

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

URIEL RED, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF CORRECTIONS – AVENAL STATE PRISON,
legally uninsured, administered by STATE COMPENSATION INSURANCE
FUND/STATE CONTRACT SERVICES, Adjusting Agency, *Defendants***

**Adjudication Numbers: ADJ10192449; ADJ13356694; ADJ13356088
Fresno District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of the July 2, 2024 Joint Findings of Fact and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) wherein the WCJ determined that the apportionment findings of Agreed Medical Evaluator (AME), Dr. Scott Graham, were not substantial medical evidence. The WCJ found that applicant sustained 34% permanent disability to the lumbar spine for the May 26, 2015 injury, 34% permanent disability to the lumbar spine for the cumulative injury through September 14, 2016, and 32% permanent disability for the lumbar spine for the March 29, 2020 injury.

Defendant contends that Dr. Graham's apportionment findings constitute substantial medical evidence in accordance with Labor Code section¹ 4663. Defendant also contends that overpayments in permanent disability should be credited under section 4909 and that the lien of the Employment Development Department (EDD) should be dismissed due to EDD's failure to meet its burden of proof.

We have received an Answer from applicant and the WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

¹ All further references are to the Labor Code unless otherwise indicated.

We have considered the Petition for Reconsideration (Petition), the Answer, and have reviewed the record in this matter. Based upon the Report, which we adopt and incorporate, and the reasons discussed below, we will deny the Petition.

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 July 15, 2024, and the next business day after the 60-day period is September 13, 2024. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on the next business day after September 13, 2024. As such, 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

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.

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

According to the proof of service, the Report in this case was served on July 15, 2024, and the case was transmitted to the Appeals Board on July 15, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. As such, we conclude that the parties were provided with notice of transmission as required under section 5909(b)(1) since service of the Report per section 5909(b)(2) provided parties with actual notice as to commencement of the 60-day period on July 15, 2024.

Turning now to the issue of apportionment, section 4663(c) outlines apportionment requirements for treating or evaluating physicians. Pursuant to this section, in order for a report to be considered “complete on the issue of permanent disability,” it must make an apportionment “determination” which explains what “approximate percentage of the permanent disability” was directly caused by “the 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.” (*Id.*) If the evaluating physician is unable to make an apportionment determination, the physician is to “state the specific reasons why.” (*Id.*)

Aside from satisfying the requirements outlined under section 4663(c), pursuant to *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc), in order to constitute substantial medical evidence, a medical opinion must be framed in terms of reasonable medical probability, be based upon pertinent facts and an adequate examination and history, not be speculative, and set forth the reasoning in support of its conclusions. In other words, the medical opinion must detail the history and evidence in support of its conclusions with a discussion on “how and why” the specified condition(s) and/or factor(s) are causative in terms of permanent disability. (*Id.* at 604, 611; see also *E.L. Yeager v. Workers’ Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 4 922 [71 Cal.Comp.Cases 1687].)

Further, as confirmed in our en banc opinions in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc) (*Nunes I*) and *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 (Appeals Board en banc) (*Nunes II*), the validity of an apportionment analysis outlined by a physician is not assumed and the issue of whether it is substantial medical evidence must be carefully weighed and

determined by the WCJ. (see Lab. Code, § 5952(d); *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) In instances where the WCJ determines that a physician has failed to identify valid legal apportionment, applicant is entitled to an award without apportionment. Similarly, if a physician identifies apportionment but the WCJ determines that the apportionment findings are not substantial evidence (and development of the record is not otherwise warranted) applicant is also entitled to an award without apportionment. (See, e.g., *Escobedo*, supra, 70 Cal.Comp.Cases 604, at p. 611; *Boone v. State of California - Dept. of Transp.* (July 23, 2018, ADJ7974582) [2018 Cal. Wrk. Comp. P.D. LEXIS 348]; *Maverick v. Marriott Int'l* (January 30, 2015, ADJ2034254) [2015 Cal. Wrk. Comp. P.D. LEXIS 50].) In some instances, a physician may have properly assessed apportionment but has determined that it would be impossible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability. In such cases, assuming development of the record is not warranted, an applicant is also entitled to an award without apportionment. (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113, 133]; see also *James v. Pacific Bell Tel. Co.* (May 10, 2010, ADJ1357786) [2010 Cal. Wrk. Comp. P.D. LEXIS 188].)

In the instant case, in his initial July 13, 2023 report, Dr. Graham indicated that there “*will be apportionment*” for applicant’s lumbar spine given “*anticipated degenerative changes.*” (Joint Exhibit AA, AME Report of Dr. Graham, July 13, 2023, p. 10, emphasis added.) In making this determination, it appears that Dr. Graham had not yet reviewed the medical file in this case. In his subsequent July 24, 2023 report, Dr. Graham found 50% apportionment to the lumbar spine based upon applicant’s “preexisting condition.” (Joint Exhibit BB, AME Report of Dr. Graham, July 24, 2023, p. 3.) No further explanation was provided. In his final January 2, 2024 report, Dr. Graham explained that his apportionment findings were written “to comport with Dr. Klassen’s analysis.” (Joint Exhibit CC, AME Report of Dr. Graham, January 2, 2024, p. 3.) Ultimately, Dr. Graham’s findings are not only speculative but lacking in reasoning. It appears that rather than provide his own opinions, Dr. Graham opted instead to adopt those of Dr. Klassen with no basis or rationale. We therefore agree with the WCJ that Dr. Graham has failed to provide a “comprehensive explanation” for apportionment and as such, his apportionment findings “do not amount to substantial medical evidence.” (Report, pp. 7-8.)

In light of the foregoing, we will deny the Petition. Accordingly, the issue of alleged overpayments in permanent disability is moot.

Defendant raises the issue of the alleged lien of the Employment Development Department (EDD). However, this issue was not raised at trial and should be addressed at the trial level with the WCJ in the first instance. It is therefore premature for us to address the lien at the present time as a final decision with respect to the lien has not yet issued.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the July 2, 2024 Joint Findings of Fact and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 12, 2024

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

**URIEL RED
MITCHELL & POWELL
STATE COMPENSATION INSURANCE FUND**

RL/cs

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