WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RAMON MUNOZ, ***Applicant***

vs.

THE EDWARD THOMAS COMPANY;
TRAVELERS PROPERTY CASUALTY COMPANY OF AMERICA, ***Defendants***

Adjudication Number: ADJ10825156
Los Angeles District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant filed a Petition for Reconsideration (Petition) of the Findings and Award (F&A) issued on April 23, 2025, wherein the workers' compensation administrative law judge (WCJ) found the applicant sustained injury arising out of and in the course of employment to the right knee and hypertension. The WCJ also found, in part, no apportionment of the hypertension disability, that defendant was not entitled to a credit for overpayment of temporary disability, and that applicant's attorney was entitled to 18% of the permanent disability as reasonable attorney's fees.

In the timely Petition, defendant challenges 1) finding no apportionment of hypertension disability to nonindustrial causes, 2) failing to allow credit for temporary disability overpayment, and 3) holding applicant attorney's fees in trust pending the filing of a Fee Disclosure Statement.

The WCJ's Report and Recommendation (Report) recommends the Petition be denied. We received an answer (Answer) from applicant.

We have considered the allegations of the Petition and the Answer and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, for the reasons stated in the WCJ's Report, and for the reasons discussed below, we will grant the Petition for Reconsideration solely to amend the F&A to clarify that defendant shall hold applicant's attorney's

fees in trust pending the filing of a fee disclosure statement. (Finding of Fact 4; Award (b).) We will otherwise make no other substantive changes and will affirm the F&A.

BACKGROUND

As found by the WCJ in the F&A, while employed on January 13, 2016, by defendant as a painter/maintenance, applicant sustained injury to the right knee and hypertension and did not sustain injury to the right shoulder or right wrist. Applicant was originally unrepresented.

For claimed orthopedic injuries applicant was evaluated on March 7, 2017, by Panel Qualified Medical Examiner (PQME) Gustav Salkinder, M.D., with history of injury to the right knee on January 13, 2016, while lifting 35-40 pound tables to place on a cart. Dr. Salkinder diagnosed chronic right knee pain with internal derangement, medial meniscus tear, and osteoarthritis. Surgery had been recommended, however due to extensive medical problems surgery was cancelled. Applicant was found to have reached maximum medical improvement (MMI) and was assigned 7% whole person impairment (WPI) for the right knee, which was apportioned 25% to progressive non-industrial causative factors. (Defendant Exhibit H, PQME Gustav Salkinder, M.D., March 29, 2017, pages 3, 22-24.)

On November 15, 2017, an award issued based on stipulations with request for award for injury to the right knee of 15% permanent partial disability after apportionment to nonindustrial factors.

Subsequently, applicant retained counsel and filed a timely petition to reopen on June 4, 2018. On August 13, 2018, an amended application for adjudication of claim was filed to add liver and high blood pressure as additional body parts injured.

PQME Dr. Salkinder issued a December 18, 2018, supplemental report stating, "the patient should be evaluated by a Panel Qualified Medical Evaluator in the field of internal medicine/gastroenterology." (Defendant Exhibit G, PQME Gustav Salkinder, M.D., December 18, 2018, page 3.)

PQME Dr. Salkinder reevaluated the applicant on April 26, 2019, and noted the applicant underwent surgery on the right knee on November 29, 2018. Applicant was found to have reached MMI and was assigned 15% WPI for the right knee with 25% apportionment to non-industrial factors. (Defendant Exhibit F, PQME Gustav Salkinder, M.D., May 17, 2019, pages 47-48.)

PQME Dr. Salkinder reevaluated the applicant on August 21, 2020, after revision knee surgery performed May 28, 2020. Applicant was found to have reached MMI and, due to improvement, was assigned 7% WPI for the right knee with no change in apportionment. (Defendant Exhibit E, PQME Gustav Salkinder, M.D., September 21, 2020, pages 10-12.)

On May 25, 2022, applicant deposed PQME Dr. Salkinder, and a 3% add-on for pain was provided. (Joint Exhibit E, Deposition PQME Dr. Salkinder, May 25, 2022, page 27, line 21 to page 28, line 9.)

Finally, PQME Dr. Salkinder re-evaluated the applicant on August 18, 2022. Applicant remained MMI, however WPI was increased to 15%, with no change in his opinion on apportionment. (Joint Exhibit A, PQME Gustav Salkinder, M.D., September 16, 2022, pages 19-20.)

Applicant was first evaluated for internal complaints by PQME Dr. Sherman, on April 1, 2019. Diagnoses were: 1) orthopedic injuries, not addressed, 2) hypertension, and 3) gastroesophageal reflux disease (GERD). There was no permanent disability in the industrial arena as there was no change in medication to treat hypertension. Apportionment for hypertension and GERD was 100% nonindustrial. (Joint Exhibit C, PQME Sherman, M.D., April 13, 2019, pages 3, 10-12.)

Applicant deposed PQME Dr. Sherman on November 4, 2020, during which the following exchange occurred:

> Q. Okay. Thank you. And I believe I understood that based on the medication changes in 2016 and in 2017, it is your opinion now that there -- it was in fact an aggravation of his hypertension following the date of injury. Is that correct?
>
> A. I guess the question is aggravation implies that it's permanent. I think it was an acceleration perhaps rather than an aggravation, because it seems like his blood pressure returned to baseline within a year and a half or so of his industrial injury or perhaps even two years, so I guess maybe that's a matter of semantics.

(Joint Exhibit H, Deposition, PQME Dr. Sherman, November 4, 2020, page 22, lines 1-12.)

PQME Dr. Sherman, re-evaluated the applicant on April 12, 2021, and issued a report dated April 14, 2021, stating, "since 2019, the hydrochlorothiazide has been discontinued and the lisinopril dosage of 40 mg. remain unchanged. However, three additional antihypertensive medications have been added, i.e. clonidine 0.1 mg., amlodipine 10 mg. and metoprolol 50 mg., each to be taken once daily for blood pressure control." "Thus, it is clear that since his industrial

injury of January 13, 2016, Mr. Munoz' preexisting nonindustrial hypertensive disorder has been aggravated on an industrial basis. This is not surprising in that Mr. Munoz has been prescribed and taken copious amounts of nonsteroidal anti-inflammatory medication as treatment for his orthopedic injuries." Finally, PQME Dr. Sherman provides a single sentence on apportionment: "Fifty percent of the hypertensive disorder of Mr. Munoz is industrial and 50% is nonindustrial." (Joint Exhibit D, PQME Dr. Sherman, April 14, 2021, pages 3-4.)

On May 21, 2021, PQME Dr. Sherman issued a supplemental report noting he had received authorization for testing. (Joint Exhibit E, PQME Dr. Sherman, May 21, 2021, page 2.) Then Dr. Sherman issued a supplemental report on May 9, 2021, with no change in opinion after review of medical records. (Joint Exhibit G, PQME Dr. Sherman, May 9, 2021, page 2.)

Finally, PQME Dr. Sherman issued a May 26, 2021, supplemental report, which provided impairment based on testing of 36% WPI and found that "[a]pportionment and future medical care remain unchanged from what was opined in my April 14, 2021, report." (Joint Exhibit F, PQME Dr. Sherman, M.D., May 26, 2021, page 3.)

Treating surgeon Dr. Glenn Takei's treatment notes that are in evidence cover the period from June 19, 2018, through May 5, 2021. (Applicant Exhibits 1 to 23.) These notes reflect applicant was temporarily totally disabled from the revision knee surgery on May 28, 2020, until Dr. Takei's permanent and stationary report on May 5, 2021. (Applicant Exhibit 8 and 1.)

Defendant submitted as exhibits benefit notices (Defendant Exhibits A, B and C), applicant's deposition transcript (Defendant Exhibit D), permanent disability and temporary disability payment itemizations in the form of Excel Spreadsheets (Defendant Exhibits I and J), and applicant's deposition taken November 12, 2018 (Defendant Exhibit D).

At trial, applicant testified through an interpreter. (Minutes of Hearing and Summary of Evidence (Minutes), May 22, 2024, pages 8 and 9.)

In the F&A, the WCJ found applicant sustained 75% permanent partial disability after apportionment of the right knee to nonindustrial conditions and with no apportionment of the hypertension disability. Applicant's attorney was awarded a fee of 18% of the permanent partial disability and it was found that defendant was not entitled to a credit for temporary disability overpayments. Although there is no finding to that effect, in the Opinion on Decision, the WCJ noted "fees shall be held in trust by Defendant until such time that a Fee Disclosure Agreement is filed."

In the Petition, defendant contends that it met its burden to show apportionment of the hypertension disability; that it is entitled to a credit for temporary disability overpayment; and the inconsistency between the award, which does not refer to holding attorney's fees in trust, and the Opinion on Decision.[1]

In the Answer, applicant contends that the findings of no apportionment, of no credit for the alleged overpayment of temporary disability indemnity payments, and of 18% attorney's fees were proper. Applicant does not address the WCJ's statement about the failure to file a fee disclosure agreement.

DISCUSSION

A.

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

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

(Lab. Code, § 5909.)

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

[1] The Petition also suggests the single reference to Dr. Bakshian in the F&A Opinion on Decision is error because Dr. Bakashian was not a doctor in this matter. (Petition, page 6, lines 2-7.) This clearly harmless clerical error does not impact the analysis of this case and is not discussed further.

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

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 May 28, 2025, and 60 days from the date of transmission is Sunday, July 27, 2025. The time limit is also extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b).) Here, July 27, 2025, is a Sunday which by operation of law means this decision is due by the next business day, which is Monday, July 28, 2025. This decision issued by or on July 28, 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.

According to the proof of service, the Report was served on May 28, 2025, and the case was transmitted to the Appeals Board on May 28, 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 May 28, 2025.

B.
1.

Defendant first asserts as error the finding of no apportionment of hypertension disability to non-industrial factors. (Petition, page 4, line 20, to page 6, line 1.)

The burden of proving apportionment of permanent disability falls on the employer because it is the employer that benefits from apportionment. (*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, 612 (en banc).)

In *Escobedo* the Appeals Board also 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. 607.)

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*. at pp. 620-621.)

In this case, PQME Dr. Sherman, originally found hypertension was 100% nonindustrial. (Joint Exhibit C, PQME Dr. Sherman, M.D., April 13, 2019, page 12.) Over time, PQME Dr. Sherman's opinions evolved, moving through finding industrial "acceleration" (Deposition, PQME Dr. Sherman, November 4, 2020, page 22, lines 1-16), to finally concluding there was an industrial aggravation of hypertension as applicant had "*taken copious amounts of nonsteroidal anti-inflammatory medication as treatment for his orthopedic injuries*." (Joint Exhibit D, PQME Dr. Sherman, April 14, 2021, page 3, emphasis added.)

In the April 14, 2021, report, PQME Dr. Sherman provides one sentence addressing apportionment: "Fifty percent of the hypertensive disorder of Mr. Munoz is industrial and 50% is nonindustrial." (Joint Exhibit D, PQME Dr. Sherman, April 14, 2021, page 4.) PQME Dr. Sherman does not expand further on this sentence and in his final report merely states apportionment remains "unchanged from what was opined in my April 14, 2021, report." (Joint Exhibit F, PQME Dr. Sherman, M.D., May 26, 2021, page 3.)

Here, PQME Dr. Sherman fails to provide substantial evidence on the issue of apportionment. There is no reasoning in support of the conclusion nor a discussion of how apportionment is appropriate based on reasonable medical probability. (*Escobedo*, *supra*.)

Defendant has failed in meeting its burden to establish apportionment, and, as such, we see no reason to disturb the F&A.

2.

Defendant seeks credit for a claimed temporary disability overpayment in the amount of $3,375.94 for payments made after August 21, 2020. (Petition, page 6, lines 16-19.)

Claims for credit against permanent disability for alleged temporary disability overpayments are discretionary with the Appeals Board. Whether to award the requested credit against permanent disability for alleged overpayments of indemnity, e.g., temporary disability, is not a right but rather a discretionary determination. (Lab. Code, § 4909; *Gamble v. Workers' Comp. Appeals Bd.* (2006) 143 Cal.App.4th 71, 92 [71 Cal.Comp.Cases 1015, 1028]; *SCIF v. Industrial Accident Commission* (*Verden*) (1965) 30 Cal.Comp.Cases 132 (writ den.); *Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429 (Appeals Board en banc).) Equitable principles are frequently applied in workers' compensation proceedings. (*Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 837 [45 Cal.Comp.Cases 1106].)

PQME Dr. Salkinder reevaluated the applicant on August 21, 2020, and found him MMI. (Defendant Exhibit E, PQME Gustav Salkinder, M.D., September 21, 2020, page 11.) The report, through no fault of applicant, was not served on the parties until a month later on September 21, 2020. In addition, the insurance carrier was served at an out-of-state address in Dallas, Texas, which possibly further delayed action by defendant. Applicant continued to receive temporary disability payments after the evaluation with PQME Dr. Salkinder and had no reason to believe he was not entitled to them. During the period of the claimed overpayment, the treating surgeon, Dr. Takei, maintained applicant's status as temporarily totally disabled. Indeed, applicant was not found permanent and stationary by Dr. Takei until much later, on May 5, 2021. (Exhibits 1 through 8.)

Although not determinative, we note that a request for overpayment of benefits is to be made by petition so as to clearly identify what relief is sought. (Cal. Code. Reg. tit. 8, §10555.) It does not appear defendant has filed the required petition.

It would be inequitable to charge applicant with an overpayment when the applicant was not responsible for the delay in service of the report relied on by defendant, it is unclear if service on an out of state defendant further compounded the delay, applicant's treating surgeon found

applicant temporarily totally disabled during the relevant period, and defendant does not appear to have filed a petition for credit.

Given the equities of this case and the reasons behind the nature and extent of the claimed overpayment, we see no reason to disturb the WCJ's finding denying credit for overpayment.

3.

Defendant objects to holding attorney's fees in trust pending the filing of a fee disclosure statement. (Petition, page 6, line 24, to page 7, line 4.)

The F&A includes the finding that a reasonable attorney fee is 18% of the permanent disability to be commuted from the side of the award and paid in one lump sum. There is also a corresponding award of permanent disability "[l]ess reasonable attorney fees of 18% of the permanent disability, to be commuted from the far end of the award, to be paid in one lump sum, less amounts previously paid." The Opinion on Decision states "Attorney fees shall be held in trust by Defendant until such time that a Fee Disclosure Agreement is filed on the instant case." (Opinion on Decision, page 3.) Based on our review of the record, we were unable to locate a disclosure agreement. Section 4906 does not permit payment of attorney's fees until the filing of the disclosure; since the WCJ intended to order that the fees be held in trust until the disclosure was filed, but there is no legally enforceable finding to that effect, we will amend the F&A to include it.

Accordingly, we grant defendant's Petition for Reconsideration, amend the F&A (Finding of Fact 4; Award (b)) to clarify that the attorney's fees shall be held in trust by defendant until such time that a fee disclosure agreement is filed. We otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued by the WCJ on April 23, 2025, is **AFFIRMED**, except that it is **AMENDED** as follows:

Findings of Fact

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4. The reasonable value of the services of applicant's attorney is 18% of the permanent disability.

AWARD

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b) Less reasonable attorney fees of 18% of the permanent disability, commuted from the far end of the award, to be held in trust by defendant pending the filing of a fee disclosure statement by applicant's attorneys, and thereafter to be paid in one lump sum, less amounts previously paid.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA
July 28, 2025

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

RAMON MUNIZ
LAW OFFICES OF SANDRA CASTRO
WOOLFORD & ASSOCIATES

PS/oo

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