WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROBERT MERRIWEATHER, *Applicant*

vs.

HP HOOD, LLC; ACE AMERICAN INSURANCE COMPANY, administered by CONSTITUTION STATE SERVICES COMPANY, *Defendants*

Adjudication Number: ADJ18058034
Sacramento District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Applicant Robert Merriweather seeks reconsideration of the July 2, 2025 Findings of Fact, Award and Orders, wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that applicant is 23% permanently partially disabled after appropriate adjustments as a result of his industrial injury.

Applicant contends that there is no substantial medical evidence to support apportionment of 40% to non-industrial factors and that he is entitled to the unapportioned award of 39% permanent disability.

We received and reviewed an answer from defendant Ace American Insurance Company. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. Based on the Report, which we adopt and incorporate, and for the reasons discussed below, we deny reconsideration.

I.

Former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code 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.

Under Labor Code 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 25, 2025, and 60 days from the date of transmission is September 23, 2025. This decision is issued by or on September 23, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 25, 2025, and the case was transmitted to the Appeals Board on July 25, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 25, 2025.

II.

Defendant has the burden of proof on the issue of apportionment. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).) Apportionment of permanent disability must be based on causation (Lab. Code, § 4663) and may be attributed to pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial medical evidence establishing that these other factors have caused permanent disability. (*Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687] citing *Escobedo v. Marshalls*, *supra*, at 612.) Permanent disability must be apportioned in accordance with substantial medical evidence. (*Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman*) (2013) 218 Cal.App.4th 1137 [78 Cal.Comp.Cases 751])

To qualify as substantial evidence, a physician's report 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. (*Gatten, supra,* 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo*, *supra,* 70 Cal.Comp.Cases 604, 612.) A medical report is not substantial evidence if it merely sets forth the physician's conclusions without explaining the reasoning behind his opinions. (*Gatten, supra,* 145 Cal.App.4th at p. 927.) "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, supra,* 70 Cal.Comp. Cases at p. 621.)

Substantial evidence has been described as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and more than a mere scintilla. (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566].) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support

the Board's findings if it is based on surmise, speculation, conjecture, or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].) Whether a physician's opinion constitutes substantial evidence "must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion." (*Ibid.*) Substantial medical evidence on the issue of apportionment requires that: "the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 621.)

Here, Sean Robinson, M.D., the Panel Qualified Medical Evaluator, opined that 60% of applicant's permanent disability is due to the industrial injury and that 40% is due to non-industrial factors such as everyday life and genetics. (Joint Exhibit 2, Dr. Robinson's report dated June 25, 2024. P. 22,) He explained in his deposition:

> Q. Okay. Now, that injury -- the actual injury that he underwent or that he had on September 17th, 2022 that caused, I believe, a meniscus injury, now would that on its own result in the need for the total knee replacement?
>
> A. The meniscus tear in and of itself would not indicate need for a total knee preplacement [*sic*], no.
>
> Q. So it's the meniscus injury combined with this preexisting osteoarthritis that led to the need for the total knee replacement on the left side; is that correct?
>
> A. That is correct. If you have a meniscus tear in the setting of arthritis and you clean up the meniscus, you're not going to solve the root problem, most likely.
>
> (Joint Exhibit 3, Deposition of Dr. Robinson, p. 10:9-21.)
>
> Q. Okay. Now, do you think -- if it was absent --say he didn't even have this fall in September of 2022, do you think there would have been a need for a left knee replacement surgery based on the osteoarthritis that he had?
>
> A. It's tough to know. There is plenty of people walking around out there with severe arthritis and don't need total knees. He had bad arthritis before, we know that from prior x-rays, but he didn't have symptoms until the need.
>
> Q. So that is how you come to the 60 percent industrial, 40 percent nonindustrial?

A. That's correct.

(Joint Exhibit 3, Deposition of Dr. Robinson, pp. 11:22-12:9.)

Dr. Robinson based his opinion on applicant's preexisting osteoarthritis on a MRI dated November 15, 2022, which states, "Osteoarticular: Severe arthrosis with large areas of full-thickness cartilage loss over the femoral condyle and tibial plateau, with associated subchondral sclerosis and edema. Prominent marginal and central osteophyte formation. . . . IMPRESSION: . . . severe lateral tibiofemoral osteoarthritis . . ." (Joint Exhibit 1, Dr. Robinson's report dated February 21, 2024, p. 21.) Dr. Robinson explained:

> Q. Okay. And so that -- let me find that. And I think going to the February 21st report there is a diagnostic study of November 15th, 2022, that does talk about severe lateral tibiofemoral osteoarthritis. So that would be the basis for the finding of the severe osteoarthritis; is that correct?
>
> A. Yes.
>
> Q. Okay. So the osteoarthritis, would that have been caused by this injury he had, or would that be something that occurs over time?
>
> A. It occurs over time.
>
> Q. Okay. So what causes it to occur over time? Is it something that -- is it genetic, is it just a matter of day-to-day life activities, a combination of something?
>
> A. Yes, so it's a combination. So I would state that in my apportionment. There is anatomic factors, genetic factors, outside activity -- outside work activities. There is a number of things that could lead to osteoarthritic changes.
>
> (Joint Exhibit 3, Deposition of Dr. Robinson, pp. 7:21-8:15.)

Based on Dr. Robinson's explanation of his 60/40 apportionment opinion in his deposition as discussed above, we conclude that there is substantial evidence supporting apportionment. Accordingly, we deny reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant Robert Merriweather's Petition for Reconsideration of the July 2, 2025 Findings of Fact, Award and Orders is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ PAUL F. KELLY, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 23, 2025

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

ROBERT MERRIWEATHER
EASON & TAMBORNINI
MULLEN & FILIPPI, LLP

LSM/pm

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
AND NOTICE OF TRANSMISSION

RECOMMENDATION: DENY

INTRODUCTION

Trial in the primary proceedings of the above-captioned case was held on June 5, 2025 and the matter was submitted at that time to Workers' Compensation Judge Christopher M. Brown. The Findings of Fact, Awards and Orders; with Opinion on Decision issued on July 2, 2025. Applicant's Attorney filed a timely, verified and sufficiently served Petition for Reconsideration on July 21, 2025.

Petitioner asserts Labor Code Section 5903 is the legal basis for the filing and the argument is consistent with LC 5903(c). Specifically, Petitioner argues the apportionment analysis of the Panel Qualified Medical Examiner is invalid.

STATEMENT OF FACTS

Robert Merriweather (Applicant) suffered an accepted industrial injury to his left knee on September 17, 2022. Dr. Sean Robinson, M.D. evaluated Applicant's left knee injury as the Panel Qualified Medical Examiner. He examined Applicant on February 8, 2024 and June 13, 2024. He issued reports dated February 21, 2024 and June 25, 2024. He was deposed on February 13, 2025. (Joint Ex. 1, 2 & 3)

Dr. Robinson gave his expert medical opinion that Applicant has 20% Whole Person Impairment (WPI) in his left knee pursuant to the AMA Guides as Applicant underwent a total knee replacement with fair results. He provided a 2% add-on for pain resulting in a total of 22% WPI.

Dr. Robinson apportioned 40% of Applicant's left knee WPI to factors other than the industrial injury. Petitioner asserts this finding is not legally valid.

DISCUSSION

The history Dr. Robinson obtained from Applicant and the medical records reviewed confirm Applicant had a prior history of bilateral knee problems and had already undergone a total knee replacement of the right knee. Dr. Robinson apportioned 60% of Applicants left knee disability to the industrial injury and 40% to Applicant's preexisting left knee problems which included osteoarthritis which was not caused by the specific injury. Dr. Robinson's reports and deposition testimony explain both how and why he reached his expert medical opinion based on his examination of Applicant, the history provided by Applicant and the records presented. His reporting was found to be substantial medical evidence on the issues of permanent disability and apportionment. (OOD Pg. 3 – 4)

The facts of this case are analogous to *County of Santa Clara v. WCAB (Justice)*. Applicant had preexisting pathology in his left knee and there were records of treatment of his left knee along with a prior total knee replacement surgery for his right knee. Based on the substantial medical evidence that non-industrial factors contributed to the need for the surgery the apportionment from the original industrial injury. *Hikida* as Applicant's medical treatment did not result in a new injury that was separate and distinct from the original industrial injury.

Dr. Robinson explained both how and why he reached his expert medical opinion on the issues of permanent disability and apportionment. His expert opinion was found to be substantial medical evidence supporting Finding of Fact Number 5. Therefore, the Petition should be denied.

NOTICE OF TRANSMISSION

Pursuant to Labor Code, Section 5909, the parties and the appeals board are hereby notified that this matter has been transmitted to the appeals board on date set out below.

DATE: July 25, 2025

Christopher Brown
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE