WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

NORBERTO GARCIA, *Applicant*

vs.

DOMINATION COLLABORATION, INC., dba MIXTO COMIDA LATINA, OASIS, A PAYCHEX COMPANY; AMERICAN ZURICH INSURANCE COMPANY, administered by ESIS, *Defendants*

Adjudication Number: ADJ13011053

Van Nuys District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued on May 21, 2025, wherein the workers' compensation administrative law judge (WCJ) found as relevant that (1) while employed as a cook during the period of March 1, 2019 through October 14, 2019, applicant sustained injury to his psyche, lower GI, cervical spine, thoracic spine, lumbar spine, bilateral shoulders, left ankle, lower extremities/gait, kidneys, and in the form of hypertension, anemia, diabetes, and left foot amputation; (2) applicant's injury caused permanent disability of 100%, entitling him to disability indemnity payable at the temporary disability rate of $348.39 per week for his lifetime, subject to cost of living (COLA) and state average weekly wage (SAWW) increases, less 15% to be paid as attorney fees; (3) applicant is found to be 100% permanently disabled based on the addition of the ratings, without regard for the vocational evaluation findings; (4) applicant will require further medical treatment to cure or relieve the effects of his injury to the psyche, lower GI, cervical spine, thoracic spine, lumbar spine, bilateral shoulders, left ankle, lower extremities/gait, kidneys, and in the form of hypertension, anemia, diabetes, and left foot amputation; and (5) the reasonable value of the services of applicant's attorney is 15% of the permanent disability indemnity, to be commuted from the far end of the award and paid in accordance with the commutation obtained by the parties from the DEU, less credit for any sums paid.

The WCJ issued an award in applicant's favor in accordance with these findings.

Defendant contends that the WCJ erroneously (1) added applicant's impairments instead of combining them using the CVC; (2) duplicated the impairment assigned for the left foot amputation by including the impairment for gait derangement; and (3) failed to account for apportionment of permanent disability resulting from hypertensive cardiovascular disease. Defendant also contends that the findings of injury as to all body parts are unsupported by substantial medical evidence.

We received an Answer.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending that apportionment of permanent disability resulting from hypertensive cardiovascular disease be included in the permanent disability calculation and that the Petition otherwise be denied.

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will deny reconsideration.

FACTUAL BACKGROUND

The WCJ admitted the PQME Report of Dr. Lonky dated December 4, 2023. It includes the following:

> With regard to whether disability should be added or dealt with via the combined values chart, the fact that this gentleman has significant hypertension, significant diabetes, and most of all, the fact that he is on dialysis, leads me to believe that the disabilities from an orthopedic/podiatric perspective and internal medicine perspective should be added together. I have already stated that internal medicine disability should also be dealt with by addition.
>
> As a way of explaining this conclusion, it is my opinion that an individual on hemodialysis with an orthopedic disability will have more intense complications of his orthopedic condition due to the metabolic changes and requirements of being on dialysis. Patients with dialysis have very specific needs, including protecting bone reabsorption, muscle fatigue, and other factors that would further intensify what he would have based on his orthopedic disability by itself.
>
> (Ex. BB, PQME Report of Dr. Lonky dated December 4, 2023, pp. 21-22.)
>
> With regard to hypertension, as already mentioned, I find no prior history of hypertension in this gentleman. Other factors come into play, however, which would require some apportionment of disability related to his hypertension. Cigarette smoking is a known predisposition to the

development of elevated blood pressure, as well as the fact that he has had poorly controlled diabetes, which can lead to difficulties with control of blood pressure, particularly under circumstances of significant stress and pain. It is my opinion, therefore, that 70 percent of this gentleman's hypertensive disability should be apportioned to the pain and stress experienced, as well as the severe anxiety, frustration, and depression over his pain in his left foot and the eventual trans metatarsal amputation. Therefore, 70 percent of the disability-related to his hypertension is industrial in nature, while 30 percent is apportioned to nonindustrial factors.

(*Id.* p. 73.)

In the Opinion on Decision, the WCJ states:

The case proceeded to trial on the following issues:

1. Injury arising out of and in the course of employment.
. . .
5. Permanent disability.
6. Apportionment.
7. Need for further medical treatment.
. . .
10. Attorney fees.
. . .
15. Whether Dr. Lonky's reports and testimony qualify as substantial medical evidence.
16. Whether substantial medical evidence exists indicating that Applicant is 100 percent totally disabled per the vocational report of expert Paul Broadus, who allegedly finds that the applicant is unable to compete in the open labor market per *LeBoeuf*.
17. Whether there is substantial medical evidence that the disability from an internal medicine standpoint should be added together along with the orthopedic disability per the opinions of Dr. Lonky, which are alleged to be in accordance with the *Vigil* decision.
18. Whether Applicant is 100 percent disabled from adding the disabilities per Dr. Lonky without the need for the vocational evidence.
. . .
Applicant testified that he started working at Mixto Comida Latina in October 2018, quit after a dispute with the chef, and then spent three months seeking jobs as a cook. The owner called him back, and he worked another nine to ten months-cooking meats, taking orders, issuing tickets, occasional prep, evening clean-up, and sometimes loading trucks (up to 80 lbs), 40 hrs/week.

Before that, he had cooked for about ten years at Tequila for two to three years, Mas Malo for five years, and Malo for three years until it closed. He worked with no significant employment gaps.

At Mixto, cramped space and misaligned floor mats forced him to stand on his toes under the grill, causing toe numbness. He was asked if there was anything different at Mixto than what he had experienced at the other restaurants. His testimony was that the space at Mixto was very small and that he worked in an area that had floor mats that were not properly placed on the floor. He told the person in charge of the mats that were not correctly placed, and that individual told him that they were correctly placed and that they had been in the correct position.

It was the applicant's testimony that he was required to work in the same position for eight hours and that he had to stand on his toes. He stated that this affected his toes because of how the floor mats were placed. He said that he continued working in the position where the floor mats were placed under the grill and that his toes and feet would go numb, even though he used special kitchen shoes.

When asked, he confirmed that the mats were at an angle such that he had to be on his toes.

On September 27, 2019, he saw a doctor for pain radiating from his toes to his lower back, received an injection, and returned to work briefly. A follow-up visit found a blackened ulcer under his foot; it was removed, he took one day off, then worked a few more days. After a week of severe pain, he went to LA County-USC Hospital, where the ulcer was deemed infected. Three months of treatment failed, the infection reached his bones, and in January 2020 his fourth and fifth left toes were amputated; in February 2020 the remaining toes were removed.

Post-amputation he developed hypertension, kidney failure requiring dialysis three times weekly, and anemia. Dialysis causes nausea, vomiting, fatigue, and weakness. He also has chronic low-back and flank pain, uses a cane or crutches, and needs help with bathing, stairs, meals, and transportation. His last day of work was October 2019; a January 2024 part-time kitchen attempt ended when his foot pain (8-9/10) made work impossible. He cannot work now.

He testified that he is still on dialysis and now goes three times per week for four hours each session. The dialysis makes him feel bad. He usually experiences nausea and vomiting and finds that he is very sleepy after the dialysis. He also states that he has no strength in his leg and that his appetite leaves him constantly. He described additional symptoms including pain in his lower back around the waist area and pain in his side moving towards

his ribs. Mr. Garcia testified that he needs help at home with certain activities such as bathing because it is a little difficult. He also needs some help going up and downstairs. He indicates that he has to be taken to places because he cannot use his bicycle or run.

. . .

He last worked at Mixto in October 2019 and stopped solely because of his foot complications.

He denied any prior ulcers or bone infections. In January 2020 two toes were amputated at Rancho Los Amigos Hospital, followed by the remaining toes in February; he again adhered to his antibiotic regimen. He began using prosthetics a few months after his foot healed and has worn them daily for about three years. They aid his mobility--he can drive for an hour and a half and stand for up to two hours--but do not relieve his pain; sitting for more than two hours also triggers discomfort. Since his 2020 surgery he's used crutches (and occasionally a cane) primarily for errands.

. . .

REVIEW OF MEDICAL EVIDENCE

A. THOMAS LIM PQME PODIATRY

The parties offered a number of joint exhibits. Dr. Thomas Lim is the PQME in podiatry. He issued a report dated July 24, 2023. His comments are:

The claimant fully cooperated with the examination, showed consistent subjective complaints and objective findings, and did not appear to exaggerate. Past medical treatment and diagnostics were reasonable and followed ACOEM guidelines. All findings align with the reported 10/14/2019 work incident and injury.

. . .

Causation:

No history of sports or motor-vehicle injuries; no regular exercise regimen. Industrial causation of the left foot injury is assessed at 50% work-related, 50% due to preexisting diabetes.

The injury arose out of and in the course of employment.

Disability and Restrictions:

The left foot reached maximum medical improvement as of this examination.

Impairment Rating:

The whole-person impairment due to the left foot injury is 18%.

Apportionment:

50% of permanent disability is attributed to the industrial injury, 50% to claimant's diabetic condition in accordance with applicable Labor Code provisions.

. . .

IMPAIRMENT RATINGS

B. STEWART LONKY PQME INTERNAL

The history reported in the January 5, 2022, report is consistent with the applicant testimony at trial and with the other medical reports. Dr. Lonky confirmed that the applicant worked on mats in the kitchen but states they were not placed correctly such that the pads of his feet were constantly perched on the edge of the mat because it was not secured underneath the refrigerator and this was uncomfortable. He would stand in front of the grill that was perched on top of refrigerators and then twist and tum behind himself to work on other food items. Mr. Garcia related that on September 28, 2019, he began to experience discomfort under the left little toe that traveled up his left leg to his left waist. He consulted a physician who informed him that he might have sciatica. He received an injection for pain/inflammation. He was advised to return to work. (JOINT EXHIBIT AA, page 3).

Dr. Lonky issued several reports and modified his opinion on both impairment and apportionment.

He stated,

Given all of these factors, it is my opinion that with reasonable medical probability the contribution of industrial factors to his development of renal disease was small, but not zero. It is my opinion that 85 percent of this gentleman's disability related to his renal failure is, in fact, related to pre-existing diabetes and small vessel disease, as well as the infection of his foot. These I would, for the reason of apportionment of his renal disease, consider nonindustrial factors. The remaining 15% of this gentlemen's disability is attributed to industrial factors. (Page 74, para 2).

In the December 4, 2023, report Dr. Lonky reviewed the podiatry reports of Dr. Kim and revised his opinion on apportionment. He then stated:

In my initial report, I refrained from giving a whole person impairment to his renal disease, and it is now my opinion that we are looking at a Class IV impairment according ·to Table 7-1 in the *AMA Guides to the Evaluation of Permanent Impairment*. It is my opinion that there is an 80% impairment of the whole person given the fact this gentleman is on hemodialysis at this time: The fact that he is on hemodialysis for life affects my attribution of this 80% impairment according to Table 7-1.

In discussing apportionment, given the opinions of Dr. Kim, I will revise my opinion regarding the apportionment to industrial and nonindustrial factors. In my initial report, I had apportioned 15% of the disability due to

his renal disease to his industrial factors. I now, having read the podiatry Qualified Medical Evaluation, feel that this should be revised upward to 40% industrial causation of his 'renal disease and his renal disability with 60% being nonindustrial, related primarily to his preexisting diabetes, its natural progression, and small vessel disease.

. . .

In his report of January 25, 2024, Dr. Lonky offered the following significant finding after reviewing reports and records,

The CT scan of the abdomen shows that there are, in fact, mildly atrophic kidneys, indicating that his hypertension has played a role in the development of his renal disease, along with his diabetes mellitus. Nephrosclerosis, which occurs frequently as a result of hypertension, usually results in the shrinking of the kidneys. Therefore, the opinion that I expressed previously regarding the dual causes of his renal disease being both his hypertension and his diabetes is, in my opinion, apparently correct, with reasonable medical probability.

I see no reason to alter my opinion, in which I had concluded that his renal disease should be apportioned 60 percent as nonindustrial and 40 percent as industrial, as far as causation is concerned. It was also my opinion at that time that an 80 percent impairment was appropriate since Mr. Garcia was on hemodialysis.

The other question raised in the communication was whether or not I believe that the applicant's ulcer would have arisen without any preexisting diabetes.

As I have commented and as a podiatry evaluation has confirmed, I believe that the combination of microvascular disease and neuropathy, as well as the uneven floor and pressure on his feet, all contributed to his development of a pressure ulcer. I believe that, in a normal, healthy individual, it is most likely that some callus would have occurred, but I am not able to project that the ulcer and osteomyelitis would have occurred in the absence of diabetes. I believe that it was a contributing factor since it resulted in both microvascular abnormalities and peripheral neuropathy.

I see no reason to alter my previous opinions, but I do feel that some comments should be made regarding diabetes. In my initial report, I stated that it was my opinion that it would be medically reasonably probable that the development of his ulcer and infection worsened his diabetes mellitus. I have now reviewed several other opinions regarding this, which all seem to concur. Therefore, in my initial report, I had rated the diabetes impairment as 8 percent, according to Table 10-8 in the *AMA Guides to the Evaluation of Permanent impairment. Fifth Edition.* It is now my opinion that 90 percent of the disability associated with that diabetes should be

considered preexisting and not industrial; however, 10 percent of the disability associated with diabetes mellitus in this gentleman should be considered industrial, and aggravation and worsening of diabetes caused by his infected foot and osteomyelitis. It can be seen that there is a contribution of that ulcer and infection to his glucose control. After the amputation, with the removal of the ulcer, glucose control became much less difficult. (Joint Exhibit DD Stewart Lonky, J-DD 1-25-24 Page 16-17 para 3-6 ;)

B. Rodney Gabriel Orthopedic PQME

Dr. Gabriel reported this noted history:
The patient's left foot amputation is industrial in origin and consistent with his CT 09/21/2019 -10/14/2019. The patient has a long history of insulin-dependent diabetes mellitus and diabetic foot disease. The patient has a left lower extremity diabetic peripheral neuropathy which is nonindustrial in origin. The patient has degenerative disease of his lumbar spine, which has been aggravated by his altered gait. The patient's bilateral shoulder pain is industrial in origin and consistent with his work related activities.

AMA IMPAIRMENT RATING:
Per *American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition*, Table 17-32, the patient has an 18% midcourt amputation. Per Table 17-11, the patient has a left ankle 3% plantarflexion whole-person impairment. Per Table 17-12,

The patient has a left ankle 1% inversion impairment and a 1% eversion impairment.
Per Table 15-3, the patient has a 5% lumbar spine DRE Category II impairment.
Per Table 15-5, the patient has a 0% cervical spine DRE Category I impairment.
In regard to his left shoulder, per Figure 16-40, the patient has a 1% flexion impairment,
Per figure 16-43, the patient has a 1% abduction impairment for a 2% left shoulder impairment.
Per Table 16-3, the patient has a 1% whole-person impairment.

In regard to his right shoulder, Per Figure 16-40, the patient has a 1% flexion impairment,
Per Figure 16-4, the patient has a 1% abduction impairment for a 2% right shoulder impairment.
Per Table 16-3, the patient has a 1% whole-person impairment. The patient has a 2% pain impairment.
I would apportion 40% of the patient's left foot and ankle impairment to his work-related injury and 60% to his diabetic foot disease. The patient

has a gait derangement and muscle atrophy, which cannot be combined with his amputation impairment rating. I would apportion 50% of the patient's lumbar spine impairment to his CT 09/21/2019-10/14/2019 work-related injury and 50% to degenerative spine disease from the natural course of aging. I would apportion 50% of the patient's shoulder impairment to his CT 09/21/2019-10/14/2019 work-related injury and 50% to his diabetes.

PSYCHIATRIC INJURY

Dr. Grewal is applicant's treating physician in psychiatry. In his report of January 26, 2021, he discussed causation and apportionment. His opinion is discussed below.

In my opinion, the patient has sustained a mild Depressive Disorder (Not Otherwise Specified) and anxiety Disorder (Not Otherwise Specified) the cause of which has been 100% due to the emotional response to the orthopedic injuries/pain/disability.
Therefore, if the orthopedic injuries and associated disability are considered to be greater than 50% due to industrial causes, then actual events of patient's employment have been the predominant cause of the derivative psychiatric injury, and the psychiatric injury is industrially compensable pursuant to Labor Code Section 3208.3, as clarified by the Lockheed Gildardo decision. This is not a separate work stress injury, but is a derivative psychiatric injury arising from the emotional effects of physical injuries.

Whole Person Impairment Rating

Mr. Garcia presents with impairment in several areas such as work, family relations, judgment, thinking, and mood. Mr. Garcia is suffering from chronic pain, severe functional limitations and major depression & anxiety. Further, he is unable to perform some activities of daily living. His judgment, thinking, concentration & attention skills are impaired due to severe pain and constant depressed mood, and high anxiety states. In addition, his social and occupational functioning is impaired.

The patient's GAF of 60 is equivalent to a Whole Person Impairment (WPI) rating of 15.

Therefore, if the orthopedic injuries and associated disability are considered to be greater than *50%* due to industrial causes, then actual events of patient's employment have been the predominant cause of the derivative psychiatric injury, and the psychiatric injury is industrially compensable pursuant to Labor Code Section 3208.3,as clarified by the Lockheed Gildardo decision. (Pg. 19-20)

INJURY AOE/COE

Based upon applicant's credible testimony and the medical report(s) of Dr. Rodney Gabriel, Dr. Stewart Lonky, Dr. Thomas Lim, Dr. Dorian, and Dr. Grewal, it is found that applicant sustained injury to his psyche, lower GI, cervical spine, thoracic spine, lumbar spine, bilateral shoulders, left foot amputation, left ankle, lower extremities/gait, hypertension, kidneys, anemia, and diabetes arising out of and occurring in the course of employment.

. . .

PERMANENT DISABILITY

Soro Dorian, D.C. 08-11-2021
CERVICAL: DRE II 8 WP+ 1 WP FOR PAIN 13%
15.01.01.00 - 9 - [l.4]13 - 322F - 13 - 13 PD
THORACIC: DRE II 8 WP+ 1 WP FOR PAIN 13%
15.02.01.00 - 9 - [l.4]13 - 322F - 13 - 13 PD
LEFT GAIT: 15 WP
17.01.02.00 - 15 - [l.4]21 - 322F – 21 21 %

Dr. Thomas Lim's findings duplicate Dr. Gabriel's.

Dr. Grewal gave the applicant a 15% impairment in psyche as a compensable consequence of the orthopedic injury. As this is has not been found to be a catastrophic injury per LC 4660.l(c) (2) (B).

Panel Qualified Medical Evaluator
Rodney A. Gabriel, M.D.
04-27-2022

LUMBAR: DRE II 5 WP
50% (15.03.01.00 - 5 - [1.4]7 - 322F - 7- 7) 4%
CERVICAL: DRE 10% PD
AMPUTATION: 18 WP
40%(17.01.02.02 - 18 - [l.4]25 - 322F - 25 -25) 10%
40%(LEFT ANKLE - ROM) 3% 2%
40 %(17.07.04.00 - 3 - [1.4]4 - 322F - 4 - 4) 2%
LEFT SHOULDER - ROM: 1 WPI
50% (16.02.01.00 - 2 - [1.4]3 - 322F - 3 - 3) 2%
RIGHT SHOULDER - ROM: 1 WP+ 1 WP FOR PAIN
50% (16.02.01.00 - 2'- [1.4]3 - 322F - 3 - 3 PD) 2%

Thomas Lim, M.D. in podiatry also gave an 18% WPI for the left foot which is the same as that given by Dr. Gabriel.

Panel Qualified Medical

Evaluator
Panel Qualified Medical
Stewart Lonky, M.D.

UPPER URINARY TRACT DISEASE: 80 WP
40 %(07.01.00.00 - 80 - [1.4]100) 40%
03-02-2023
12-04-2023
01-05-2022
HYPERTENSIVE CARDIOVASCULAR DISEASE: 30 WP
04.01 .00.00 - 30 - [l .4]42 - 322F - 42 - 42%
DIABETES MELLITUS: 8 WP
10 %(10.01.00.00 - 8 - [l.4]11 - 322F - 11 - 11) 1 %
ADDED VALUE
13% + 13% = 26%
26% + 4% = 30%
30% + 10% = 40%
40% + 2% = 42%
42% + 2% = 44%
44% + 2% = 46%
46% + 2% = 48%
48% + 40 = 88%
88% + 42 = 122%
122% + 1 = 123%
MAXIMUM TOTAL VALUE IS 100% PERMANENT DISABILITY

APPLICATION OF KITE AND VIGIL CASES IS APPROPRIATE

. . .
In the matter before us, Dr. Lonky has explained the synergistic effect of applicant's injuries and indicated why they should be added. He wrote: With regard to whether disability should be added or dealt with via the combined values chart, the fact that this gentleman has significant hypertension, significant diabetes, and most of all, the fact that he is on dialysis, leads me to believe that the disabilities from an orthopedic/pediatric perspective and internal medicine perspective should be added together. (Joint Exhibit BB). There is no evidence to rebut that finding.
. . .
APPORTIONMENT
. . .
Dr. Lonky has carefully considered the applicant's medical history and previous treatment history.
Dr. Gabriel, Dr. Lim and Dr. Grewal applied apportionment consistent with the orthopedist and the internist.

(Opinion on Decision, pp. 4-18.)

In the Report, the WCJ states:

> [T]he permanent disability (PD) ratings on page 13 of the WCJ's Opinion on Decision do not reflect apportionment to hypertension. The WCJ rated: 04.01.00.00 - 30 - [1.4]42 - 322F - 42 - 42%.
>
> However, the rating should have applied Dr. Lonky's 20% apportionment to hypertension as follows: 04.01.00.00: 30[8]42 – 322F – 42 – 42(.8) = 34% PD.
>
> Despite this adjustment, Mr. Garcia's total permanent disability remains above 100% when correctly rated and combined using the additive method required by *Vigil*. Therefore, this apportionment correction does not impact the WCJ's finding of permanent total disability.
> . . .
> Dr. Lonky's apportionment of internal conditions is based on a correct and updated understanding of Mr. Garcia's medical condition, including the interrelationship between his diabetes, hypertension, and kidney failure. As such, it qualifies as medical evidence. Once the orthopedic apportionment based on erroneous causation assumptions is excluded, the WCJ's award is . . . justified.
> . . .
> [T]he corrected rating strings confirm what the record overwhelmingly shows: Mr. Garcia's impairments, properly rated and combined, yield well over 100% permanent disability.
> . . .
> (cerv + thoracic)13%+ 13% = 26%
> (+ lumbar) 26%+ 4% = 30%
> (+ amputation)30%+ 10% = 40%
> (+ left ankle) 40% + 2% = 42%
> (+ left shoulder)42% + 2% = 44%
> (+ right shoulder)44% +2% =46%
> (+ kidney)46% + 40% = 86%
> (+ correct hypertension)86% + 34% = 120%
> (+ diabetes)120% + 1% = 121%
> (+ anemia not rated by WCJ) 121% + 11% = 132%
> . . .
> The bottom line is unavoidable: Mr. Garcia's corrected impairment ratings not only support but exceed a 100% permanent disability finding, even when taking Defendant's objections at face value.
>
> (Report, pp. 4-6.)

DISCUSSION

I.

Former Labor Code section 5909[1] 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. (§ 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part:

> (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 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 July 10, 2025, and 60 days from the date of transmission is September 8, 2025. This decision is issued by or on September 8, 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 July 10, 2025, and the case was transmitted to the Appeals Board on July 10, 2025. Service of the Report and transmission of the

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

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 July 10, 2025.

II.

We turn first to defendant's contention that the WCJ erroneously added applicant's impairments instead of combining them using the CVC.

In *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court of Appeals found that the impairments "are generally combined" using the CVC, though the "scheduled rating [under the CVC] is not absolute" and other methodologies may be used to calculate permanent disability. (*Id*., p. 614.) Thus, while the scheduled rating is prima facie evidence of an employee's permanent disability, the scheduled rating is rebuttable. (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist.* (*Almaraz-Guzman II*) (2009) 74 Cal.Comp.Cases 1084, 1106 (Appeals Board en banc); see *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc)*; City of Sacramento v. Workers' Comp. Appeals Bd.* (*Cannon*) (2013) 222 Cal.App.4th 1360.) The overarching goal of rating permanent impairment is to achieve accuracy. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Almaraz-Guzman III*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) (*Almaraz-Guzman III*, *supra,* at p. 822.)

For example, in *Athens Administrators v. Workers' Comp. Appeals. Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied), the Court concluded that impairments resulting from cumulative injury to the bilateral hips may be added where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating of the level of disability than the rating that results from using the CVC. (See also *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ den.) (stating that a physician's opinion as to the most accurate rating method should be followed if she or he provides a reasonably articulated medical basis for doing so); *Johnson v. Wayman Ranches*, 2016 Cal.Wrk.Comp. P.D. LEXIS 235.)

In *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (En Banc), the Appeals Board held that application of the CVC may be rebutted where the medical evidence shows that there is no overlap between the effects on the activities of daily living (ADLs) between the rated body

parts, or, if there is overlap, where the overlap increases or amplifies the impact of the overlapping ADLs.

Citing the Appeals Board panel decision *Anaya v. Scotia Tool & Machine, Inc.,* 2024 Cal. Wrk. Comp. P.D. LEXIS 471,[2] defendant argues that Dr. Lonky's reporting rebutting application of the CVC cannot constitute substantial medical evidence because it does not discuss the impacts of applicant's internal medicine conditions on his ADLs in comparison to those of of his orthopedic and podiatric conditions.

In *Anaya*, the panel rescinded the WCJ's finding that the applicant was permanently totally disabled and returned the matter to trial level for further development of record on the issue of permanent disability because the medical reporting was not based upon a complete history of the impacts of the applicant's injury on his ADLs; and, in consequence, did not compare the impacts of the applicant's physical injury with those of his psychological injury or make a finding that the impacts overlapped in a manner which amplified their effects.

In this case, however, Dr. Lonky's reporting was based upon a complete history of applicant's injury and demonstrates that the impacts of the internal medicine conditions overlapped with the impacts of his orthopedic and podiatric conditions in a manner which amplified their effects. (Opinion on Decision, pp. 11-12, 17; Ex. BB, PQME Report of Dr. Lonky dated December 4, 2023, pp. 21-22.) More specifically, Dr. Lonky reported that adding impairments would be the more accurate method to rate the level of disability based upon applicant's "significant hypertension, significant diabetes, and most of all, the fact that he is on dialysis" because "[p]atients with dialysis have very specific needs, including protecting bone reabsorption, muscle fatigue, and other factors that would further intensify what he would have based on his orthopedic disability by itself." (Ex. BB, PQME Report of Dr. Lonky dated December 4, 2023, pp. 21-22.) In addition, as defendant states in the Petition, Dr. Lonky testified that the "diabetes makes his HTN worse [and] his foot ulcer made his diabetes worse." (Petition, p. 6:16-18 (citing Joint Exhibit EE page 20: 12-15.)

[2] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [118 Cal. Rptr. 2d 105, 67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we may consider them to the extent that we find their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc).)

Accordingly, we are unable to discern error in the finding that applicant's impairments should be added instead of combined using the CVC.

Defendant alternatively contends that Dr. Lonky's reporting on the overlap of applicant's internal, orthopedic and podiatric impacts does not constitute substantial medical evidence because his specialty is internal medicine and his opinions concern orthopedics and podiatry.

To constitute substantial evidence medical reporting 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." (*Escobedo v. Marshall*s (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) A physician is not limited to commenting upon their specialized area and may opine upon any issue raised, if they feel they have the special knowledge, skill, experience, training, or education to do so. (See *Havanis v. California Department of Transportation*, 2024 Cal. Wrk. Comp. P.D. LEXIS 167.)

Here, we have explained that Dr. Lonky's reporting on the overlap of applicant's internal, orthopedic and podiatric impacts was based upon a complete history of applicant's injury and concludes that the impacts overlap in a manner which amplifies their effects. The reporting is framed in terms of medical probability and sets forth reasoning supporting its conclusions. Therefore, it is substantial medical evidence.

Accordingly, we discern no merit to defendant's alternative argument that the reporting on the impacts of applicant's orthopedic and podiatric conditions is not substantial medical evidence.

We next address defendant's contention that the WCJ erroneously duplicated the impairment assigned for the left foot amputation by including the impairment for gait derangement.

Here, our review of the WCJ's impairment calculation does not show that the impairment assigned for gait derangement was included in the final calculation of permanent disability. In addition, the WCJ states in the Report that the final permanent disability calculation used the amputation impairment "exclusively." (Report, p. 5.)

Accordingly, we discern no support to the argument that the WCJ erroneously duplicated the impairment assigned to the left foot amputation.

We next address defendant's contention that the WCJ erroneously failed to account for apportionment of permanent disability resulting from hypertensive cardiovascular disease.

In *Escobedo, supra,* the Appeals Board held that (1) section 4663 requires the reporting physician to make an apportionment determination; (2) apportionment to other factors allows apportionment to causation, including pathology, prior conditions, and retroactive work restrictions; (3) applicant holds the initial burden to prove industrial injury and also has the added burden of establishing the approximate percentage of permanent disability directly related to the industrial injury; (4) defendant has the burden of establishing the approximate permanent disability caused by other factors; and (5) a medical report addressing apportionment may not be relied upon unless it constitutes substantial evidence. (*Escobedo*, *supra*, at p. 612.)

To 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. Furthermore, if a physician opines that a percentage of disability is caused by a degenerative disease, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Id*.)

In the instant case, Dr. Lonky reported that applicant's permanent disability resulting from hypertension should be apportioned at 30% to non-industrial factors, including cigarette smoking and poorly controlled diabetes. (Ex. BB, PQME Report of Dr. Lonky dated December 4, 2023, pp. 21-22.) In doing so, however, he did not explain how and why these non-industrial pathologies caused the extent of the disability, suggesting that his apportionment was based on surmise, conjecture or guess. (See *Escobedo*, *supra*; *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].) Therefore, Dr. Lonky's reporting as to apportionment of applicant's permanent disability resulting from hypertension is not to be relied upon.

In any event, had Dr. Lonky's reporting as to apportionment of permanent disability resulting from hypertension been reliable, applicant's permanent disability would still exceed 100%; and, as such, the failure to account for the apportionment would be harmless. (Report, p. 6.)

Accordingly, we are unable to discern error in the WCJ's failure to account for Dr. Lonky's apportionment of permanent disability resulting from hypertension.

Lastly, we address defendant's contention that the findings of injury as to all body parts are without substantial medical evidence. Specifically, defendant argues that Dr. Lonky's reporting fails to "specify whether HTN caused Applicant's Renal Disease or his Renal Disease caused his HTN," resulting in a failure to establish the initial mechanism and the following sequence of injury as to all body parts. (Petition, pp. 11:19-21, 13:17.)

Here, we are unaware of any evidence, and defendant cites none, for the proposition that that applicant's renal disease much have resulted from a single cause or mechanism, must less one which in turn instigated injury to applicant's other body parts. To the contrary, after reviewing a CT scan of the abdomen on January 25, 2024, Dr. Lonky reported findings "indicating [applicant's] hypertension . . . played a role in the development of his renal disease, along with his diabetes mellitus." (Opinion on Decision, p. 12.) Thus, Dr. Lonky concluded that his initial opinion that applicant's renal disease resulted from "dual causes" in the form of "both his hypertension and his diabetes" was correct. (*Id*.)

Accordingly, we discern no merit to the argument that the findings of injury as to all body parts are unsupported by substantial medical evidence.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Findings and Award issued on May 21, 2025 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

JOSÉ H. RAZO, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 8, 2025

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

NORBERTO GARCIA
GLAUBER/BERENSON/VEGO
HANNA BROPHY

SRO/bp

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