WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

ANGELICA GONZALEZ, *Applicant*

vs.

GOLETA UNION SCHOOL DISTRICT, Permissibly Self-Insured, *Defendant*

Adjudication Number: ADJ14413891
Santa Barbara District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of December 13, 2024, wherein it was found that while employed on October 29, 2021 as a playground supervisor, applicant sustained industrial injury to the neck, low back, thoracic spine, right shoulder, arms and hands, causing permanent disability of 45%. In finding permanent disability of 45% it was found that "applicant is entitled to an unapportioned award."

Defendant contends that the WCJ erred in finding permanent disability of 45% arguing that the WCJ should have applied the apportionment determination of independent medical evaluator orthopedist Yuri Falkinstein, M.D., who opined that 50% of applicant's cervical and lumbar spine impairment was caused by factors other than the industrial injury. We have not received an answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated below and for the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny the defendant's Petition.

Preliminarily, we note that former Labor Code 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, Labor Code 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 Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on December 30, and 60 days from the date of transmission is February 28, 2025. This decision is issued by or on February 28, 2025, so we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on December 30, 2024, and the case was transmitted to the Appeals Board on December 30, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on December 30, 2024.

Turning to the merits, we will deny reconsideration for the reasons stated by the WCJ his Report. While Dr. Falkinstein's report may be substantial evidence of some level of

apportionment, he does not adequately explain the level of nonindustrial apportionment, as required by *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Bd. en banc). We acknowledge that determining the level of apportionment is not an exact science and "[a]rriving at a decision on the exact degree of disability is a difficult task under the most favorable circumstances. It necessarily involves some measure of conjecture and compromise …." (*Liberty Mutual Ins. Co. v. Industrial Acc. Com. (Serafin)* (1948) 33 Cal.2d 89, 93 [13 Cal.Comp.Cases 267].) Nevertheless, there must be some attempt at explaining the percentages of apportionment decided upon, not just the existence of non-industrial factors. Here, Dr. Falkinstein does not explain how or why 50% is the appropriate level of non-industrial apportionment. Accordingly, we deny defendant's Petition for the reasons stated in the Report, which we quote here:

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION AND NOTICE OF TRANSMITTAL

I.
INTRODUCTION

1.	Applicant's Occupation:	Playground Supervisor
	Age of Applicant:	[69]
	Date(s) of Injury:	January 29, 2021
	Parts of Body Injured:	Neck and low back
	Manner in Which Injury Occurred:	Not in dispute
2.	Identity of Petitioner:	Defendant
	Timeliness:	The Petition is timely
	Verification:	The Petition is verified
	Services:	The Petition was served on all parties
3.	Date of Issuance of Order:	December 13, 2024
4.	Petitioner's Contention:	The WCJ erred in not finding apportionment.

II.
FACTS

The matter initially proceeded to trial on November 7, 2023 resulting in the appointment of Yuri Falkinstein, M.D. pursuant to Labor Code §5701 as a "regular physician".

The matter next proceeded to trial with a Findings and Award being issued on

November 15, 2024 based on the medical reporting of the original primary treating physician Dr. Wickman.

A Petition for Reconsideration was filed, and after further review, the deficiencies initially noted by the WCJ were revisited, resulting in the Findings and Award being set aside. A new decision premised on the findings of Dr. Falkinstein issued on December 13, 2024.

Following that, defendant filed a Petition for Reconsideration contending the WCJ's failure to find apportionment was incorrect, and further, defendant filed a DOR to set a Rating MSC for cross-examination of the rater set for December 23, 2024. However, due to the filing of the Petition for Reconsideration, there is no jurisdiction for a Rating MSC or cross-examination of the rater to go forward. Further, the cross-examination of the rater is pointless, since the rating instructions were predicated on the strict instructions provided by me. Pursuant to *Blackledge*, while the rater may rate per my instructions, it is my determination of the permanent disability that controls.

Defendant filed this instant Petition for Reconsideration averring the WCJ erred in not applying Dr. Falkenstein's apportionment determination.

III.
DISCUSSION

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures those defects.

Yuri Falkinstein, M.D., in the capacity of a regular physician appointed pursuant to Labor Code §5701, wrote two medical reports but was not deposed. On page 10 of his medical report of May 21, 2024, Dr. Falkinstein wrote as follows:

> "Pursuant to Labor Code 4663 and 4664, and within reasonable medical certainty, apportionment of the permanent residual **cervical and lumbar** spine impairment based on causation is 50% **industrially related** to the injury sustained on **01/29/21** and **50%** of the impairment was caused by pre-existing degenerative changes as seen on imaging studies and based on low energy nature of the applicant's injury, her short prior industrial exposure, and advanced age at time of injury."

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. Marsh*alls (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board 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 nonindustrial 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* summarized 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.

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. (*Ibid.* italics added.)

Here, there are numerous problems with the apportionment explanation of Dr. Falkinstein. First, he never explains how the pre-existing nonindustrial disability caused or contributed to her permanent disability sustained as a result of the industrial injury.

Further, the doctor provides three different bases to support apportionment. Pre-existing degenerative changes, her short prior industrial exposure and advanced age at the time of the injury.

First, the doctor never delineates how much of the 50% is made up by each factor he cites specifically. Secondly, he never explains how these factors caused or contributed to the applicant's overall permanent disability.

Based on the doctor's failure to provide substantial medical evidence on the issue of apportionment, applicant is entitled to an unapportioned award.

IV.
RECOMMENDATION

For the reasons stated, it is respectfully recommended that defendant's Petition for Reconsideration be denied based on the arguments and merits addressed herein.

This case was transmitted to the Reconsideration Unit on December 30, 2024.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of December 13, 2024 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

I DISSENT (See attached Dissenting Opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 28, 2025

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

ANGELICA GONZALEZ
WOLFF-WALKER LAW FIRM
TOBIN LUCKS

DW/*pm*

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

DISSENTING OPINION OF COMMISSIONER JOSÉ H. RAZO

I respectfully dissent. I would have granted the defendant's Petition and applied the apportionment found by independent medical evaluator orthopedist Yuri Falkinstein, M.D.

Dr. Falkinstein's discussion of apportionment meets the standard set by the Court of Appeal in *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687]. In *Gatten*, the Court of Appeal reversed a WCAB finding of no apportionment, and found, in accordance with an independent medical examiner's report, that 20 percent of the injured worker's permanent disability was caused by non-industrial factors. The medical evidence supporting apportionment in *Gatten* was the physician's review of an MRI showing degenerative disc disease. The *Gatten* court held that apportionment was proper even though the applicant was asymptomatic prior to the industrial injury, writing that, "[t]he doctor made a determination based on his medical expertise of the approximate percentage of permanent disability caused by [the] degenerative condition [in] applicant's back. [Labor Code] [s]ection 4663, subdivision (c), requires no more." (*Gatten*, 145 Cal.App.4th at p. 930.)

Similarly, here, Dr. Falkinstein made a determination based on his medical expertise after an adequate examination and after review of the relevant medical record. Dr. Falkinstein noted degenerative changes that pre-existed the industrial injury on imaging studies and applied his clinical knowledge and experience in determining how the mechanism of injury could have contributed to a certain level of disability. "His conclusion cannot be disregarded as being speculative when it was based on his expertise in evaluating the significance of these facts." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th 922, 930 [71 Cal.Comp.Cases 1687].)

Accordingly, I would have granted reconsideration and amended the WCJ's decision to apply Dr. Falkinstein's apportionment and find permanent disability of 23%. I therefore respectfully dissent.

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 28, 2025

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ANGELICA GONZALEZ
WOLFF-WALKER LAW FIRM
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DW/*pm*

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