

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

**CHRISTINA VACCARO, *Applicant***

**vs.**

**ELKS LODGE NO. 1968; TECHNOLOGY INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ13465387  
San Francisco District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

We have considered the allegations of the Petition for Reconsideration and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, and as further explained below, we will deny defendant's Petition for Reconsideration of the WCJ's Findings and Award.

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 June 4, 2025, and 60 days from the date of transmission is Sunday, August 3, 2025. The next business day that is 60 days from the date of transmission is Monday, August 4, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)<sup>1</sup> This decision is issued by or on Monday, August 4, 2025, so that 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 WCJ, the Report was served on June 4, 2025, and the case was transmitted to the Appeals Board on June 4, 2025. 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 June 4, 2025.

We further note that under Labor Code section 5904, the petitioner for reconsideration shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the Petition. The sole issue raised in the Petition is whether the medical and vocational reporting supports the finding and award of 100 percent permanent disability.

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<sup>1</sup> 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.

In this case, John Lavorgna, M.D., served as the Agreed Medical Evaluator (AME), and his opinions provided the sole medical evidence submitted by the parties. We presume that the AME was chosen by the parties because of his expertise and neutrality, and that his opinions should ordinarily be followed unless there is good reason to find those opinions unpersuasive. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114, 117].) In his report dated December 17, 2020, the AME determined that applicant had reached Maximal Medical Improvement and assigned Whole Person Impairment percentages for applicant's cervical spine (8 percent for a Cervical Category II Diagnosis-Related Estimate according to *The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*), lumbar spine (8 percent for a Lumbar Category II Diagnosis-Related Estimate per the *AMA Guides*), left shoulder (16 percent whole person impairment), and left hip (20 percent for full-time use of a cane and moderately severe gait derangement). (Joint Exhibit 101, Report of AME John Lavorgna, M.D., dated December 17, 2020, page 10, paragraphs 3-6.) The AME apportioned 100 percent of these impairments to applicant's industrial injury of June 23, 2018. (*Id.*)

In his subsequent report dated January 5, 2021, the AME opined that these impairments should be added instead of combined because they "act synergistically to create a greater level of impairment" as contemplated in the case of *East Bay Municipal Utility District v. Workers' Compensation Appeals Board (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.). (Joint Exhibit 102, Report of AME John Lavorgna, M.D., dated January 5, 2021, page 1, last paragraph, and page 2, first paragraph.) Dr. Lavorgna confirmed this opinion at his deposition of May 11, 2021. (Joint Exhibit 104, Transcript of the Deposition of John Lavorgna, M.D., dated May 11, 2021, page 20, line 6 to page 21, line 24.) In his re-evaluation of December 13, 2023, Dr. Lavorgna revised the Whole Person Impairment of the left shoulder to 13 percent. (Joint Exhibit 103, Report of AME John Lavorgna, M.D., dated December 19, 2023, page 6, paragraph 2.)

Applicant's Whole Person Impairment percentages, when adjusted in accordance with Labor Code section 4660.1 and the current rating schedule, produce the following percentages of permanent disability:

- 15.01.01.00 - 8 - [1.4]11 - 322F - 11 - 15% neck (cervical spine)
- 15.03.01.00 - 8 - [1.4]11 - 322F - 11 - 15% back (lumbar spine)
- 16.02.01.00 - 13 - [1.4]18 - 322F - 18 - 24% left shoulder
- 17.01.07.00 - 20 - [1.4]28 - 322F - 28 - 36% left hip

If added, the adjusted Whole Person Impairment percentages would total 90 percent. However, because Dr. Lavorgna's discussion of the interaction between applicant's impairments lacks specificity and does not apply the current standards for rebuttal of the Combined Values Chart set forth in *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc), a strict rating of applicant's impairments would have to be based upon the Combined Values Chart in the rating schedule. On that chart, permanent disability of 36, 24, 15, and 15 percent combine to a total of 64 percent permanent disability.

Ultimately, whether applicant's impairments combine to 64 percent or add to 90 percent is of no moment, because the AME also provides several quite severe restrictions on applicant's ability to work. Dr. Lavorgna found that applicant can only work up to one hour at a time in a sedentary position, with full-time use of a cane whenever she is up. He also found that applicant cannot do any lifting, pushing, pulling, or carrying, and that she must lie down once or twice a day. (Joint Exhibit 101, December 17, 2020, page 9, last paragraph.) At deposition, Dr. Lavorgna clarified that applicant could lift, push, pull, or carry up to two or three pounds. (Joint Exhibit 104, May 11, 2021, page 19, lines 21-24.) In his last report, the AME further clarified that applicant cannot work with her left arm away from her body, requires assistance getting up and sitting down, and has to lie down not just once or twice a day, but "most of the day." (Joint Exhibit 103, December 19, 2023, page 5, second to last paragraph.)

Both of the vocational experts in evidence have concluded that these work restrictions have caused applicant to lose 100 percent of her earning capacity. Defendant's Petition focuses on defense expert Evan Oemcke's criticisms of the opinions of applicant's expert, Scott Simon, but neglects to mention that Mr. Oemcke himself concedes that applicant's diminished earning capacity is 100 percent if the need to lie down "most of the day" exceeds employer tolerances. (Defendant's Exhibit A, Report of Evan Oemcke dated July 22, 2024, page 102, paragraph 3, lines 8-10 and 12-13.) No evidence is offered in support of the conjecture that any employer would permit applicant to lie down most of the day, and common sense dictates that no employer would, in fact, tolerate applicant literally lying down on the job in any occupation.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Findings and Award issued by the WCJ on April 28, 2025 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**I CONCUR,**

**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**AUGUST 1, 2025**

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

**CHRISTINA VACCARO  
FARNSWORTH LAW GROUP  
LLARENA, MURDOCK, LOPEZ & AZIZAD**

**CWF/cs**

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

**Report and Recommendation on  
Petition for Reconsideration and Notice of Transmission to WCAB**

Elizabeth Dehn, Workers' Compensation Judge, hereby submits her report and recommendation on the Petition for Reconsideration filed herein

**Introduction**

On May 22, 2025 defendant, through their attorney of record, filed a Petition for Reconsideration of my April 25, 2025 Findings and Award, which was served on all parties on April 28, 2025.

Petitioner asserts that that evidence does not justify the findings of fact and that the findings of fact do not support the order, decision or award. The petition was timely filed and accompanied by the verification required under Labor Code section 5902 and Regulation 10940(c). To date, I am not aware of an answer having been filed by applicant.

**Facts**

Chirstine Vaccaro, born [], while employed on June 23, 2018 as a bartender at Vista California by Elks Lodge Number 1968, sustained an admitted injury arising out of and in the course of employment to the head, left arm, left shoulder, left hip, left leg, neck and back[.]

The applicant sustained a fracture of the left shoulder, left hip and femur on the date of injury, and was taken to Tri-City Hospital in Oceanside. She was transferred to a skilled nursing facility, and underwent left hip and femur surgery on August 3, 2018. Although left shoulder surgery was recommended, she was not medically cleared for surgery due to aortic stenosis. She did have valve replacement surgery, but following that nonindustrial heart surgery, the left shoulder surgery was no longer recommended.

The parties utilized John Lavorgna as an Agreed Medical Examiner. He initially evaluated the applicant on December 17, 2020 at which time he found her condition to be at maximum medical improvement, and provided his assessment of permanent disability and work restrictions. In terms of impairment, for the cervical spine, he assigned 8% Whole Person Impairment (WPI). Due to loss of range of motion for the left shoulder he assigned 16% WPI. For the low back he assigned 8% WPI. He assigned 20% WPI for the left hip due to moderately severe gait derangement. There was no apportionment. Dr. Lavorgna recommended the applicant undergo an evaluation for post-concussion syndrome and post-traumatic stress syndrome. Recommended

work restrictions were work for one hour at a time in a sedentary position with full-time use of a cane and [applicant] had to lie down once or twice a day. She also could not lift, push, pull or carry.

At his deposition of May 11, 2021, Dr. Lavorgna clarified the work restrictions to be a two to three pound limit on the amount she could lift [sic], push, pull or carry.

Stephen Francis, PhD performed a neuropsychological consult on August 22, 2022. He found that there were no residual neurological issues on an industrial basis.

Dr. Lavorgna reevaluated the applicant on December 13, 2023. He noted that she had increased vertigo and headaches, although he did not provide impairment for either. He opined that her condition worsened since his the [sic] last evaluation, although the hip impairment remained the same, and her left shoulder range of motion now warranted 13% WPI. His report was silent on cervical spine and lumbar impairment. He recommended increased work restrictions and stated she could not work with her left arm away from her body and [she] had to lie down most the day. She noted that she was no longer independent with dressing, bathing, doing her hair or getting up and sitting down.

Applicant obtained a [report] from Scott Simon who opined that the applicant was permanently, totally disabled. Defendant obtained a report from Evan Oemcke who opined that the applicant could be employable if the restriction that she lie down “most of the day” falls within the acceptable employer allowances for being off task during the day.

The matter proceeded to trial on March 17, 2025 on the issues of injuries [sic] to parts of body, earnings, permanent disability, the need for medical treatment and attorney’s fees. After carefully considering the documentary evidence, the applicant’s testimony, and the relevant case law, I issued my decision and found that the I find that [sic] applicant did not met her burden of proof for injuries to the psyche, neuropsych, vertigo and headaches, that applicant’s earnings were \$416.00 which entitles her to both temporary and permanent disability at the rate of \$277.30 and that applicant was permanently, totally disability [sic]. It is from that Findings of Fact and Award that the petitioner seeks reconsideration only of my finding of permanent, total disability.

### **Discussion**

I found that the applicant was permanently, totally disabled based on the opinions of applicant’s vocational expert, Scott Simon. Mr. Simon did analyze the work restrictions outlined by Dr. Lavorgna in his December 1, 2020 report, along with the return to work voucher and

clarification of weight limit Dr. Lavogna provided at his deposition. Mr. Simon opined that the applicant was unable to return to the workforce, was not amenable to rehabilitation, and had lost all access to employment in the labor market [sic]. (Applicant's Exhibit 1, page 23.) His opinion that the applicant would not be able to perform even the least physically demanding positions with the earlier restrictions of working for one hour at a time in a sedentary position and the need to lie down once or twice a day was consistent with the applicant's appearance at trial. Although applicant's expert did not review the December 19, 2023 report of Dr. Lavorgna in which he increased the applicant's work restrictions, it is hard to see how it would change his conclusions on the applicant's employability with the increased worker [sic] restriction that the applicant could not work with her left arm away from her body and had to lie down most of the day.

My finding of permanent total disability is also supported by defendant's vocational expert. Evan Oemcke reviewed all of the reports of Dr. Lavorgna, including the December 19, 2023 report with the increased work restrictions. He stated that if the restriction that she lie down "most of the day" falls within the acceptable employer allowances for being off task, she would have access to jobs such as lobby attendance [sic], office helper, surveillance system monitor, parking lot cashier and car wash cashier, but if her need to lie down most of the day exceeded the acceptable amount of time that employers allow workers to be off task, she has no labor market access. (Defendant's Exhibit B, page 101.) He also noted that if her time off task were to exceed employer allowances due to her need to lie down most of the day she would not benefit from rehabilitation or to be amendable to rehabilitation for jobs in the open labor market [sic]. (Id. at 98.) He cited research that indicated that off task behavior tolerate[d] by employers varied between 10-25% of the workday, or 6-12 minutes per hour on average. (Id. at 69.) He opined that the need to lie down "most of the day," as recommended by the AME, would be more than 50% of the time, which would exceed the acceptable minimum time that employers allow workers to be off task and she would have no access to any jobs in the open labor market. (Id. at pages 52, 58, 63, 72.)

Defendant argued that the report of Mr. Simon was not substantial evidence because he used outdated testing. However, I note that both experts had similar results with their reports. Mr. Simon found that the applicant's reading comprehension was above 12.9 level and spelling was also above 12.9 level. (Applicant's Exhibit 1, page 6.) These are the same levels found by [sic] Mr. Oemcke. (Defendant's Exhibit B, page 37.) Defendant also contends that the transferrable skills analysis performed by Mr. Simon was flawed because he purportedly added additional

physical restrictions to the occupations he considered (switchboard operators, answering service and customer service representative, counter clerks and rental clerks.) However, Mr. Oemcke found the applicant could only perform the work of a clerk if the need to lie down “most of the day” did not exceed the acceptable amount of time to be off task. (Defendant’s Exhibit B, pages 70-72.) It is clear that my finding of permanent total disability was consistent with the reporting of both experts.

**Recommendation**

For the foregoing reasons, I recommend that defendant’s Petition for Reconsideration, filed herein on May 22, 2025, be denied. This matter is being transmitted to the Appeals Board on the service date indicated below my signature.

Elizabeth C. Dehn

Workers’ Compensation Judge

Workers’ Compensation Appeals Board