WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ROSS GRIMSLEY II, *Applicant*

vs.

SAN FRANCISCO GIANTS; ACE AMERICAN INSURANCE COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ13704483
Santa Ana 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.

In addition to the WCJ's well-reasoned report, we note the following.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

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

[1] All further references are to the Labor Code unless otherwise noted.

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 May 5, 2025, and 60 days from the date of transmission is Friday, July 4, 2025. The next business day that is 60 days from the date of transmission is Monday, July 7, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on July 7, 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 May 5, 2025, and the case was transmitted to the Appeals Board on May 5, 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 5, 2025.

Defendant's Petition challenges the WCJ's determination of applicant's occupational group code, asserting that applicant's work as a professional baseball coach falls under occupational group code 390. (Petition for Reconsideration (Petition), dated April 22, 2025, at p. 3:7.) The WCJ's Report observes that her determination was based on applicant's testimony at trial, including his testimony that his time spent working for the defendant from 1999 to 2014 was

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

more physically demanding than the beginning of his coaching career, and that applicant "found being an instructor more difficult than his time pitching in the Major League…." (Report, at p. 4.) After a careful review of the evidence concerning applicant's *actual job duties*, including the testimony of applicant which the WCJ determined to be fully credible, the WCJ found that applicant's job duties most closely aligned with occupational group number 493. We have given the WCJ's credibility determination(s) great weight because the WCJ had the opportunity to observe the demeanor of the witness(es). *(Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Based on our independent review of the evidentiary record, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.)

We also note that irrespective of the stipulations of the parties, the WCAB may "make its findings and award based upon such stipulation, or may set the matter down for hearing and take further testimony or make the further investigation necessary to enable it to determine the matter in controversy." (Lab. Code, § 5702.) Here, we find the WCJ's determination of applicant's occupational variant to be supported by substantial evidence, including applicant's credible testimony at trial. We decline to disturb the WCJ's determination of occupational variant, accordingly.

Defendant next contends that the reporting of primary treating physician (PTP) Dr. Einbund was inadmissible because applicant's nomination of the physician to act as PTP was pretextual and obtained in order to circumvent the requirements of sections 4060 to 4062.2. (Petition, at p. 5:15.) However, the evidentiary record on this point is incomplete because the issue was not raised at trial. Defendant neither objected to the admissibility of the reporting of Dr. Einbund at the time of trial nor did it challenge applicant's original appointment of Dr. Einbund as primary treating physician. (Minutes, at p. 2:17.) We thus find defendant's arguments in this respect to be unpersuasive. (See *Cottrell v. Worker's Comp. Appeals Bd.* (1998) 63 Cal.Comp.Cases 760, 761 (writ den.); *California Compensation Insurance Co. v. Workers' Comp. Appeals Board* (*Gale*) (1997) [62 Cal.Comp.Cases 961].)

Moreover, as the WCJ has observed, when defendant denied liability for applicant's claim, applicant was "free to choose his own care," and defendant relinquished any claim to control over applicant's medical treatment options. (Report, at p. 9.) We also agree with the WCJ's analysis finding that defendant's assertions with respect to Dr. Einbund's lack of medical treatment are

unsupported in the record. (See Report, at p. 11.) We note that the relevant and considered opinion of one physician, although inconsistent with other medical opinions, may constitute substantial evidence. (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].) Accordingly, and because Dr. Einbund was appropriately nominated as the PTP in the first instance following defendant's denial of liability in this matter, we agree with the WCJ's admission of and reliance on the reporting of Dr. Einbund.

Finally, defendant avers the WCJ improperly rejected the nonindustrial apportionment identified by both PTP Dr. Einbund and QME Dr. Tran. Defendant observes that both physicians reviewed relevant medical records and offered apportionment opinions based thereon. (Petition, at p. 7:6.) However, we agree with the WCJ's assessment that a review of the records is not the relevant standard with respect to whether an apportionment opinion constitutes substantial evidence. As we noted in our en banc decision in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc) (*Escobedo*), the mere fact that a physician's report purports to address the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report 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 that factors other than the industrial injury at issue caused permanent disability. (*Id.* at p. 621.) Our decision in *Escobedo* summed up the minimum requirements for an apportionment analysis as follows:

> [T]o 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.
>
> 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.

(*Ibid.*, italics added.)

Here, we agree with the WJC's assessment that the apportionment opinion of Dr. Einbund does not adequately describe how and why the identified factors of apportionment are currently manifesting in permanent disability. (Report, at pp. 12-13.) Based on our independent review of the entire record, we agree that defendant has not met its burden of establishing apportionment to nonindustrial factors. (See *Lamb v. Workers' Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Escobedo, supra,* 70 Cal.Comp.Cases 604. 612.)

We will deny reconsideration, accordingly.

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/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 7, 2025

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

ROSS GRIMSLEY II
PRO ATHLETE LAW GROUP
BOER, PETERSON & KOBY

SAR/abs

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

REPORT AND RECOMMENDATION ON
DEFENDANT'S PETITION FOR RECONSIDERATION

FACTS

Applicant filed an Application for Adjudication of Claim on October 9, 2020. (EAMS DOC. ID#34088473). The claim was denied on December 23, 2020. (Notice of Denial of Claim, Defense Exhibit A). On September 13, 2024, Applicant filed a Declaration of Readiness to Proceed ("DOR") on numerous issues. (EAMS DOC. ID#53877493). The parties appeared at a Mandatory Settlement Conference ("MSC") on October 21, 2024, and jointly requested to set the matter for trial. (EAMS DOC. ID#78512163). The following was reflected in the Minutes of Hearing ("MOH") by the MSC Workers' Compensation Judge: "DA to circulate PTCS and file and serve the completed and executed PTCS NO LATER THAN 10/31/24; E-filers to file exhibits no later than 20 days before trial). (*Id*). The trial was set for December 4, 2024, and the MOH was served on Petitioner on October 24, 2024. (*Id*.) Parties requested a continuance, (EAMS DOC. ID#55130080) that was granted on December 16, 2024, (EAMS DOC. ID#78680475). A new trial date was set for February 11, 2025. (*Id*.). The Pre-Trial Conference Statement ("PTCS") was not filed by the parties until one day before trial on February 10, 2025. (EAMS DOC. ID#56281095). The parties appeared for trial before the undersigned on February 11, 2025. On the day of trial, the PTCS was amended. (EAMS DOC. ID#78859012). The issues for trial were: 1) AOE/COE; 2) Temporary disability; 3) Permanent and Stationary date; 4) Permanent disability; 5) Apportionment; 6) Further medical treatment; 7) Attorney fees; 8) Labor Code 5412 date of injury; 9) Labor Code 5500.5 liable party; and 10) Whether Petitioner could withdraw from Occupation Code 590.

On the day of trial, Petitioner acknowledged that the Pre-Trial Conference Statement filed the day prior had listed the Occupation Group Number as 590 in the stipulation page and requested to have it changed to 390. Applicant attorney objected; therefore, withdrawal of the Occupation Code was taken up as an issue for trial. Applicant proffered and the Court admitted without objection four reports and the deposition transcript of Dr. Michael J. Einbund. ("Dr. Einbund") (Applicant Exhibits 1-5). Petitioner submitted four reports and one deposition transcript of Panel Qualified Medical Examiner ("QME") Dr. Trieu T. Tran ("Dr. Tran") also admitted into evidence without objection. (Defense Exhibits B-F). After review of the medical evidence, the court found the reports of Dr. Einbund more persuasive and issued a Findings & Award ("F&A") on April 2,

2025. The Petition for Reconsideration raises three issues: 1) Occupation Code; 2) Apportionment to right shoulder and left knee; and 3) Validity/Admissibility of Dr. Einbund's reports.

Applicant gave the following credible testimony at trial. He was a baseball coach from 1984 to 2014. (Minutes of Hearing/ Summary of Evidence ("MOH/SOE") 2/11/2025 at p: 5:10½). As a coach, he threw batting practices daily and practiced all the fundamentals with the fungo bats. (*Id*. at 12½ -15). He did fielding practices hitting balls to infields and to the outfield, and if he was not pitching or batting, he was doing fungos during practice. (*Id.* at 16-18). The majority of his coaching career was spent with the San Francisco Giants ("Giants"), from 1999 to 2014. (*Id*. at 22½ -23). Before his time with the Giants, he was physically fine, but coaching for the Giants was a different experience from the other teams. (*Id*. at p. 23½ -24½). While with the Giants, he was asked to go to the Major Leagues to throw to Barry Bonds[1] and did this for about five to six years. (*Id*. at p. 6:14½). Barry Bonds wanted the balls thrown harder than most other players. (Id.)

Applicant testified that his job was more grueling with the Giants from 1999-2014, than at the beginning of his coaching career. (*Id*. at 5½ -6). He pitched more in this role, his job duties increased, and he found it was more difficult being an instructor than a pitcher in the Major League. (*Id*. at 7-8). With the Giants, they had batting practice daily with perhaps two to three days off a month sometimes playing twenty-one days in a row. (*Id*. at p 9:4½ -6). For a period of time, there were only two coaches doing batting pitches until they got more coaches. (*Id*. at p. 5:14-16). On average, Applicant would pitch twenty minutes each day, estimating eighty or more pitches daily albeit with less intensity than a player. (*Id.* at p. 10:2½ -4½). He found being an instructor more difficult than his time pitching in the Major League in part because as an instructor he went year round going to Winter Ball from February to December. (*Id.* at p. 6:8-9). As a coach, he participated in Spring Training, Minor League, Regular Season, Fall Instructional and Winter League. (*Id*. at p. 11:5½ -8). He estimates he attended Winter League three to four times and Fall Instructional over half of the time he was a coach. (*Id*.).

Dr. Einbund conducted an initial in-person evaluation of the Applicant on March 29, 2022. At this evaluation, Dr. Einbund issued a 'Doctor's First Report of Occupational injury or Illness' and an 'Initial Comprehensive Primary Treating Physician's Medical-Legal Orthopaedic Evaluation with Request for Authorization.' (Applicant Exhibit 1). In this report, Dr. Einbund requested authorization for a course of physical therapy twice a week, X-rays and MRI's for multiple body parts. (*Id*. at p. 12). On May 10, 2022, Dr. Einbund issued a 'Primary Treating

Physician's Progress Report (PR-2)' via telehealth. (Applicant Exhibit 2). Under treatment plan, Dr. Einbund wrote "treatment has been denied." (*Id*. at p. 8).

On June 27, 2022, Applicant returned for an in-person evaluation and Dr. Einbund issued a 'Comprehensive Primary Treating Physician's Maximum Medical Improvement Report'. (Applicant Exhibit 3). In this report, Dr. Einbund found causation to multiple body parts as a result of continuous trauma sustained as a professional baseball coach. (*Id*. at p. 22). He apportioned 10% of Applicant's current left knee disability to surgery in 1994/1995 and 90% to the continuous trauma for his time as a coach. (*Id*.). With respect to this apportionment, the only additional information added was as follows: "Mr. Grimsley underwent surgery in 1994 or 1995, due to the wear and tear that he sustained while coaching. The surgery was performed during the off-season and he did not miss any time as he was able to return for the following spring training". (*Id*.). Dr. Einbund also apportioned 10% of Applicant's right shoulder impairment. He wrote "[w]ith regard to his right shoulder, Mr. Grimsley developed pain due to hitting fungos. He underwent right should arthroscopy during the off-season in 2012 and did not miss any time. 10% of his current right shoulder disability is apportioned to the specific injury leading to surgery in 2012, and 90% is apportioned to the continuous trauma of coaching." (*Id*.).

Dr. Einbund issued a 'Supplemental Med-Legal Report' on August 23, 2024, after review of team/medical records. (Applicant Exhibit 4). Based on review of the records he wrote "it would be reasonable to apportion 10% of his current left shoulder, left elbow, bilateral knee and right ankle impairment to the continuous trauma that he sustained during his career as a professional baseball pitcher." (*Id*. at p. 5). Petitioner deposed Dr. Einbund on May 13, 2024. (Depo. of Dr. Einbund, Applicant Exhibit 5).

Dr. Tran issued his initial report on November 12, 2021, and found no evidence of industrial injury. (Defense Exhibit B, at p. 112). One June 23, 2023, he issued a supplemental report after he reviewed the March 29, 2022, May 10, 2022, and June 27, 2022 reports of Dr. Einbund. (Defense Exhibit C, at pp. 2-5). He also issued an opinion disagreeing with Dr. Einbund. (*Id*. at p. 6).

DISCUSSION

OCCUPATION CODE

Petitioner contends that the undersigned erred in using Occupational Group 493 to calculate Applicant's permanent disability ("PD"") rating instead of Occupational Group 390. Petitioner's reliance on this seems to be based on Applicant's job title of "Professional Baseball Coach". The Occupational Group is a question of fact to be determined by the trier of fact. While a job title may be helpful and is a starting point to finding the Occupational Group, the duties the Applicant actually performed is more accurate. *See, Zenith National Insurance Co. v. Workers' Comp. Appeals Bd., (Higgins)* (1975) 40 Cal.Comp.Cases 566 (writ denied) (appeals board relied on a workers' testimony concerning his actual duties rather than title to determine the occupational variant); *Solar Turbines Int. v. Workers' Comp. Appeals Bd., (Bigford)* (1979) 44 Cal.Comp.Cases 158 (writ denied) (occupational variant was decided based on the applicant's credible testimony); *Cervantes v. Milgard Mfg.,* 2024 Cal. Wrk. Comp. P.D. LEXIS 234 (occupational group number 370 more accurately reflected requirements of applicant's job than 320 based on applicant's job activities). Labor Code section 5502 holds that "if the claim is not resolved at the mandatory settlement conference, the parties shall file a pretrial conference statement noting the specific issues in dispute. Discovery shall close on the date of the mandatory settlement conference." Lab. Code §5502(d)(3).

Although Petitioner had initially completed the Pre-Trial Conference Statement stipulation page with Group Number 590, because the Pre-Trial Conference Statement was not executed and signed by all parties and the court at the MSC, the undersigned Judge found there was no binding stipulation. Despite this procedural defect with the execution of the Pre-Trial Conference Statement, absent objection from the parties and in the spirit of litigating workers' compensation matters expeditiously, the trial went forward and Occupation Group/withdrawal from same was taken up as an issue for consideration.

Based on Applicant's credible testimony at trial, the undersigned found that Occupational Group 493 more accurately reflects the requirements of Applicant's job as a coach for purposes of rating his PD. Section 3, Part A of the 2005, Schedule for Rating Permanent Disabilities ("PDRS") contains an alphabetized list of occupations with their scheduled "Occupational Group" Numbers. Part C contains descriptions and sample occupations of each group. According to the PDRS, to

use Part C, one must "[s]imply determine the basic functions and activities of the occupation under consideration and relate it to a comparable scheduled occupation to determine the appropriate group number.) (PDRS, at p. 3-1). Part C describes Group 390 as follows: "[I]nside and outside work requiring significant walking, some uneven ground, and climbing – leg demands are most significant aspect of duties; work may be *high risk but not necessarily highly physical*; demands for arms & spine are at middle of 300 series." (PDRS, at p. 3-35)[2] (emphasis added). Group 590 is described as "[p]eak athletic performance requiring whole body strength with specialized training and skills; highest variants for all parts of the body." (PDRS, at p. 3-37).[3] Group 493 is described as "[s]ubstantial athletic performance required but less arduous than Group 590".[4] Also found in category 493 are professional golfers. (*Id*. at 3-12).

Based on Applicant's testimony at trial, the undersigned finds that while his duties with the Giants did not require peak athletic intensity as required by professional athletes Group 590, they were more arduous than those described in Group 390. Applicant testified that his time with the Giants and demands on him were more difficult than with other teams, in part because of the team's expectations, but also because the Giants initially only had two coaches doing all the training, and for about six-seven years of his career he was responsible for training with Barry Bonds who required pitches at a higher intensity level. The Applicant did almost daily and year-round batting and fielding practices sometimes for twenty-one days straight, estimating up to eighty pitches in a day. If he was not pitching or batting to the players, he was working fungos hitting to the infields and outfields. In review of the basic functions and activities described herein, the undersigned finds these job duties are more analogous to a professional golfer or professional bowler falling into Group 493.

RELIANCE ON DR. EINBUND

Petitioner challenges *for the first time* on appeal the propriety and admissibility of the reports of Dr. Einbund. This trial court finds this approach disconcerting. These issues were not litigated at trial raising concerns with due process. Issues *must* be litigated at the trial level and issues not raised in the trial court are forfeited for purposes of appeal. *See Schultz v. Workers' Comp. Appeals Bd*., 232 Cal.App.4th 1126; *People v. Valdez* (2012) 55 Cal.4th 82. Therefore for this reason alone, this issue should be deemed waived and not given further consideration.

Petitioner's argument on this issue is multi-faceted. First, Petitioner appears to contend that Dr. Einbund's reports are not admissible as a treating physician because he is not within a reasonable geographic distance of the Applicant's residence, was not selected for continuing medical treatment, and only evaluated the Applicant twice in person rendering no treatment. For these reasons, Petitioner contends that Dr. Einbund's report were obtained in violation of and to circumvent the procedures of Labor Code section 4060 et seq. In the alternative, Petitioner argues that Dr. Einbund's reports are consulting reports.

Petitioner's arguments on this issue are without merit for the reasons *infra*. Petitioner denied liability for Applicant's claim leaving Applicant free to choose his own care. As such, Petitioner lost control over where and from whom Applicant could treat. Moreover, Petitioner's contention that Applicant could have treated closer to his home at "literally hundreds if not thousands of qualified orthopedic surgeons between Bradenton, Florida and Santa Ana, California"[5] misplaces the burden of proof on this matter. In order to support a finding that an applicant's geographic location for medical treatment is unreasonable, the employer must present evidence demonstrating the availability of a similar, or equally effective program in a more limited geographic area closer to applicant's domicile. *Braewood Conv. Hosp.* v. *Workers' Comp. Appeals Bd.,* 34 Cal 3rd 159. Petitioner has offered no such evidence.

Petitioner's reliance on Reg. 9785(b) regarding designation of treatment for continued care is also misplaced. The Regulation reads:

> (b)(1) An employee shall have no more than one primary treating physician at a time.
>
> (2) An employee may designate a new primary treating physician of his or her choice pursuant to Labor Code §§ 4600 or 4600.3 provided the primary treating physician has determined that there is a need for:
>
> (A) continuing medical treatment; or
>
> (B) future medical treatment. The employee may designate a new primary treating physician to render future medical treatment either prior to or at the time such treatment becomes necessary.

Cal. Code Regs. §9785(b).

Petitioner suggests that Dr. Einbund could only have been selected for continuing treatment

to Applicant's knees. (PFR, at p. 5, para. 3). This suggests that Applicant was treating for an accepted cumulative trauma claim to his knees in 2016 and a physician determined there was a need for future medical treatment. Applicant did not file his claim until 2020 and the cumulative trauma claim was denied.

Finally as to Dr. Einbund's qualification as a treating physician, the Regulation states the following:

> The "primary treating physician" is the physician who is primarily responsible for managing the care of an employee, and who has examined the employee *at least once* for the purpose of *rendering or prescribing treatment* and monitored the effect of the treatment thereafter.

Cal. Code Regs. §9785(a)(1) (emphasis added).

Dr. Einbund stated in his initial report:

> I have examined this patient in my capacity of his primary treating physician with regard to the symptomology that is attributed to the industrial injury that he sustained on a continuing trauma basis while coaching professional baseball. I am the patient's treating doctor. He has not yet reached maximum medical improvement. I am requesting authorization for a course of physical therapy at two times a week for six weeks. I am requesting authorization for a complete series of x-rays . . . I am requesting authorization for MRI scans . . . I am requesting authorization for consultation with a psychiatrist. . . After all the appropriate diagnostics tests and appropriate consultation are obtained, I will be able to discuss the patient's disability status and any further need for medical care.

(Applicant Exhibit 1, at p. 12).

In his subsequent report on May 10, 2022, under treatment plan, Dr. Einbund notes that treatment was denied. (Applicant Exhibit 2, at p. 8). Here, Dr. Einbund evaluated the Applicant more than once and *prescribed* treatment as discussed above. Treatment prescribed was denied by Defendant. Dr. Einbund; therefore, meets the requirement of a Primary Treating Physician. Petitioner also appears to argue that because some of the treatment reports are prepared in the format of a medical-legal report, Dr. Einbund was merely circumventing the medical legal process. Labor Code section 4060, permits medical-legal evaluations by a treating physician and obtaining such a report from a treating physician is especially appropriate where the claim has been denied and where there are issues of permanent disability.

Finally, Petitioner suggests that Dr. Einbund's reports were obtained under Labor Code section 4605, intended to be consultations at Applicant's expense, and therefore cannot support a PD award. In support, Petitioner argues that Dr. Einbund himself notes he was obtained for a consult in the treatment rendered section of his first report. (PFR, at p. 5). The undersigned is unable to find any such reference in Dr. Einbund's report. The only time the word consult or consultation was used by Dr. Einbund in that report was when requesting/prescribing a consultation with a psychiatrist and indicating that he would discuss disability and further need for care when all consults were obtained. (Applicant Exhibit 1, at p. 12). The Labor Code section on consulting reports reads as follows:

> Nothing contained in this chapter shall limit the right of the employee to provide, at his or her own expense, a consulting physician or any attending physicians whom he or she desires. Any report prepared by consulting or attending physicians pursuant to this section shall not be the sole basis of an award of compensation. A qualified medical evaluator or authorized treating physician shall address any report procured pursuant to this section and shall indicate whether he or she agrees or disagrees with the findings or opinions stated in the report, and shall identify the bases for this opinion.

Lab. Code §4605.

An analysis under this section is very complex and in some instances involves details as minute as the timing of the evaluations. By failing to raise this as an issue for trial, Applicant is deprived of his due process to provide rebuttal evidence.

Finally, even if Dr. Einbund's reports are considered consulting reports, they are still admissible and the requirement that either a PTP or QME must review the report and state whether he or she agrees or disagrees with the findings or opinions were met. Dr. Tran reviewed the reports of Dr. Einbund in his supplemental report and opined on them. (Defense Exhibit C, at p. 2-6).

APPORTIONMENT

Petitioner contends that the undersigned erred when it rejected Dr. Einbund's apportionment of 10% to the left knee for surgery in 1994 and 10% to the right shoulder due to a specific injury in 2012. Petitioner's contention appears to be based on the fact that Dr. Einbund reviewed the team records, operative reports, and contemporaneous diagnostics tests for the shoulder and knee. This however, is not the standard for legal apportionment.

Petitioner holds the burden of proof on apportionment of permanent disability. Labor Code §5705; *see also Escobedo v. Marshalls*, 70 Cal.Comp.Cases 604 (Appeals Board en banc.). If a physician apportions a part of an injured worker's disability to a preexisting condition or injury, the physician must explain 'how and why' the condition or injury is causing permanent disability at the time of the evaluation and 'how and why' it is responsible for the percentage of the disability assigned by the physician. *Escobedo supra* at 621. *See also Sykes v. Los Angeles County Metro. Transit Auth.* 2022 Cal. Wrk. Comp. P.D. LEXIS 175 (WCAB affirming an unapportioned award as the physician did not explain 'how and why' the non-industrial accident contributed to Applicant's current level of disability); *Navarette v. Sectran Security, Inc*., 2020 Cal. Wrk. Comp. P.D. LEXIS 281 (WCAB affirmed unapportioned award as the QME failed to explain the nature of the preexisting condition and how and why the preexisting condition and any related disability was responsible for a percentage of applicant's permanent disability at the time of the QME evaluation).

Dr. Einbund did not provide the 'how and why' for his apportionment opinions in his medical reports. In turn, his opinion does not comply with the requirements of *Escobedo* and is therefore not substantial legal apportionment.

RECOMMENDATION

For the reasons stated above, it is respectfully requested that the decision not be disturbed and Petitioner's Petition for Reconsideration be denied.

DATE: May 5, 2025

Josephine K. Broussard
WORKERS' COMPENSATION JUDGE