WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RAMIRO SOLORIO, *Applicant*

vs.

CALIFORNIA COMMUNITY NEWS and ACE AMERICAN INSURANCE COMPANY, administered by GALLAGHER BASSETT INSURANCE SERVICES, *Defendants*

Adjudication Numbers: ADJ10564064 (MF); ADJ13211148
Van Nuys 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.

Former Labor Code section[1] 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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

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

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 February 24, 2025, and 60 days from the date of transmission is April 25, 2025. This decision is issued by or on April 25, 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 shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on February 24, 2025, and the case was transmitted to the Appeals Board on February 24, 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 February 24, 2025.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 25, 2025

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

RAMIRO SOLORIO
GLAUBER, BERENSON & VEGO
FLOYD SKEREN MANUKIAN LANGEVIN

JB/*pm*

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 RECONSIDERATION
OF SECOND AMENDED JOINT FINDINGS AND AWARD

I
INTRODUCTION

Defendants have filed a timely, verified petition for reconsideration of the Second Amended Joint Findings and Award, which included a set of findings and an award for each of two cases. In Case Number ADJ10564064, it was found that on June 16, 2016, applicant Ramiro Solorio sustained injury arising out of and in the course of employment to his lumbar spine, left shoulder, and left elbow while employed as a truck driver/loader/unloader at Irwindale, California, by California Community News, insured by Ace American Insurance Company, administered by Gallagher Bassett Insurance Services, for which applicant was awarded temporary disability indemnity for all periods of wage loss, up to a maximum of 104 weeks, during the period from June 16, 2016 to March 11, 2022, payable at the rate of $809.25 per week, less adjustment for any earnings and credit for sums paid, and less an attorney fee in a sum equal to 15% of any net retroactive temporary disability due, plus permanent disability of 54%, with indemnity payable for 303.25 weeks at the rate of $290.00 per week, commencing after the last day of temporary disability indemnity, less an attorney fee payable to applicant's attorney, and with an award of future medical care. In the other case, ADJ13211148, it was found that applicant sustained injury arising out of and in the course of employment to his gastrointestinal system and hypertension during the period September 1, 1996 to July 2, 2016, while doing the same job with the same employer and insurer, for which there was no award of temporary disability, and an award of permanent disability of 67%, with indemnity payable for 407.25 weeks at the rate of $290.00 per week, less an attorney fee of $17,715.38, and with an award of future medical care.

Defendant's petition contends that by the order, decision or award, the undersigned acted without or in excess of his powers, that the evidence does not justify the findings of fact, and that the findings of fact do not support the order, decision or award. More specifically, the petition raises three issues: (1) defendants argue that the undersigned erred in finding temporary disability in Case Number ADJ10564064 for all periods of wage loss up to a maximum of 104 weeks during the period from June 16, 2016 to March 11, 2022; (2) the decision failed to address the claimed body parts; and (3) the court erred in not finding apportionment per Dr. Rogachefsky and Dr. Simon.

At the time this report was prepared, no answer had yet been filed by applicant's counsel, but an answer is anticipated.

II
FACTS

The Second Amended Joint Findings and Award dated February 7, 2025 was issued after parties had resubmitted all issues in lieu of developing the record, based on applicant's decision to withdraw the issue of whether he sustained any industrial injury to the psyche. A previous Appeals Board panel decision of September 23, 2024 had denied defendants' previous petition for reconsideration or removal of a findings and notice of intent to develop the record with respect to the issue of injury to the psyche, but that issue is now moot.

At the initial trial held on September 19, 2023, the parties stipulated in Case Number ADJ10564064, which was designated as the Master File, that applicant Ramiro Solorio, while employed on June 16, 2016, at age 68, as a truck driver/loader/unloader at Irwindale, California, by California Community News, claimed to have sustained injury arising out of and in the course of employment to his left knee and left hip. ln Case Number ADJ13211148, it was stipulated that applicant Ramiro Solorio, while employed during the period September 1, 1996 to July 2, 2016 (at which point applicant was also 68 years of age), as a truck driver/loader/unloader at Irwindale, California, by California Community News, had sustained injury arising out of and in the course of employment to his lumbar spine, left shoulder and left elbow, and was claiming to have sustained injury arising out of and in the course of employment to gastrointestinal and hypertension (MOH/SOE 9/19/2023, p. 2, lines 22-33, and p. 3, lines 35-44).

The parties further stipulated that at the time of both claims of injury, the employer's workers' compensation carrier was Ace American Insurance Company, care of Gallagher Bassett Insurance Services, and at the time of both claims of injury, the employee's earnings were $1,213.88 per week, warranting indemnity rates for temporary and permanent disability per code. The parties' trial stipulations also included that the employer has furnished some medical treatment, the primary treating physician is Dr. Longacre, and no attorney fees have been paid and no attorney fee arrangements have been made (Id., p. 2 lines 35-47 and p. 4, lines 1-12).

The issues submitted for decision in Case Number ADJ10564064, the Master File, were (1) parts of body injured: The left hip, the right hip, buttocks, bilateral upper extremities, bilateral shoulders, psyche and internal (psyche has now been withdrawn); (2) earnings: The employee

supporting his claim of earnings with testimony and a W-2 form and the employer/carrier basing it upon wage information (this issue has been resolved by the parties' stipulation to an earnings rate); (3) temporary disability with the employee claiming July 2, 2016 through July 2, 2018 per Dr. Sadler; (4) permanent and stationary date with the employee claiming September 29, 2020, based on PTP Dr. Longacre and the employer or carrier claiming December 8, 2018, based on Dr. Simon; (5) permanent disability; (6) apportionment; (7) occupation and group number, with the employee claiming 460 and the employer or carrier claiming 351; (8) need for further medical treatment; (9) liability for self-procured medical treatment; and (10) attorney fees. The issues submitted for decision in Case Number ADJ13211148 were the same as the issues in the Master File, with two additional issues: injury arising out of and in the course of employment (AOE/COE), and the question of whether Dr. Longacre is actually the Primary Treating Physician (PTP) for purposes of the denied cumulative trauma injury claim as well as for the admitted specific injury (Id., p. 3, lines 1-32, and p. 4, lines 15-22).

Applicant provided written evidence in the form of 15 medical reports from former PTP Charles Sadler, M.D. from September 9, 2016 to March 22, 2018; these reports were admitted without objection as Applicant's Exhibits 1 through 15. Two reports of subsequent PTP Matthew Longacre, M.D. dated January 28, 2020 and September 29, 2020 were admitted without objection as Applicant's Exhibits 16 and 17, respectively. Also admitted without objection as Applicant's 21 through 24 were reports of internal medicine PQME Benjamin Simon, M.D. dated December 8, 2018, October 28, 2019, January 15, 2021, and .July 10, 2023 (Id., p. 4, line 25 through p. 6 line 5).

Applicant also moved into evidence three reports of internal medicine treating physician Paul Grodan, M.D., dated September 8, 2020, March 31, 2021, and July 10, 2021, and these were marked for identification as Applicant's Exhibits 18, 19, and 20 (Id., p. 5, lines 32-39). Defendant objected to admission of Dr. Grodan's reports into evidence, and a ruling on that objection was deferred to the time of written decision. In the opinion on decision, defendant's objection to admission of Applicant's Exhibits 18 and 19 was overruled without prejudice, and defendant's objection to Applicant's Exhibit 20 was sustained without prejudice, so Applicant's Exhibits 18 and 19 were admitted into evidence but Applicant's Exhibit 20 was not. This ruling on defendant's objection was based on the express provisions of the California Labor Code regarding what can be received as evidence or used as proof of any fact in dispute by the Workers' Compensation Appeals

Board (including any Workers' Compensation Administrative Law Judge at any District Office of the Workers' Compensation Appeals Board)., as set forth in California Labor Code Section 5703(a).[1] Under that section, reports of "attending or examining physicians" may be admitted into evidence, but "only if the physician has further stated in the body of the report that there has not been a violation of Section 139.3 and that the contents of the report are true and correct to the best knowledge of the physician." This statement must be made under penalty of perjury. While Dr. Grodan's reports identified as Applicant's Exhibits 18 and 19 did include this required language in their declaration at the end of the report, the last report of Dr. Grodan identified as Applicant's Exhibit 20 did not. However, the opinion noted that the ruling on defendant's objections is without prejudice, and the failure of Dr. Grodan' s report dated July 10, 2021 to declare under penalty of perjury that he has not violated Labor Code Section 139.3 is a curable defect, so this exhibit may become admissible at further proceedings in this matter if it is amended to include the required declaration. Similarly, the decision to admit or consider Applicant's Exhibits 18 and 19 at this time was expressly made without prejudice to later consideration of whether they may be properly used as the basis or sole basis for a decision. It was noted that nothing in California Code of Regulations, Title 8, Section 9785 regarding the duties of a PTP or secondary treating physician require the exclusion from evidence of non-compliant reports.

Defendants offered into evidence as Defendant's Exhibits A through C the PQME reports of Dr. Simon, M.D. dated December 8, 2018, October 28, 2019, and January 15, 2021, which were admitted without objection, noting that these are the same documents that were admitted as Applicant's Exhibits 21, 22, and 23. Defendant's Exhibit D, a Job Description dated November 21, 2016, was marked for identification only and a ruling on applicant's objection to admitting this exhibit was deferred to the time of written decision. In the opinion on decision, applicant's

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[1] California Labor Code § 5703(a) reads as follows:

The appeals board may receive as evidence either at or subsequent to a hearing, and use as proof of any fact in dispute, the following matters, in addition to sworn testimony presented in open hearing:

(a) Reports of attending or examining physicians.

(l) Statements concerning any bill for services are admissible only if made under penalty of perjury that they are true and comet to the best knowledge of the physician.

(2) In addition, reports are admissible under this subdivision only if the physician has further stated in the body of the report that there has not been a violation of Section 139.3 and that the contents of the report are true and correct to the best knowledge of the physician. The statement shall be made under penalty of perjury.

objection to Defendant's D was overruled without prejudice, and that exhibit was admitted into evidence, on the grounds that Labor Code Section 5703(c) allows "reports of employers, containing copies of timesheets, book accounts, reports, and other records properly authenticated" to be received as evidence and used as proof of any fact. The opinion noted that although there was no defense witness at trial to formally authenticate the document, under Labor Code Section 5708 the Workers' Compensation Appeals Board is not bound by the common law or statutory rules of evidence regarding authentication, and there appears to be no basis for doubt regarding the authenticity of the document identified as Defendant's Exhibit D, which is in fact substantially consistent with applicant's description of his job duties, insofar as applicant described his job as regularly requiring lifting of bundles weighing 45 to 50 pounds (MOH/SOE 9/19.2023, p. 8, lines 32-35), and the employer's job description acknowledges that to do his job, applicant had to "be able to lift up to 50 pounds, requires repetitive bending, clinging on and off material handling equipment and vehicles" (Job Description, Defendant's Exhibit D, p. 3, para. 2).

Defendant's Exhibits E through X were all admitted without objection: a Supplemental Job Displacement Benefit Voucher dated 11/21/2018 (Defendant's E); a letter to Paul Grodan, M.D. Re: 9785 Packet dated 03/31/2021 (Defendant's F); a letter to Paul Grodan, M.D. Re: 9785 Packet dated 01/13/2021 (Defendant's G); a letter to Paul Grodan, M.D. Re: 9785 Packet dated 10/16/2019 (Defendant's H); correspondence from Applicant's Attorney regarding Labor Code Section 4600 and Sam Ahdab, M.D. dated 10/23/2019 (Defendant's I); an authorization letter to Sam Ahdab, M.D. dated 12/13/2019 (Defendant's J); an authorization letter to Sam Ahdab, M.D. dated 12/20/2019 (Defendant's K); a 4600 Letter designating Secondary Treating Physician Paul Grodan, M.D. dated 02/26/2021 (Defendant's L); a printout of benefits dated 08/12/2020 (Defendant's M); a denial of benefits to the psyche dated 04/14/2020 (Defendant's N); a printout of benefits dated 05/01/2023 (Defendant's O); a medical report of PQME Richard Rogachefsky, M.D. dated 03/11/2022 (Defendant's P); a medical report of PQME Richard Rogachefsky, M.D. dated 05/05/2022 (Defendant's Q); a medical report of PQME Richard Rogachefsky, M.D. dated 07/04/2022 (Defendant's R); an authorization letter to Matthew Longacre, M.D. dated 12/13/2019 (Defendant's S); a 4600 Letter from Applicant's Attorney regarding Matthew Longacre, M.D. dated 11/12/2019 (Defendant's T); a letter from Applicant's Attorney regarding Secondary Treating Physician for Internal, Sam Ahdab, M.D., dated 11/12/2019 (Defendant's U); an authorization letter to Sam Ahdab, M.D. dated 12/13/2019 (Defendant's V); an e-mail to

Applicant's Attorney regarding an Objection to Matthew Longacre, M.D. dated 11/05/2020 (Defendant's W); and, correspondence to Applicant Attorney regarding an objection to Matthew Longacre, M.D. dated 06/07/2018 (Defendant's X) (MOH/SOE 9/19/2023, p. 6, line 24 through p. 8, line 12).

At the trial hearing, applicant Ramiro Solorio testified that he was previously employed by California Community News since 1994. He testified that he was hired as a driver of Bobtail and semitrailer trucks and held that same job capacity at all times. He was loading and unloading and driving and delivering newspaper bundles on pallets. These were very heavy. He used a fork-lift or moved them by hand. He had an automatic pallet jack and a fork-lift to do this. Sometimes pallets or bundles would fall off during transit. Mr. Solorio had to do heavy lifting and carrying as part of his job. The heaviest item he carried were bundles of newspaper on pallets that weighed 45 to 50 pounds per bundle, and the pallets themselves weighed 15 to 20 to 40 pounds. Mr. Solorio estimated that he also carried up to 75 pounds when he had to move machinery. On a normal day he would only lift up to 50 pounds, but maybe four to six times per week he would have to lift heavy machinery as well. He worked Monday to Friday and sometimes Saturdays and Sundays.

On the date of his injury, applicant testified that he walked into the side door of a warehouse and the doorbell alarm rang. He went to the left, and about halfway into an aisle he was hit by a forklift. He was struck in the legs, and the forklift knocked him down. He turned and twisted onto the cement floor. He doesn't remember which side hit the ground first. He lay there for a minute or two. He was hit from behind and was not expecting it. He told his employer, and they sent him to Healthpointe Industrial Medical Clinic. At Healthpointe, Mr. Solorio reported an injury to his back, left shoulder, left elbow, left hip and left knee the first time he saw them. He doesn't remember if x-rays were ever taken of his left hip.

His care was then transferred to Dr. Charles Sadler. At first he didn't remember when, but then his memory was refreshed when he was shown a report of Dr. Sadler dated September 19, 2016. He confirmed that he reported his back injury, left shoulder injury, left elbow injury, left hip injury, and left knee injury to Dr. Sadler. He believes all of these body parts were caused by his workplace injury of June 16, 2016. He had surgery on a private basis in May of 2020 because it was too much pain for him to continue without surgery. He takes pain medications for orthopedic injuries and medication for gastrointestinal issues. He believes these medications are all related to his injury.

Mr. Solorio testified that he first noticed stomach symptoms after his injury of June 16, 2016. He did not have these symptoms before the injury. Now he has gas, upset stomach and a twirling in his stomach. He is not sure of the correct terms because he is not a doctor. His stomach is not feeling normal. He also has heartburn and nausea. He doesn't recall when he was diagnosed with hypertension and doesn't really take medications for it. He knows what hypertension medications are and his blood pressure has always been good. He didn't have to take blood pressure medications until about three or four years back, and sometimes now he doesn't even take them because his blood pressure is good. He thinks that he didn't have any high blood pressure before his injury of June 16, 2016. If he were told that Dr. Simon diagnosed hypertension, it would surprise him. Applicant believes he was diagnosed with diabetes after 2020. He thinks didn't have it prior to his June 16, 2016 injury.

Applicant did not recall the exact date of his last date at work. He stopped working because of his injury. He was still on the books of the company but left on workers' compensation leave. He didn't recall which doctor gave him work restrictions or whether Charles Sadler, M.D. did. Applicant did recall that Dr. Rogachefsky. the orthopedic PQME, evaluated him many times. Mr. Solorio estimates that his face-to-face time with Dr. Rogachefsky each time was about 20 minutes.

Mr. Solorio agreed that his memory is not getting better with time. He didn't recall his deposition at first, but when he was informed that it took place on June 12, 2017, he recalled it. He recalled that he took an oath at the deposition, and he believes everything he said at his deposition was true and accurate. He recalled that he was asked about his job duties. He believes he answered truthfully. He agreed that he identified driving and loading and unloading, moving, and stacking as job activities in his deposition testimony. He agreed that it was an accurate estimate when he estimated that he lifted about 40 pounds per bundle of newspaper. He didn't agree with the statement that his memory is not as good today as it was six and a half years ago at his deposition and that, therefore, his heaviest weight he lifted was in fact 40 pounds and not up to 75.

Mr. Solorio testified that he transported Sunday and daily inserts as directed by the transportation manager. He believes he maintained accurate receipts and records. He operated company vehicles in a safe and courteous manner. He inspected all vehicles prior to use. He believes he ensured a safe and healthy work environment. He ensured a high degree of quality and quantity of work. He inspected the work area to make sure it was clean and well organized. He is familiar with and followed the policies and procedures of the employer. He informed the

operations manager of any accident or error to prevent missed deadlines. He maintained effective and open communication with the supervisor and co-workers. He maintained a good working relationship with the Los Angeles Times and its representatives. He evaluated the transportation process and made appropriate reports and kept appropriate records for the transportation manager and supervisor. Mr. Solorio believes he ensured compliance with local, state, and federal regulations.

On cross-examination, Mr. Solorio again recalled seeing Dr. Rogachefsky. He believes he was truthful with Dr. Rogachefsky. He did not lie or exaggerate in any way. Mr. Solorio remembered seeing Dr. Simon, the internal medicine PQME, after he was told that there was a report of January 15, 2021, and that Dr. Simon's office was on Grand Avenue. Mr. Solorio believes he was truthful with Dr. Simon and did not lie or exaggerate in any way.

Mr. Solorio then clarified that when he said that the maximum weight he lifted was 40 pounds, he was thinking that this question was about stacks of newspaper only. Machinery, however, weighed up to 75 pounds, and once in a great while he had to lift machines if they were in his way. He estimates that this happened about three times per week. He would lift up to 40 pounds every day. He lifted items without assistance from co-workers.

The Occupation Code under the current rating schedule is found to be 460, for a driver/loader/unloader-per applicant's testimony, he lifted up to 40 lbs. every day, and up to 75 lbs. "once in a great while" when machines were in the way. The Job Description in Defendant's D, which is admitted over Applicant's objection, appears to be consistent with the 40-pound description ("Must be able to lift up to 50 pounds, requires repetitive bending, clinging on and off material handling equipment and vehicles"). Occupation Code 350 is simply for "Truck Drivers"; 351 is for using like forklifts, cranes, and snowplows to perform heavy driving. Occupation Code 460, for "Material Handlers & Machine Loaders & Unloaders" fits better in this case, because moving 40-pound bundles of newspapers was integral to applicant's job and distinguishes him from Group 350 ("some loading") and Group 351 (operating heavy equipment like forklifts, but with no mention of loading/unloading in the schedule's description of this category).

The opinion on decision explained that the findings of injury, permanent disability, and need for further medical care were all based on a careful review of all of the medical reports admitted into evidence, and in particular the reports of orthopedic PQME Dr. Rogachefsky, which were found to be the most recent, substantial, and persuasive indication of a specific orthopedic

injury and disability in case number ADJ10564064. The finding of temporary disability was based on the date that applicant reached maximal medical improvement (MMI) according to Dr. Rogachefsky, and temporary disability according to his treating physicians prior thereto. The reports of internal medicine PQME Dr. Simon in case number ADJ13211148, corroborated in part by the reports of Dr. Grodan, provided the basis for the findings and award of a cumulative internal injury in case number ADJ13211148. The opinion noted that a medical expert opinion in either psychology or psychiatry was no longer needed to determine whether there is any industrial injury to the psyche, because applicant had withdrawn that issue.

The opinion explained that in case number ADJ10564064, Dr. Rogachefsky's finding of 25% Whole Person Impairment (WPI) of the lumbar spine under Table 15-3 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), and 3% WPI of the left shoulder using Tables 16, 19, 40, and 43 of the AMA Guides, should adjust and combine under the current rating schedule and Labor Code § 4660.l to permanent disability (PD) as follows:

15.03.01 .00- 25-[x l.4]35-460H-41-51% PD, lumbar

16.02.02.00-3-[x l.4]4-460G-5-7% PD, left shoulder

51 C 7 = 54% PD

As noted in the opinion, permanent disability of 54% warrants 303.25 weeks of indemnity at the rate of $290.00 per week under Labor Code § 4658. These payments total $87,942.50, 15% of which is to be commuted and paid to applicant's attorneys of record as a $13,191.38 attorney fee, which was found to be reasonable.

The opinion explained that in the other case, case number ADJ13211148, Dr. Simon's finding of 30% WPI for hypertension under Table 4-2 of the AMA Guides, and 12% WPI for GERD or gastropathy under Table 6-3 of the AMA Guides, should adjust and combine under the current rating schedule and Labor Code § 4660.1 to permanent disability (PD) as follows:

04.01.0.00-30-[x l.4]42-460H-48-58% PD, hypertension

06.01.00.00-12-[x l.4]17-460F-17-22% PD, GERD

58 C 22 = 67% PD

Permanent disability of 67% warrants 407.25 weeks of indemnity at the rate of $290.00 per week under Labor Code § 4658. These payments total $118,102.50, 15% of which is to be commuted and paid to applicant's attorneys of record as a $17,715.38 attorney fee, which was found to be reasonable.

The percentages of permanent disability found by the Panel QMEs were not reduced by apportionment, because, as explained in the opinion on decision, each physician's apportionment opinions apportionment opinions were conclusory and skeletal, and did not set forth the reasoning behind the physicians' opinions explaining the mechanism of causation of permanent disability, and why an approximate percentage was chosen as opposed to some other percentage. Accordingly, it was found that their opinions on apportionment do not constitute substantial medical evidence under the criteria set forth in the Appeals Board's opinion in the case of *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604. Accordingly, the two permanent disability awards do not include nonindustrial apportionment, which was in each instance found to be unexplained, compound, or speculative, as set forth above.

The issue of reimbursing for any self-procured treatment expense was deferred, based on the lack of specific evidence provided on this issue.

Defendants filed a timely, verified petition for reconsideration of the Second Amended Joint Findings and Award, as explained in the introduction above, challenging (1) the award of 104 weeks of temporary disability in Case Number ADJ10564064, (2) failure to address claimed body parts, and (3) the finding that Dr. Rogachefsky and Dr. Simon's apportionment opinions were not substantial medical evidence.

III
DISCUSSION

Each of the three issues raised in defendants' petition is addressed in turn below.

(1) The finding of temporary disability in Case Number ADJ10564064 for all periods of wage loss up to a maximum of 104 weeks during the period from June 16, 2016 to March 11, 2022 is based on reasonable inferences from the medical evidence and applicant's testimony

While the applicant has the burden of proving his entitlement to temporary disability benefits (Labor Code section 5705; *Edwards v. Workers' Comp. Appeals Bd*. (2008) 73 Cal.Comp.Cases 1358, 1360 [writ denied]), and any decision of the WCAB must be supported by substantial evidence (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Board en banc]), the undersigned is also entitled to draw reasonable inferences from the evidence (*Ybarra v. Workers' Comp. Appeals Bd*. (2002) 103 Cal.App.4th 987, 990 [127 Cal.Rptr.2d 208, 67 Cal.Comp.Cases 1283]). Although defendants' petition raises the procedural point that Dr.

Longacre, the doctor who was stipulated as the PTP[2] indicated that applicant was temporarily disabled, the fact that a treating or consulting physician, Dr. Sadler, indicated temporary disability in Case Number ADJ10564064 through March 22, 2018 "except for any time actually worked during this period" (Report of Dr. Sadler 3/22/2018, Applicant's 15, p. 14), combined with applicant's testimony that he stopped working because of his injury (MOH/SOE 9/19/2023, p. 10, I. 1-4), PTP Dr. Longacre's indication of maximal medical improvement (MMI) as of September 29, 2020 (Report of Dr. Longacre 9/29/2020, Applicant's 17, p. 5), with work restrictions of sedentary work only, no overhead work, and no lifting more than 10 pounds (Id., at p. 8), and the opinion of the orthopedic PQME, Dr. Rogachefsky, that applicant attained MMI status as of March 11, 2022 (Report of Dr. Rogachefsky 7/4/2022, Defendant's R, pp. 2-3) with restrictions of no lifting, pushing, or pulling greater than 25 pounds or performing overhead activities with the left shoulder (Id., at p. 4), all give rise to a reasonable inference that applicant was temporarily disabled for periods of actual wage loss, up to the maximum of 104 weeks, between June 16, 2016 and March 11, 2022, less adjustment for any earnings during this period, if any.

The fact that this inference is drawn from applicant's testimony that was not specific with respect to his last date worked, as well as from information and opinions gleaned from all of the medical evaluators, should not be an impediment to a finding that entitlement to temporary disability is probable during the awarded temporary disability period, subject of course to the parties' adjustment in the event there are found to be any earnings during that period. This line of reasoning was followed in the panel decision in the case of *Boatman v. City of Los Angeles*, 2011 Cal. Wrk. Comp. P.D. LEXIS 6, which cited W*estern Pacific Railroad v. Industrial Acc. Com. (Galli)* (1936) 17 Cal. App. 2d 119, 120-121 [61 P.2d 459, 1 Cal.Comp.Cases 190]. In *Galli*, the Court of Appeal upheld a finding of temporary disability based on applicant's testimony that he could not work, even though it contradicted the expert medical opinion in evidence, In the present case, there is no expert medical opinion that contradicts the applicant's temporary disability status during the awarded period.

This inference, based on all of the evidence provided, should not be limited to a period of temporary disability described in the issues at trial. The Board has the discretion to reject even

[2] Defendant identifies as an unaddressed issue whether Dr. Longacre was the PTP, but that issue was raised only in Case Number ADJ13211148, the internal injury case. In that case, the issue of whether Dr. Longacre was the PTP is immaterial, because all findings in that case are based on the internal medicine PQME, Dr. Simon.

factual stipulations, and certainly ought not to be bound by the manner in which a disputed issue is described. (See *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)*, 77 Cal. App. 4th 1114, 1119 [92 Cal. Rptr. 2d 290,293, 65 Cal.Comp.Cases 1]).

(2) The findings and award followed the opinions of Dr. Rogachefsky and Dr. Simon with respect to parts of body, which are further discussed here to provide a complete basis for the opinion

The opinion on decision referred to the medical expert opinions of Dr. Rogachefsky and Dr. Simon as the basis for the finding of injury. To the extent that this evidence was not described and discussed in the opinion on decision as required by Labor Code section 5313, it is described and discussed here to cure that defect. (See *City of San Diego v. Workers' Comp. Appeals Bd. (Rutherford)* (1989) 54 Cal.Comp.Cases 57 (writ denied); *Smales v. Workers' Comp. Appeals Bd*. (1980) 45 Cal.Comp Cases 1026 (writ denied).)

In Case Number ADJ10564064, the parties stipulated that Ramiro Solorio, while employed on June 16, 2016, as a truck driver/loader/unloader at Irwindale, California, by California Community News, sustained injury arising out of and in the course of employment to his lumbar spine, left shoulder and left elbow, and claims to have sustained injury arising out of and in the course of employment to his left knee and left hip (MOH/SOE 9/19/2023, p. 2, l. 24-33). The findings and award found injury to only the admitted body parts (lumbar spine, left shoulder and left elbow), based on the medical reports of PQME Dr. Rogachefsky, and did not adopt the opinion of Dr. Sadler that the left hip and left knee were injured on an industrial basis. Dr. Rogachefsky did not indicate any injury to the left hip or left knee. Dr. Sadler found injury, but did not substantiate his finding of injury to these two body parts, except for what appears to be boilerplate references to "decreased range of motion, tenderness, limited ADLs, abnormal imaging, use of cane" (Report of Dr. Sadler 3/22/2018, Applicant's 15, pp. 13-14). These claims of objective factors of disability of the hip and knee seem questionable in light of Dr. Sadler's later indication that a "strict interpretation of the AMAG 5th would appear to result in a rating of 0% WPI" for both body parts (Id., p. 17).[3] With respect to the issue of whether there is industrial injury to the

[3] Dr. Sadler does provide an "Almarez/Guzman II" rating (see *Milpitas Unified School District v. Workers Comp. Appeals Bd (Guzman)* (2010) 187 Cal.App.4th 808) of 20% and 2% WPI for the left hip and left knee, respectively, but his reference to Table 17-5e of the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* for this purpose is perplexing as that table could qualify for a "strict" rating, in the absence of any other rating method under Table 17-2. In any event, defendant's petition for reconsideration does not raise this rating issue.

right hip, buttocks, bilateral upper extremities, bilateral shoulders, psyche and internal (MOH/SOE 9/19/2023, p. 3, I. 3-7), there is simply no substantial medical evidence to support a finding to any of these body parts, with the exception of two specified internal systems (gastrointestinal and hypertension), and the psyche was specifically withdrawn (MOH/SOE 12/2/2024, p. 2, l. 2-3). Accordingly, no industrial injury was found or awarded with respect to the additional body parts identified as the right hip, buttocks, bilateral upper extremities, bilateral shoulders, psyche and internal.

In Case Number ADJ13211148, the parties stipulated that Ramiro Solorio, while employed during the period September 1, 1996 to July 2, 2016, as a truck driver/loader/unloader at Irwindale, California, by California Community News, claims to have sustained injury arising out of and in the course of employment to gastrointestinal and hypertension (MOH/SOE 9/19/2023, p. 3, l. 37-44). Industrial causation of injury to these two disputed body parts was found based on the medical reports of internal medicine PQME Dr. Simon, as indicated in the opinion on decision. Dr. Simon found that hypertension and GERD are industrial (Report of Dr. Simon 7/10/2023, Applicant's 24, p. 16, under "Discussion of Causation"), and Dr. Grodan 's reports (Applicant's 18 and 19) concur. The petition for reconsideration does not seem to question the finding of industrial injury to gastrointestinal and hypertension.

(3) The apportionment opinions of all of the physicians in evidence, including those of Dr, Rogachefsky and Dr. Simon, do not constitute substantial medical evidence

In the case of *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, the Appeals Board held, en banc, that "it is well established that any decision of the WCAB must be supported by substantial evidence." (*Escobedo v. Marshalls* (2007) 70 Cal.Comp.Cases 604, 620, citing Labor 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].) "In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability." (*Escobedo*, cited above, 70 Cal.Comp.Cases 604, 620, citing *McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal.Comp Cases 660], *Travelers Ins. Co. v. Industrial Acc. Com. (Odella)* (1949) 33 Cal.2d 685, 687-688 [14 Cal.Comp Cases 54],

Rosas v. Workers' Comp. Appeals Bd. (1993) 16 Cal.App.4th 1692, 1700-1702, 1705 [58 Cal.Comp.Cases 313].) "Also, 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." (*Escobedo v. Marshalls*, cited above, 70 Cal.Comp.Cases 604, 620, citing *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]; *Zemke v. Workmen's Comp. Appeals Bd., supra*, 68 Cal.2d at p. 798.) "Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Escobedo*, cited above, 70 Cal.Comp Cases 604, 621, citing *Granado v. Workers' Comp. Appeals Bd*. (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding), *Zemke v. Workmen's Comp. Appeals Bd., supra*, 68 Cal.2d at pp. 799, 800-801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence), and *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)

So, *Escobedo* summarizes a half-century of jurisprudence on the issue of what constitutes substantial medical evidence as follows: a doctor's report must provide reasoning, not merely conclusions, that are based on relevant facts, an adequate history and examination, correct legal theories, and based on reasonable medical probability, not guesswork.

In both of the present cases, the physicians' apportionment opinions were conclusory and skeletal, and did not set forth the reasoning behind the physicians' opinions explaining the mechanism of causation of permanent disability, and why an approximate percentage was chosen as opposed to some other percentage. Accordingly, it was found that those opinions do not constitute substantial medical evidence under the standards set forth in *Escobedo*, which expressly provides an analogous example:

> 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."

(*Escobedo*, cited *supra*, at 621.)

In case number ADJ10564064, Dr. Rogachefsky and Dr. Longacre both apportion 20% of lumbar PD to "preexisting degenerative changes" without explanation. Dr. Sadler approves 50% of low back PD to a 1981 injury-but this, too, is not explained. In case number ADJ13211148, the award accepts Dr. Simon's finding that while hypertension and GERD are industrial (See Applicant's 24, p. 1, under "Discussion of Causation"), his diabetes and hyperlipidemia are nonindustrial. Also accepted are Dr .Simon's finding that applicant reached MMI as of December 8, 2018 without any periods of internal temporary disability, but with 12% WPI for GERD under Table 6-3 of the AMA Guides, and 30% WPI for Left Ventricle Hypertrophy (LVH) under Table 4-2 (which is seconded by Dr. Grodan, and unambiguously indicated in the AMA Guides). However, Dr. Simon's 80% nonindustrial apportionment of the PD from hypertension is found not to constitute substantial medical evidence, because he uses the word "may" instead of expressing it in terms of reasonable medical probability ("left ventricular hypertrophy may be due, in part, to the presence of the non-industrial prosthetic aortic valve" Applicant's 23, p. 109, para. 4), and he also sweepingly attempts to apportion to a number of conditions together without any analysis of how each condition is causing applicant's permanent disability (citing "advancing age, alcohol use, family history, and a high incidence in the general population" as "non-industrial issues" Applicant's 23, p. 109, para. 3), and without any explanation of why these effects would approximately correspond to the percentage of apportionment that he selected. Dr. Simon's boilerplate statement that his opinions are all based on reasonable medical probability and not speculative does not cure these defects.

IV
RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied.

Date: 2/21/2025

Clint Feddersen
Workers Compensation
Administrative Law Judge