WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

FRANK DERRICK, *Applicant*

vs.

RONALD L.WOLFE & ASSOCIATES;
INSURANCE COMPANY OF THE WEST, *Defendants*

Adjudication Number: ADJ15533922
Santa Barbara 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, we will deny reconsideration.

I.

Former Labor Code[1] 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.

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

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 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 January 8, 2025, and 60 days from the date of transmission is Sunday, March 9, 2025. The next business day that is 60 days from the date of transmission, is Monday, March 10, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, March 10, 2025, 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 January 8, 2025, and the case was transmitted to the Appeals Board on January 8, 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 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 January 8, 2025.

II.

Section 4663 provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) A doctor who prepares a report addressing the issue of permanent disability due to a claimed industrial injury must address the issue of causation of the permanent disability. (Lab. Code, § 4663(b).) Section 4663 requires that the doctor "make an

[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.

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." (Lab. Code, § 4663(c).) Pursuant to section 4663(c) and section 5705, applicant has the burden of establishing the approximate percentage of permanent disability directly caused by the industrial injury, while defendant has the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612-613 (Appeals Board en banc) (*Escobedo*).)

The report by the physician addressing the issue of apportionment must be supported by substantial evidence. (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 620, citing Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378–379 [35 Cal.Comp.Cases 525].) "Moreover, in the context of apportionment determinations, the 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." (*Escobedo*, *supra*, at p. 621.) Therefore, for the reasons stated in the Report, we agree that defendant did not meet its burden to support apportionment based on the medical reporting by Qualified Medical Evaluator (QME) Dr. Keith Robertson.

Further, the WCJ correctly combined and did not add the applicant's impairments. "Impairments to two or more body parts are usually expected to have an overlapping effect upon the activities of daily living, so that generally, under the AMA Guides and the PDRS, the two impairments are combined to eliminate this overlap." (*Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686, 691 (Appeals Board en banc).) The burden is on the applicant to show that the impairments should not simply be combined by showing that: "1) The ADLs [Activities

of Daily Living] impacted by each impairment to be added, and 2) Either: a) The ADLs do not overlap, or b) The ADLs overlap in a way that increases or amplifies the impact on the overlapping ADLs." (*Id*. at p. 693.) In the instant case, applicant did not provide any such evidence to support the finding that the impairments should be added instead of combined. Therefore, the WCJ correctly combined instead of added the impairments.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 10, 2025

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

FRANK DERRICK
GHITTERMAN,GHITTERMAN & FELD
BRADFORD & BARTHEL, LLP

JMR/mc

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION AND NOTICE OF TRANSMITTAL

I.

INTRODUCTION

1.	Applicant's Occupation	:	Maintenance Technician
	Applicant's DOB	July 11, 1964	
	Date(s) of Injury		March 21, 2021
	Parts of Body Injured		Cervical spine and lumbar spine
	Manner in Which Injury Occurred		Not in dispute
2.	Identity of Petitioner		Defendant
	Timelines		The petition is timely
	Verification	:	The petition is verified
	Service		The petition was served on all parties
3.	Date of Issuance of Decision/Order	:	December 3, 2024
4.			Petitioners' Contentions WCJ erred in applying PQME's opinion on Permanent Disability using range of method as proposed by PQME falling within the four corners of the AMA Guides. Disabilities should not have been added and WCJ erred in not applying apportionment.

FACTS

Applicant sustained an admitted injury to his cervical and lumbar spine. Applicant was evaluated by Keith Robertson, M.D., in the capacity of a PQME. This was the only medical evidence submitted in this case. Dr. Robertson authored five (5) reports and was deposed.

Following trial, an Opinion on Decision issued. Defendant's Petition for Reconsideration raises error with regards to three issues.

First, the WCJ erred in applying the range of motion (ROM) method of determining permanent disability versus a diagnosis related estimate was followed.

Secondly, applicant was entitled to an unapportioned Award as the apportionment determination was found to not constitute substantial medical evidence.

Thirdly, defendant contends the disability should be combined and not added.

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.

Defendant contends in Dr. Robertson's medical report, dated July 12, 2022 (Exhibit A), Dr. Robertson stated that Almaraz/Guzman did not apply in this case.

However, this was Dr. Robertson's initial report. He subsequently wrote four others and was deposed on February 13, 2024.

In that deposition starting on page 6, lines 17-25 and starting again on page 7, lines 1-8, Dr. Robertson addressed why he used the ROM versus DRE.

> Q. And going through the report in the prior medical records, I note in the EMG study as well as prior PTP reports that it's noted that the applicant did not have any objective signs of radiculopathy in his upper extremities from the cervical spine; is that correct?
> A. That's correct.
> Q. So that being the case, wouldn't the DRE measurement be the correct measurement in this case?

> A. No, I don't believe so. I think the range of motion fits better because it's multi-level and it's bilateral, and I think I fit it into -- I forget the section -- I wrote it down here -- in the Guides – and I think it fits better there. So I think it's justifiable, based on that first table, I think it's 15-4, explaining the difference between DRE and range of motion, and I think it fits range of motion.

In his subsequent report dated April 2, 2024, Dr. Robertson provides both a DRE and ROM analysis and goes into great detail as to how and why he believes it is appropriate in this case to use the ROM method, as it more accurately reflects applicant's permanent disability.

The doctor's last words on this subject support the use of the Range of Motion (ROM) method of determining impairment instead of using the DRE method for determination of applicant's permanent disability.

I even wrote in my Opinion on Decision under the following heading:

[“]**WHETHER THE IMPAIRMENTS SHOULD BE ADDED OR COMBINED**

> Applicant has failed in his burden of proof to provide the WCJ with medical evidence regarding the impact on activities of daily living (ADLs) and whether they overlap on the different body parts. No medical report, opinion or deposition testimony was presented supporting the adding of the impairments rather than combining them was submitted."
> Not sure where defendant's argument is coming from. Nowhere in the decision did I indicate the disabilities should be added.
>
> Defendant next contends the WCJ erred in not applying Dr. Robertson's findings with regards to apportionment.

In his initial report of July 22, 2022, Dr. Robertson wrote under the heading of apportionment,

> [“]My opinion on apportionment determination is based on the approximate percentage of the permanent disability caused by the direct result of the described work factors arising out of and accruing during the course of employment and the approximate percentage of the permanent disability caused by other possible factors both before and subsequent to the industrial injuries, including prior industrial injuries and is provided within a reasonable degree of medical probability.
>
> As reported above there is documented evidence of pre-existing conditions here including the neck and back (mid and low).

> On August 19, 2004, there is a fall from a ladder with complaint of left knee and mid/low back pain. Subsequently, on September 3, 2004, we see some evidence of neck pain.
>
> On March 28, 2013, we see x-rays of the cervical and thoracic spines secondary to a motor vehicle accident. Those radiographs demonstrate findings of degenerative disc disease in both spinal regions.
>
> On March 26, 2020, there is a report from Dr. Wexlar that notes the February 25, 2020 motor vehicle accident with neck and low back pain followed by 9 sessions of physical therapy. On June 29, 2020, Dr. Lamb notes that he had not had much therapy recently due to Covid which intimates that he would still be attending said therapy.
>
> Then on March 2, 2021, there was the subject incident with neck, mid and low back pain. A CT scan of the cervical spine demonstrates the findings of DISH which would be a preexisting, non-industrial condition wherein there is acquired ossification of multiple vertebral segments. This condition, while not with certainty, is often found in the presence of diabetes or other conditions.[]
>
> The bottom line here is that certainly, apportionment of the neck and back to preexisting, non-industrial factors will be at issue and will be discussed further in a final report.
>
> I reserve the right to alter my opinion with regard to apportionment in the event of any subsequent review of medical records; at such time, a Supplemental Report will be issued.["]

In his last medical report dated April 2, 2024, not only did the doctor reiterate verbatim the words in his initial report, but he went on to indicate,

> ["]At this time, in light of the discussion above, the cervical spine would reasonably be apportioned as 50% to pre-existing factors with the remaining 50% to March 2, 2021. As for the thoracic spine, with no residual impairment, apportionment is moot.
>
> For the lumbar spine again there will be apportionment to pre-existing factors, but definitive opinions are deferred pending a final report.
>
> Based upon the discussion above, in correlation with the MRI findings of chronicity with multiple levels of facet arthropathy and disc degeneration and in consideration of obesity (BMI 31.9), the lumbar spine is apportioned as 40% to pre-existing degenerative changes with the remaining 60% to the subject claim.["]

This was the last narrative medical report authored by Dr. Robertson. In his deposition, apportionment was not addressed.

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 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 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* 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 the doctor failed to explain how and why the previous industrial and non-industrial conditions, e.g. degenerative disc disease, caused or contributed to applicant's overall disability as a result of this instant industrial injury.

The doctor's opinion does not meet the requirement of *Escobedo,* and his conclusions do not constitute substantial medical evidence. Applicant is entitled to an un-apportioned 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 January 8, 2025.

DATE: January 8, 2025

Scott J. Seiden
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDG