration. As our Decision After Reconsideration, we will amend the F&A to reflect that the SAWW adjustment per section 4659(c) shall commence on January 1 following the year in which applicant's life pension commences. We will also amend the F&A to correct a strictly clerical error contained in Paragraph 3 of the Award.[2] Otherwise, we will affirm the F&A of April 15, 2024.

FACTUAL BACKGROUND

The WCJ's Report provides the following:

> Applicant sustained a work-related injury on 2/11/2016 to his back, neck and knees. In the intervening years he has undergone low back surgeries and significant treatment for multi-level neck pathologies. He has undergone right knee surgery as well....
>
> Applicant's job title was "glazier." (Min/Hrg, 1/3/2024, p.4, line 12). The employer produces finished windows of all sizes up to and including 10 ft. x 10 ft. Applicant stands all day and applies bead to window frames and installs the glass to the frames using mallets. The finished frames are then physically moved along the production line....
>
> Dr. Steven Silbart acted as [Agreed Medical Evaluator (AME)]. He declared Applicant to be P&S on 12/9/2022 (Court's Ex. X-5) with factors of impairment in the back, neck and right knee. He utilized the ROM[3] method to evaluate the spine due to multi-level pathology (AMA Guides, p. 398). He used Table 15-7 for the spine.
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> The case was tried on 1/3/2024 and submitted for decision. The factors of impairment found by Dr. Silbart were dispatched to the DEU [Disability Evaluation Unit] on 1/10/2024. Included in those Formal Instructions to the DEU was a request from the undersigned that the Disability Evaluator review the testimony and the history given to Dr. Silbart to determine the correct occupational group number.
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> On 1/11/2024 the Disability Evaluator returned the rating of 84% permanent disability based on Occupational Group # 380 (glazier).

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[2] Paragraph 3 of the Award cites to the attorney's fee as set forth in Finding of Fact *No. 11*. (F&A, p. 2.) However, the attorney's fee is actually set forth in Finding of Fact *No. 13*. We will amend Paragraph 3 of the Award to correct this clerical error.

[3] "ROM" stands for "range of motion."

> The Defendant timely objected. The objection to the rating was tried on 4/10/2024. The Disability Evaluator reviewed both Occupational Group # 380 and #370. It was her opinion that based upon the job duties (rather than the job title) that Group #370 was more appropriate for this particular job....The disability was re-rated based on Group 370 resulting in a rating of 81%.
>
> The matter re-submitted for decision on all issues including Defendant's objection.
>
> On 4/15/2024 the undersigned issued the Findings and Award granting Defendant's objection and thereby awarding 81% permanent disability based on Occupational Group 370. No apportionment was found. The award included a life pension at the rate of $162.34 per week. The award stated that the COLA upgrade to the life pension under Cal. Lab. Code sec. 4659(c) would commence on 1/1/2018.

(Report, pp. 1-2, bracketed material added.)

DISCUSSION

I. The WCJ did not err by rating applicant's permanent disability using Occupational Group 370

Defendant contends that the WCJ erred in using Occupational Group 370 to calculate applicant's PD rating. Defendant asserts that Occupational Groups 320 or 321 were "better suited" to match applicant's job activities. We disagree.

Section 3, Part A of the 2005 Schedule for Rating Permanent Disabilities (PDRS) contains an alphabetized list of occupations with their scheduled "Occupational Group" numbers; Part B of the PDRS contains an occupational group chart that "illustrates the overall system for classifying occupations into groups"; and Part C contains a "description and sample occupations of each group." The information in Part C "may be useful if the occupation cannot be located in Part A." (PDRS, p. 3-1.) According to the PDRS, to use Part C, one must "[s]imply determine the basic functions and activities of the occupation under consideration and relate it to a comparable scheduled occupation to determine the appropriate group number." (PDRS, p. 3-1.)

In the Report, the WCJ explains that, according to the evidence, applicant's basic job activities are most accurately described by those performed by a "glass installer" under Occupational Group 370, Part A. (Report, p. 3; PDRS, Part A, p. 3-12.) Part C provides that jobs contemplated under Occupational Group 370 include the following characteristics: "installation…[and] [m]echanical work on…equipment, requiring a combination of some skill and significant physical effort." (PDRS, Part C, pp. 3-34-35.)

Defendant contends that Occupational Groups 320 or 321 were "better suited" to match applicant's job activities. Occupational Group 320 contemplates: "Assemblers [¶] Precision work requiring use of hand tools….[¶] Typical occupations: Machinist, Office Machine Servicer, Television & Radio Repairer Group." (PDRS, Part C, p. 3-32.) Occupational Group 321 contemplates: "Assemblers [¶] Use of hand tools required; precision requirements less than 320 – arm variants slightly lower; same demand on spine and legs as 320 & 322. [¶] Typical occupations: Furniture Assembler, Garment Cutter, machine Painter, spray gun." (PDRS, Part C, pp. 3-32-33.)

All findings by a WCJ and the Appeals Board must be supported by substantial evidence in light of the entire record. (*Lamb v. Workers' Comp. Appeals Bd*. (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *LeVesque v. Workers' Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

Upon review, we conclude that the WCJ's decision to rate applicant's PD using Occupational Group 370 is supported by substantial evidence.

As explained in the WCJ's Report,

> The employer produces finished windows of all sizes up to and including 10 ft. x 10 ft. Applicant stands all day and applies bead to window frames and installs the glass to the frames using mallets. The finished frames are then physically moved along the production line. So, he is lifting and moving large panes of glass as well as finished frames….

(Report, p. 3.)

The WCJ also rejected defendant's claim that Occupational Groups 320 or 321 were more appropriate, stating:

> [T]he undersigned rejected Group 320 or 321 since those groups involve only fine motor skills using precision tools. This Applicant only worked with a mallet to adhere large glass to frames. He was on his feet all day and lifting heavy and very heavy items regularly. Such activities are inconsistent with Group 320 and 321.

(Report, p. 4.)

Additionally, during trial, on cross-examination by defendant, the Disability Evaluator specifically stated that Occupational Groups 320 and 321 were "not applicable" to applicant's job activities, whereas "[t]here is a factual basis to use Group 370." (Minutes of Hearing/Summary of Evidence (MOH/SOE), April 10, 2024, p. 2.) The Disability Evaluator's opinion was based upon a review of Dr. Silbart's medical reports, as well as applicant's testimony.

As stated in our en banc decision of *Blackledge v. Bank of America* (*Blackledge*) (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc):

> [A]lthough a WCJ's rating instructions must fully describe the WPI(s) to be rated, this does not absolutely preclude a WCJ's instructions from also seeking the assistance of a rater. A WCJ's rating instructions are merely "tentative" findings of fact. (*Stapp*, 81 Cal.App.3d at p. 587 [43 Cal.Comp.Cases at p. 658]; see also *Hegglin,* 4 Cal.3d at p. 169 [36 Cal.Comp.Cases at p. 97]; *Ratzel*, 252 Cal.App.2d at p. 331 [32 Cal.Comp.Cases at p. 273].) Moreover, a rater of the DEU "is an expert . . . in the application of the rating schedule" (*Aliano v. Workers' Comp. Appeals Bd.* (1979) 100 Cal.App.3d 341, 373 [161 Cal. Rptr. 190] [44 Cal.Comp.Cases 1156, 1177] (*Aliano*)) and "a rating specialist's expert opinion [can] be of assistance to the Board." (*Johns-Manville Products Corp. v. Workers' Comp. Appeals Bd.* (*Carey*) (1978) 87 Cal.App.3d 740, 752 [151 Cal. Rptr. 215] [43 Cal.Comp.Cases 1372, 1379] [**25] (*Carey*).)

(*Blackledge, supra,* 75 Cal.Comp.Cases at p. 622.)

According to the Minutes of Hearing produced at trial, applicant testified:

> He installs glass into window frames. The glass is delivered to him. He also receives the frames from the production line. The windows will have to be set on racks in front of him that range in height from waist level for the smaller windows, knee level for the medium size windows, and floor level for the larger windows. He is required to lift the windows after glazing for moving it to the next person on the production line. *The heaviest ones could weigh as much as 300 pounds, being 10 feet by 10 feet.* These would be lifted onto the racks with employee help. *On the date of the injury, he was working on such a window, and he and another employee were lifting it* from the floor to about knee level. The applicant's job involves standing all day for an eight-hour day.

(MOH/SOE, January 3, 2024, p. 4, italics added.)

Applicant's testimony was consistent with his statements to Dr. Silbart, whose medical evaluation stated: "Mr. Cervantes reports that…he sustained an injury [] when [he] *was lifting a heavy window that weighed approximately 300 pounds*. He was being assisted by a co-worker; however, as they lifted the window his co-worker lost his grip and *he was left holding most of the weight*." (Court's Exh. X-1, Dr. Steven B. Silbart, M.D., Agreed Medical Examination, November 3, 2020, p. 2, italics added.)

Upon review of this evidence, we agree with the WCJ that job activities involving as installing and lifting windows weighing *hundreds* of pounds are better classified as "significant physical efforts" under Occupational Group 370, rather than "precision" efforts under Groups 320

and 321. Thus, we uphold the WCJ's decision to rate applicant's PD using Occupational Group 370 and deny reconsideration on this issue.

II. The WCJ did not err in rejecting defendant's permanent disability apportionment claim

Defendant contends that the WCJ should have apportioned PD for applicant's cervical and lumbar spine injuries, based upon AME Dr. Steven Silbart's statement that "the patient's current cervical and lumbar disability is apportioned 10% to the pre-existent degenerative disc changes, and 90% to the February 11, 2016 specific injury." (Court's Exh. X-5, Dr. Steven B. Silbart, M.D., AME Follow-Up Medical Legal Evaluation III, December 7, 2022, p. 12.) According to defendant, "since there is no other rationale to not apply apportionment, apportionment according to the AME should be applied." (Petition, p. 4.) As explained below, this is little more than an assertion that the WCJ should have apportioned 10% of applicant's PD to a preexisting, nonindustrial disease simply because the doctor "said so," which does not constitute substantial evidence to support such a finding by the WCJ.

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].) As explained in *Escobedo*, substantial medical evidence on the issue of apportionment requires that:

> [T]he 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. [Citations.]
>
> 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 p. 621.)

Under sections 4663 and 4664(a), the apportionment of permanent disability is based on causation. In *Escobedo*, the Appeals Board emphasized that the language in sections 4663 and 4664(a) stating that permanent disability shall be based on "causation" refers to causation of the injured employee's permanent disability, *not* causation of their injury. (*Escobedo, supra,* 70 Cal.Comp.Cases at pp. 607, 611.) Specifically, the Board explained that "the percentage to which an applicant's *injury* is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." (*Id.* at p. 611, italics in original.)

Escobedo is consistent with the Supreme Court's subsequent decision in *Brodie v. Workers' Comp. Appeals Bd.* (*Brodie*) (2007) 40 Cal.4th 1313 [72 Cal.Comp.Cases 565], wherein the Court declared that "the new approach to apportionment 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.*" (*Id.* at p. 1328, italics added.) The Court explained that "[e]mployers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors." (*Id.* at p. 1321.)

Thus, under *Brodie* and *Escobedo*, and as defendant claims in this case, it is now permissible to apportion PD where the current disability actually caused, at least in part, by a preexisting condition. This concept has been recognized in a number of cases decided after *Brodie*. (See, e.g., *City of Jackson v. Workers' Comp. Appeals Bd*. (*Rice*) (2017) 11 Cal.App.5th 109 [82 Cal.Comp.Cases 437] [allowing apportionment of permanent disability caused by genetic or

congenital cervical spine pathology]; *Acme Steel v. Workers' Comp. Appeals Bd*. (*Borman*) (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751] [allowing applicant's hearing disability to be apportioned to congenital degeneration of the cochlea].) Of course, the decision to apportion PD to said source(s) under *Brodie* and its progeny must still be supported by substantial medical evidence. (*Escobedo, supra,* 70 Cal.Comp.Cases at p. 621.)

In his Report, the WCJ explains the reasons that he found no basis to apportion PD between applicant's degenerative disc condition and industrial causative sources under *Escobedo* as follows:

In his report of 12/7/2022 (Court's Ex. X-5) Dr. Silbart opines in pp. 11-12:

> "Under April 2004 Guidelines, with apportionment-to-causation, the patient's current cervical and lumbar disability is clearly contributed to by degenerative factors, separate and apart from his work activities. Those causative factors include the degenerative disc changes noted in the cervical and lumbar spine. The presence of such changes is indicative of decreased integrity of the cervical and lumbar spine making them more vulnerable to injury.
>
> Accordingly, and taking all factors into consideration, the patient's current cervical and lumbar disability is apportioned 10% to the pre-existent degenerative disc changes, and 90% to the February 11, 2016 specific injury."

The impairment in both the cervical and lumbar spine was determined using the ROM method under the AMA Guides (as opposed to the DRE method). This is due to the multi-level pathology.

As set forth in [*Escobedo*] *v. Marshalls* (2005) 70 CCC 604, *en banc,* in order to support a finding of apportionment under Cal. Lab. Code sec. 4663 it is necessary for the physician to explain how a portion of the disability (not the injury) is caused by a preexisting cause, and how the quantity of apportionment is determined.

Above, Dr. Silbart has simply stated that degenerative conditions in the spine increase the spine's vulnerability to injury. But injury is not the issue. The issue i[s] disability. *Martinez v. Co. of Alameda* (2018) 83 CCC 747, 2018 Cal. Wrk. Comp. P.D. LEXIS 17.

On pp. 11 – 12 of Ex. X-5 Dr. Silbart explains the rationale for his findings of impairment using the ROM method of assessment. A detailed review shows quite clearly that the impairments of both cervical and lumbar spine were a combination of diagnosis (Table 15-7) and ROM loss (Table 15-8 and 15-9 for the lumbar spine and Table 15-12, 15-13 & 15-14 for the cervical spine).

> The ROM does not involve apportionment at all since Applicant was asymptomatic before this injury.
>
> With regards to the lumbar spine Table 15-7 describes specific spinal lesions requiring and/or resulting in surgery. In Disorder Category IIE the impairment is due to surgically treated lesions (10%) plus 2% for additional levels. This is described as it applies to the lumbar spine in this case.
>
> With regards to the cervical spine Table 15-7 also describes under Disorder Category IIF multiple level disc lesions not treated with surgery. This is 6% wpi plus 3% for additional levels of lesions.
>
> These surgical lesions, which account for 100% of the Applicant's symptoms and loss of ROM were the result of this injury. While certain unexplained and asymptomatic degenerative conditions could have existed, there is simply no explanation as to how they contribute to the present disability. The disability is caused by loss of ROM and surgical lesions described in Table 15-7. Dr. Silbart may have felt that degenerative conditions may increase vulnerability to injury, he does not explain how they presently cause any of the present disability.

(Report, pp. 4-5.)

The WCJ's explanation is factually and legally sound, and defendant has given us no reason to disturb it under the principles of *Brodie* and *Escobedo*.

Again, under *Escobedo*, a physician's medical opinion must constitute substantial medical evidence, and it is defendant's burden to prove apportionment. (*Escobedo, supra,* 70 Cal.Comp.Cases at p. 621; see also *Zemke, supra,* 68 Cal.2d at p. 798; *Normand, supra,* 26 Cal.3d at p. 456.) As explained in *Escobedo*, each physician must explain the "how and why" of their apportionment opinion, i.e., the physician must set forth the facts and reasoning that support their apportionment determination. (*Escobedo* at p. 621.) Discussing an example similar to the case at hand, we stated that, "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." (*Ibid*.)

Here, Dr. Silbart's medical report contained only cursory statements that failed to explain the "how and why" of his opinion that 10% of applicant's PD should be apportioned to his degenerative disc condition. Specifically, Dr. Silbart failed to explain the nature of applicant's degenerative disc changes; how and why these changes were causing part of applicant's PD at the

time of evaluation; and how and why these changes were responsible for the percentage of PD identified. (*Escobedo, supra,* 70 Cal.Comp.Cases at p. 621.) Thus, Dr. Silbart's medical opinion does not satisfy the standards set forth in *Escobedo,* and defendant did not carry its burden of proof on apportionment.

Based on the foregoing, we uphold the WCJ's decision not to apportion PD for applicant's cervical and lumbar spine injuries.

III. The WCJ applied the incorrect SAWW adjustment start date

In the Report, the WCJ states that the F&A erroneously identified January 1, 2018 as the start date for applicant's SAWW adjustment under section 4659(c). We agree with the WCJ, whose Report explains the application of section 4659(c) as follows:

> Cal. Lab. Code sec. 4659(c) dictates that a life pension award shall be subject to an annual increase based on the "state average weekly wage" as increased over the rate from the previous year[.][4]
>
> …[I]n *Baker v. WCAB* (2011) [52 Cal.4th 434]…the Court held that any life pension awarded under the terms of Cal. Lab. Code sec. 4659 shall be subject to the COLA[5] increase commencing January 1 of the year in which the entitlement to the pension commences.
>
> The award made herein erroneously indicated that the COLA increase would commence on January 1, 2018, which was the year in which the permanent disability award commenced, not the life pension. Hence the award was in error.
>
> Hence the Findings of Fact no. 7 in the award dated 4/15/2024 ought to have read:
>
> "7. The SAWW adjustments pursuant to Cal Lab. Code sec. 4659(c) shall commence on January 1 following the year in which the life pension herein commences."

(Report, pp. 4-5.)

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[4] Section 4659(c) provides in pertinent part: "For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension…shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the 'state average weekly wage' as compared to the prior year. For purposes of this subdivision, 'state average weekly wage' means the average weekly wage paid by employers to employees covered by unemployment insurance as reported by the United States Department of Labor for California for the 12 months ending March 31 of the calendar year preceding the year in which the injury occurred." (Lab. Code, § 4659(c).)

[5] The SAWW adjustment is sometimes referred to as the "cost-of-living adjustment" (COLA). (*Baker v. Workers' Comp. Appeals Bd*. (*X.S.*) (2011) 52 Cal.4th 434, 437 [76 Cal.Comp.Cases 701].)

We agree with the WCJ's recommendation. Thus, we will grant reconsideration on this issue and amend the F&A accordingly.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the April 15, 2024 Findings and Award is **GRANTED**.

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the April 15, 2024 Findings and Award is **AFFIRMED**, **EXCEPT** as **AMENDED** below.

FINDINGS OF FACT

* * *

7. The SAWW adjustment pursuant to Cal. Lab. Code sec. 4659(c) shall commence on January 1 following the year in which the life pension herein commences.

* * *

AWARD

***

2. Permanent disability and life pension as set forth in Paragraphs 6 and 7.

3. Attorneys' fees as set forth in Paragraph 13.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 28, 2024

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

RUBEN CERVANTES
PENNINGTON & TRODDEN
SCHLOSSBERG & UMHOLTZ

AH/oo

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