

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

LINDA ERNEST, *Applicant*

vs.

**TRADER JOE'S, permissibly self-insured;
administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants***

**Adjudication Number: ADJ12320361
Los Angeles 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 Code¹ 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.

¹ All further statutory references are to the Labor Code.

(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 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 December 18, 2024, and 60 days from the date of transmission is Sunday, February 16, 2025. The next business day that is 60 days from the date of transmission Tuesday, February 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Tuesday, February 18, 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 December 18, 2024, and the case was transmitted to the Appeals Board on December 18, 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 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 December 18, 2024.

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.

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 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. (*Heggin 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. Michael Slutzker.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ PAUL F. KELLY, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 18, 2025

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

**LINDA ERNEST
BERGER & MICHELENA
LAW OFFICES OF MORGAN A. MUNOZ**

JMR/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECON / REMOVAL

I **INTRODUCTION**

1. IDENTITY OF PETITIONER: Defendant TRADER JOE'S administered by SEDGWICK CMS
2. TIMELINESS: The Petition was timely filed on 12/10/2024.
3. VERIFICATION: The Petition is verified.
4. PETITIONER'S CONTENTION(S): The WCJ erred in his decision dated 11/26/2024 in finding that Petitioner did not meet its burden of proof as to apportionment for the left hand, left wrist, and left knee.
5. DATE EAMS FILE TRANSMITTED TO APPEALS BOARD: 12/18/2024

II **RELEVANT FACTS**

Applicant LINDA ERNEST, sustained an injury arising out of and in the course of employment on 12/15/2017 to her low back, left hand, left wrist, and left knee.

The undersigned WCJ issued a decision on 11/26/2024 awarding 51% permanent disability based on the medical reporting of PQME Michael Slutzker, MD, and finding that Defendant was entitled to apportionment for the low back, but that Defendant had not met its burden to establish apportionment for non-industrial disability to the left hand, left wrist, and left knee.

The Defendant has filed the within Petition for Reconsideration and only challenges Court's finding regarding apportionment to the left knee.

III **DISCUSSION**

Defendant argues that the evidence does not justify the findings of fact. The Defendant does not dispute that the burden to prove apportionment rests with Defendant. See Pullman Kellogg v. Workers' Compensation Appeals Board (Normand) (1980) 26 Cal. App. 3d 450, 45 Cal. Comp. Cases 170.

This Court found that the PQME did not provide a sufficient explanation as to how and why the PQME assigned values for apportionment.

Defendant relies on reporting from the QME purportedly dated 10/20/2020, which is apparently a typographical error. The Defendant actually appears to refer to Joint Exhibit 3, the Report of Dr. Slutzker dated 10/12/2020. On page 23 of the report, the QME reviewed deposition testimony from the Applicant indicating that there was a worsening of her pain from 7/10 to 10/10 after a subsequent injury at Costco in 2018. She then had mild improvement until a third fall at Whole Foods on 03/03/2019.

On page 34 of the report, Dr. Slutzker opined that “all of the impairment secondary to her non-displaced patellar fracture is solely the consequence of her 12-16-17 industrial injury.” In the next paragraph, PQME Slutzker addressed “other left knee impairments” and apportioned 25% to the 12-16-2017 industrial injury, and 75% to the two subsequent injuries. PQME Slutzker reiterated these findings on page 40 of his reports dated 03/20/2023 [Joint Exhibit 6] and again in his report dated 11/29/2023 [Joint Exhibit 7].

However this was not persuasive to the Court to put 75% of the left knee apportionment on the subsequent injuries. The doctor did not parcel out impairment between the patellar fracture, which he reported to be 100% industrial, and the “other left knee impairments” which are ambiguous. The PQME also did not say how he determined that only 25% of these “other” impairments were industrial when he also reported that she said her pain was already at 7/10 before the Costco fall. These are ambiguities that it was Defendant’s burden to resolve. Defendants had every opportunity to clarify Dr. Slutzker’s apportionment findings so that his conclusions would constitute substantial medical evidence on that issue but chose not to. It is not this Court’s duty to assist a party in meeting their burden of proof. San Bernardino Comm. Hospital vs. WCAB (McKernan) 74 Cal. App. 4th 928, 88 Cal. Rptr. 2d 516, 64 Cal. Comp. Cases 986 (1999)

The Court therefore found that valid, legal apportionment had not been established for the left knee under the principles of Labor Code §§4663, 4464, and Pullman Kellogg, supra. See also Benson v. Workers' Comp. Appeals Bd. (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113]; Kopping v. Workers' Comp. Appeals Bd. (2006) 142 Cal.App. 4th 1099, 1115 [71 Cal.Comp.Cases 1229]; Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 607 (en banc).

IV
RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

Date: 12/16/2024

KEITH N. PUSAVAT
Workers' Compensation Judge