WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SERVANDO ALVAREZ, *Applicant*

vs.

CORONADO LIVERY, INC.;
STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ10128397
San Diego District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the April 7, 2025 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found and awarded 32 percent permanent disability after apportionment.

Applicant contends that the apportionment has not met the standards for substantial medical evidence set forth in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc). No answer has been received from defendants.

We received a Report and Recommendation from the WCJ, which recommended that we deny the Petition.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report of the WCJ with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration and amend the WCJ's decision of April 7, 2025 to find that applicant's injury caused 96 percent permanent disability and award an unapportioned award of 96 percent permanent disability.

FACTS

At trial on February 20, 2025, the parties stipulated that during the period from August 22, 2014 to August 22, 2015, applicant sustained injury arising out of and in the course of employment to his knees and shoulders while employed as a driver by Coronado Livery, Inc., insured by State

Compensation Insurance Fund. Applicant was 61 years of age at the end of this stipulated period of cumulative trauma. The parties further stipulated that at the time of injury, applicant's earnings were $358.19 per week, warranting indemnity rates of $238.79 for temporary disability and $238.79 for permanent disability, and that the applicable Occupational Group Number is 250. (Minutes of Hearing and Summary of Evidence dated February 20, 2025, p. 2, numbered lines 3-11.)

The only exhibits admitted into evidence at trial were a deposition transcript and five reports of Qualified Medical Evaluator (QME) Christopher Pallia, M.D., admitted as Joint 1 through 6, and a report of treating physician James McSweeney, M.D. dated February 8, 2021. (*Id*. at p. 3, numbered lines 7-22.) According to the history in Dr. Pallia's first report, dated January 13, 2016[1], applicant was hired by Coronado Livery on June 25, 2014 to transport people from Coronado Island to the airport. His passengers included soldiers with heavy duffle bags, which he had to carry and lift into a van. He first noticed increasing pain in his shoulders from carrying and lifting passengers' baggage in April or May of 2015. (Joint 6, Report of Dr. Chris Pallia dated January 13, 2016, p. 2, l. 14-18.)

Dr. Pallia did not review contemporaneous records of any prior treatment, but applicant did tell him that he had previously sustained work injuries without permanent disability, from which he felt he had recovered. Applicant also reported having prior pain in his knees, and facial surgery for eye cancer. (*Id*. at p. 4, lines 1-7, and p. 7, lines 16-23.) Dr. Pallia's initial report defers any opinion on causation of injury, due to the lack of any records of prior treatment. (*Id*. at p. 8, lines 15-21.)

Dr. Pallia issued a supplemental report dated March 22, 2016, reviewing a March 11, 2016 MRI of the right knee, but he once again deferred any opinion on causation because he did not receive requested reports from applicant's treating physicians. In a second supplemental report dated November 8, 2016[2], Dr. Pallia reviewed treatment reports including x-ray reports from

[1] The dates used in the headings of Dr. Pallia's evaluation reports, and in the February 20, 2025 Minutes of Hearing and Summary of Evidence, refer to the date of Dr. Pallia's examination of applicant, and not to the date that the report was signed. For the sake of convenience and clarity, these dates are referred to as the date of the report.

[2] The Minutes of Hearing and Summary of Evidence erroneously refer to November 16, 2019 as the date of this report, which was admitted into evidence as Joint 4. (Minutes of Hearing and Summary of Evidence dated February 20, 2025, p. 3, numbered lines 14-15.)

Physician's Radiology Group, an operative report from Dr. Myer, and progress reports from Dr. Myer and physician's assistant Lora Rancourt. At this point, Dr. Pallia expressed his belief that applicant sustained a rotator cuff tear and a medial meniscus tear prior to his job with Coronado Livery, even though there are no contemporaneous records of a rotator cuff tear prior to 2014 (See Joint 4, Report of Dr. Chris Pallia dated November 8, 2016, pp. 1-3.) Dr. Pallia then apportioned 80 percent of shoulder disability and 100 percent of knee disability to preexisting conditions, but he did not describe the mechanism by which those preexisting conditions were causing present permanent disability. The report did not explain how or why Dr. Pallia chose 80 percent as the percentage of apportionment, as opposed to 70 percent, 90 percent, or some other percentage for the shoulders. Furthermore, the report did not explain how and why applicant's reported strain of the knee and increased pain at work from repeated lifting of heavy suitcases and duffel bags had played no role in his bilateral knee condition.

About a year after QME Dr. Pallia's third report, the parties stipulated to an award of 20 percent permanent disability based not on the QME, but on treating physician Dr. Thomas Harris, whose reports are not currently in evidence. On September 6, 2018, applicant's counsel filed a timely petition to reopen the 20 percent award for new and further disability.

Approximately one year after the petition to reopen for new and further disability, Dr. Pallia re-evaluated applicant on September 18, 2019. In his reevaluation report, Dr. Pallia reviewed treating physician reports of Dr. Harris and Dr. McSweeney, as well as second and third surgical opinions and various studies, none of which predated the period of cumulative injurious exposure in the present case. Dr. Pallia noted that applicant underwent a total replacement of the right knee and acknowledges that the left knee pain had worsened to a constant 7 out of 10. Dr. Pallia further noted that applicant was using a cane because the left knee "feels loose and it gives way on him occasionally." (Joint 3, Report of Dr. Chris Pallia dated September 18, 2019, p. 7, last paragraph, and p. 8, lines 3-4.) At this point, Dr. Pallia indicated industrial causation of injury to the left knee. Although he felt that applicant had not yet reached maximal medical improvement (MMI), Dr. Pallia prognosticated that 80 percent of permanent disability would ultimately be caused by preexisting conditions.

On February 8, 2021, treating physician James E. McSweeney, M.D., evaluated applicant and issued a permanent and stationary report, admitted into evidence as Applicant's 7. This report, which was the sole treating physician report admitted into evidence at trial, indicated 20 percent

Whole Person Impairment (WPI) in each knee using Table 17-35 of the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides). Dr. McSweeney apportioned 25 percent of permanent disability of the knees to "a rather significant degenerative condition." (Joint 7, Report of Dr. James McSweeney dated February 8, 2021, p. 6, lines 16-17.) Dr. McSweeney did not explain the mechanism of this apportionment, nor why he chose 25 percent as opposed to some other number.

On July 31, 2024, QME Dr. Pallia re-evaluated applicant a second time, and reviewed 416 pages of records, some previously reviewed, but none of them clearly predating the cumulative injury period. Only one of the reviewed records was prior to 2015, a 2014 x-ray of the knees, and that record was described as "illegible" except for "Conclusion: bilateral osteoarthritis." (Joint 2, Report of Dr. Chris Pallia dated July 31, 2024, p. 1, last line and p. 2, first line.) Dr. Pallia noted that at this point, both of applicant's knees had been replaced. Applicant was found to have reached MMI status on the date of examination, July 31, 2024.

Dr. Pallia's report of July 31, 2024 provided opinions on impairments under the AMA Guides. (*Id*. at p. 20, paragraphs 2-3.) Like Dr. McSweeney, Dr. Pallia indicated that there is 20 percent WPI of each knee, using Table 17-35 of the AMA Guides.

For the right shoulder, Dr. Pallia found that applicant has 8 percent Upper Extremity (UE) impairment, based on range of motion. Eight percent UE is equivalent to 5 percent WPI, to which Dr. Pallia added another 3 percent for pain using Chapter 18, stating, "I believe that the patient is entitled to an additional 3% whole person impairment for pain of the right shoulder that is ongoing, is not adequately represented [in] just the loss of range of motion." (*Id*. at p. 20, para. 3, l. 12-13.) Thus, Dr. Pallia concluded that applicant has 8 percent WPI of his right shoulder using the AMA Guides.

For the left shoulder, Dr. Pallia found 3 percent UE based on range of motion, to which he added 10 percent UE for a distal clavicle excision. Thirteen percent UE is equivalent to 8 percent WPI of applicant's left shoulder.

The apportionment opinion offered in Dr. Pallia's report of July 31, 2024 is as follows:

> Apportionment is important in this case. For the knees, I opined that 80% of the applicants permanent impairment can be attributable to the underlying preexistent arthritic disease and its natural progression and 20% can be attributable to the industrial aggravation of that arthritis on a work related basis, especially because the patient had only worked for one year at that job, I think that is reasonable.

> With regard to the shoulders, I have not made any comments on shoulder apportionment. I think it may be reasonable to apportion 20% of the patients permanent impairment with regard to the shoulders for pre-existent underlying arthritic changes and 80% to the effects of the industrial injury, because the patient did have some prior arthritic change of the AC joint of the left shoulder and underlying impingement morphology.

(*Id*. at p. 20, last paragraph and p. 21, first paragraph.)

The parties took Dr. Pallia's deposition on October 31, 2024, the transcript of which was admitted into evidence as Joint 1.[3] Both the defense attorney and applicant's attorney questioned the QME about apportionment and his recommendation to add the bilateral shoulder and knee impairments instead of combining them on the Combined Values Chart. Both attorneys asked Dr. Pallia to apply the criteria set forth in *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc). Dr. Pallia concluded that the effect on activities of daily living caused by impairment of the shoulders does not overlap with the effect of impairment of the knees, and therefore disability based on impairment of the shoulders should be added to, and not combined with, the disability based on impairment of the knees. (Joint 1, Deposition of Christopher Pallia, M.D., October 31, 2024, at p. 20, l. 16 through p. 21, l. 4.) He also explained that although the effect of impairment in each knee does overlap with the effect of the impairment of the other knee, having impairment in both limbs increases the effect of each impairment because there is no healthy limb that can be used in lieu of the other. (*Id*. at p. 40, l. 4-16.)

At deposition, Dr. Pallia did not change his opinions with respect to percentages of impairment under the AMA Guides. He discussed his prior opinions regarding apportionment, offering the following comments with respect to the knees:

> I obviously don't remember off the top of my head here, but I don't believe he had a prior injury to his knees. I might have just meant that -- because there were notes where he had been seeing his primary care physician and had been complaining of knee pain. There's one note where there's complaints. It states that the patient had knee pain for five years and that was on a – let's see, that was on -- I'll just say that was a report from June 19th of 2015. It says, "patient complaints of bilateral knee pain, eight out of ten, left greater than right. Five-year history of pain is continuous."

(*Id*. at p. 12, lines 5-16.)

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[3] Joint 1 is clearly a deposition transcript but is misidentified in the Minutes of Hearing and Summary of Evidence as "reports." (Minutes of Hearing and Summary of Evidence dated February 20, 2025, p. 3, numbered lines 14-15.)

Dr. Pallia explained why he changed his initial opinion that causation of injury of the knees was nonindustrial:

> In my '16 report, I stated that "100 percent of the patients arthritis in both knees could be apportioned to natural degenerative causes and underlying anatomic varus alignment," but I wasn't talking about apportionment of impairment, if you know what I mean, at that time period and furthermore, the patient hadn't had surgical treatment for the arthritis of the knees on an industrial basis… which was by the carrier. … So the main reason I changed is because the patient had surgical treatment of his arthritis. If he had just had the meniscus tear treated arthroscopically and was made permanent and stationary and never had any further treatment, then my opinions would have been similar.

(*Id*. at p. 15, lines 9-14.)

When asked why he chose 80 percent as the percentage of nonindustrial apportionment following the knee surgeries, Dr. Pallia offered the following explanation:

> Again, you can just look back in time, right? I mean, on June 19th of 2015, he had a five year history of pain and had a diagnosis of osteoarthritis of the bilateral knees, which is soon -- you know, it was during the time when he filed his cumulative trauma so he obviously had pre-existing arthritis and it was starting to affect his work and maybe he was aggravating the arthritis from the work -- or not maybe, but he was aggravating his arthritis from the work -- from the work duties, but there was good portion that was naturally progressive.
>
> He has an ultrasound report on July 10th of 2015 that says left side nearly bone to bone. He no, just kind of correlating the severity of the arthritis there that was ongoing. And that takes years to develop, so to speak.
>
> And then I also stated that I believed the patient had worked only one year at the Coronado livery, so he didn't have a large exposure, a large time period of exposure. I mean, if he had worked his whole career there, then we might apportion a higher percentage of his impairment to his job -- you know, to his job duties, but because he only worked a year and he had pre-existing arthritis for four years prior to working there -- or at least prior complaints of bilateral knee pain for four years prior to working there.
>
> That's the reasons for my opinions except, finally, he had total knee arthroplasty, so basically all the arthritis was removed from his knees and he had large surgeries, and the impairment that he has is more of, you know, at least a result of the surgeries.

(*Id*. at p. 16, line 8 to p. 17, line 13.)

With respect to the knees, Dr. Pallia concluded, "the way his knees are now, you know, are kind of representative of the surgery that he had under treatment for this claim from this employer." (*Id*. at p. 18, lines 22-24.)

With respect to the left shoulder, Dr. Pallia clarified that he considered applicant's rotator cuff tear to be industrial in origin:

> I believe he had surgery by Dr. Meyer on the left shoulder with a rotator cuff repair in August of 2015 and he also underwent A distal clavicle resection, which is done for arthritis of the AC joint. Again, I felt that, you know, the rotator cuff tear essentially arose from the job duties. I believe that was my opinion… So my opinions were that it seems like the left shoulder was mostly all due to his work duties.

(*Id*. at p. 20, lines 1-7.)

Dr. Pallia explained that applicant's right shoulder impairment was the result of unsuccessful industrial treatment:

> So I kind of -- but the right shoulder was kind of a quiescent impingement syndrome when I saw him back in 2016, but somehow he received two more surgeries -- two surgeries on his right shoulder that ended up causing kind of an adhesive capsulitis and a frozen shoulder post surgery and he ended up having some complications from the surgery, so again instead of just having this underlying pre-existent bursitis of the shoulder, which probably just could have been left alone, he would have been doing better, he underwent surgical intervention for that right shoulder and ended up with a worse shoulder than he did before. So this is another case of where the impairment of the shoulder arose more from the surgical treatment maybe then we'll say the pre-existing disease, unfortunately, in this case.

(*Id*. at p. 20, line 14 to p. 21, line 4.)

Dr. Pallia concluded that apportionment of shoulder impairment is "20 percent due to pre-existent activities or a pre-existent condition and 80 percent was really of his shoulder and his ongoing pain and the stiffness was due to the job exposure and the surgical treatment for his shoulders." (*Id*. at p. 22, line 23 to p. 23, line 2.)

Based on the reports and deposition testimony of QME Dr. Pallia, the WCJ issued a Findings and Award of 32 percent permanent disability after apportionment. Citing *Escobedo,* cited above, the WCJ found that apportionment to pre-existing pathology such as arthritis is permissible, and concluded that Dr. Pallia's opinion is the most persuasive, and that it constitutes substantial medical evidence, as it was "based on an adequate medical history, examination and facts; the opinion was not speculative, it set forth the reasoning behind the physician's

conclusions." (Findings and Award and Order; Opinion on Decision dated April 7, 2025, p. 2, lines 15-19 and p. 3, lines 5-11.) The percentage of permanent disability was explained in the WCJ's Opinion with the following rating strings:

Left Shoulder/Other	80% (16.02.02.00 - 8[1.4] - 11 - 250F - 11 – 14) 11 PD (A)
Left Knee	20% (17.05.10.08 - 20[1.4] - 28 - 250F - 28 – 34) 7 PD (A)
R Shoulder/LOM	80% (16.02.01.00 - 851.4] - 7 - 250F - 7 – 9) 7 PD (A)
R Knee	20% (17.05.10.08 - 20[1.4] - 28 - 250F - 28 – 34) 7 PD (A)

The WCJ added 11,7, 7, and 7 percent permanent disability, citing *Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2103) 78 Cal.Comp.Cases 213.

Applicant has filed a timely Petition for Reconsideration of the April 7, 2025 Findings and Award, contending that Dr. Pallia's opinion regarding apportionment does not meet the standards for substantial medical evidence set forth in *Escobedo*, *supra*, and that the award of permanent disability should have been based upon the opinions of treating physician Dr. McSweeney.

DISCUSSION

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 April 22, 2025, and 60 days from the date of transmission is Saturday, June 21, 2025. The next business day that is 60 days from the date of transmission is Monday, June 23, 2025 (See Cal. Code Regs., tit. 8, § 10600(b).)[4] This decision is issued by or on Monday, June 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 April 22, 2025, and the case was transmitted to the Appeals Board on April 22, 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 April 22, 2025.

II.

Labor Code section 5904 dictates that a petitioner seeking reconsideration "shall be deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration."

Because neither applicant nor defendant has petitioned for reconsideration of the WCJ's opinion that all disabilities should be added instead of combined on the CVC, that aspect of the WCJ's decision need not be considered here. However, for the sake of clarity, we observe that as noted in the discussion of facts above, the deposition testimony of Dr. Pallia does provide a

[4] 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.

sufficient basis for adding rather than combining disabilities in a manner consistent with *Vigil*, cited *supra*, which currently provides the correct standards for rebuttal of the CVC.

We agree with applicant that Dr. Pallia's opinions regarding apportionment do not constitute substantial medical evidence. At the same time, we disagree with applicant's contention that the medical report of Dr. McSweeney constitutes substantial medical evidence.

First, Dr. Pallia provides an insufficient description of the mechanism of causation of disability and an insufficient justification of the percentage that he chose. While it is true that the *Escobedo* case, cited *supra*, confirmed that degenerative changes can provide a valid basis for apportionment, it also confirmed that "any decision of the WCAB must be supported by substantial evidence." *Escoboedo*, *supra*, 70 Cal.Comp.Cases 604, 620, citing Lab. 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].)

The en banc *Escobedo* opinion explains that for an apportionment opinion to constitute substantial medical evidence, 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." (*Escoboedo*, *supra*, 70 Cal.Comp.Cases 604, 621.) An example is provided in *Escobedo* to emphasize the requirement that a physician explain both the mechanism by which degenerative changes are causing permanent disability and the reasons for selecting an approximate percentage of apportionment:

> 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 604, 621.)

In this case, Dr. Pallia identified 80% as the percentage of disability caused by what he believed to be preexisting arthritis and effects of industrial surgery, but he did not explain how and why arthritis was causing permanent disability at the time of his evaluation, or how and why it was

responsible for 80% of the disability, other than a speculative assumption regarding applicant's history that is unsupported by any contemporaneous medical evidence.

In this respect, the opinion of treating physician Dr. McSweeney is no better than that of the QME, Dr. Pallia, because Dr. McSweeney attributes 25 percent apportionment of permanent disability of the bilateral knees to a "degenerative condition" without identifying how or why the degenerative condition is causing present disability, and without any explanation of how or why he chose the approximate percentage of apportionment. Dr. McSweeney's report does not include any discussion of disability or apportionment of the shoulders. His entire discussion of apportionment with respect to the knees is as follows:

> The patient to my knowledge has not sustained a prior injury to the bilateral knees to which apportionment would be indicated. He is noted to have a rather significant degenerative condition, which likely predated the industrial injury, although was aggravated by such. The preexisting degenerative condition of the bilateral knees is considered a contributing factor to the patient's knee for the bilateral total knee arthroplasty and resultant impairment. For this individual when taking into consideration the degree of degenerative changes and the industrial injury, I find it reasonable to indicate 25% of the patient's present disability is due to nonindustrial factors, with the remaining 75% apportioned to the industrial injury in question.

(Joint 7, Report of Dr. James McSweeney dated February 8, 2021, at p. 6, lines 15-23.)

We also note that the reasoning in *Hikida v. Workers' Comp. Appeals Bd. (*2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], which held that the results of unsuccessful industrial treatment should not be a basis for apportionment, weighs against the application of nonindustrial apportionment to applicant's right shoulder or knees. Impairment of these body parts was primarily caused by industrial surgeries according to QME Dr. Pallia. Dr. Pallia explained this as follows with respect to the left shoulder:

> "somehow he received two more surgeries -- two surgeries on his right shoulder that ended up causing a kind of an adhesive capsulitis and a frozen shoulder post surgery and he ended up having some complications from the surgery, so again instead of just having this underlying pre-existent bursitis of the shoulder, which probably just could have been left alone, he would have been doing better, he underwent surgical intervention for that right shoulder and ended up with a worse shoulder than he did before. So this is another case of where the impairment of the shoulder arose more from the surgical treatment maybe than will say the pre-existing disease, unfortunately, in this case.

(Joint 1, Deposition of Christopher Pallia, M.D., October 31, 2024, p. 20, l. 16 through p. 21, l. 4.)

Dr. Pallia also testified that applicant's knee impairments are primarily a result of his knee surgeries: "he had total knee arthroplasty, so basically all the arthritis was removed from his knees and he had large surgeries, and the impairment that he has is more of, you know, at least a result of the surgeries." (*Id*. at p. 17, lines 10-13.) "The way his knees are now, you know, are kind of representative of the surgery that he had under treatment for this claim from this employer." (*Id*. at p. 18, lines 22-24.)

In the case of *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) *(*2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467], the reasoning in *Hikida* was not applied where bilateral knee replacements were successful, and not unsuccessful like the surgery in *Hikida.* As in the *Justice* case, the present case involves successful bilateral knee replacements. However, apportionment cannot be applied to the knees as it was in *Justice* because of Dr. Pallia's insufficient history and lack of justification of the percentage chosen, as explained above. Additionally, Dr. Pallia's deposition testimony indicates that his apportionment opinion is based upon an incorrect legal theory with respect to applicant's knees. Dr. Pallia testified at his deposition that he used apportionment to cut back on what he felt was an excessive provision of WPI for a total knee replacement:

> Now he's had knee replacements, he can walk for half an hour for both of his knees, but the guidelines rate knee replacements the way they do and so he ends up with a 20% impairment for each knee, so the impairment estimates don't correlate to his functional level, if you understand... So I'm kind of compensating for that issue with my apportionment in this case... Maybe that's not correct, but that's how I feel is the reasonable way to approach this case.

(*Id*. at p. 40, lines 4-16.)

Apportionment cannot be used by a physician to "compensate" for what the physician feels is excessive impairment under the AMA Guides. The correct legal approach would have been for Dr. Pallia to use other tables and criteria within the four corners of the AMA Guides to fashion a more accurate percentage of WPI than the one indicated under Table 17-35, as described in *Milpitas*

Unified School Dist. v. Workers' Comp. Appeals Bd. (*Almaraz-Guzman III*) (2010) 187 Cal.App.4th 808, 852-853 [75 Cal.Comp.Cases 837].)

A grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.]".)

Thus, we conclude that applicant is entitled to an unapportioned award of 96 percent permanent disability (PD), using the following correct rating strings to adjust the impairment percentages found by Dr. Pallia as set forth in the current rating schedule and Labor Code section 4660.1:

16.02.01.00 - 8[1.4] - 11 - 250F - 11 - 14% PD right shoulder
16.02.02.00 - 8[1.4] - 11 - 250F - 11 - 14% PD left shoulder
17.05.10.08 - 20[1.4] - 28 - 250F - 28 - 34% PD left knee
17.05.10.08 - 20[1.4] - 28 - 250F - 28 - 34% PD right knee

These percentages of permanent disability are added together in accordance with *Vigil*: for the right and left shoulders,14 plus 14 equals 28; for the left and right knee, 34 plus 34 equals 68;

adding the upper and lower extremities, 28 plus 68 equals 96 percent. Under Labor Code section 4658, permanent disability of 96 percent entitles applicant to 849.25 weeks of indemnity at the stipulated rate of $238.79 per week, for a total of $202,792.41, less advances (which were stipulated to be $47,901.27 through July 11, 2023), and less a reasonable attorney fee on permanent disability, which is determined to be 15% of the permanent disability indemnity, or $30,418.86, less fees previously awarded of $2,709.30, leaving additional net fees on permanent disability in the amount of $27,709.56, based on the criteria for reasonableness of fees set forth in WCAB Rule 10844 (Cal. Code Regs., tit. 8, § 10844). As described in Labor Code section 4659, following the last payment of permanent disability applicant is entitled to a life pension commencing at the rate of $193.42 per week and increasing on the first of January every year thereafter by a percentage commensurate with any increase in the State Average Weekly Wage (SAWW) during the previous year. A reasonable attorney fee on the award of life pension benefits is determined to be 15 percent of the present value of all remaining life pension payments, which amount should be calculated by the Disability Evaluation Unit and commuted from the side of the award of life pension.

Accordingly, we grant applicant's Petition for Reconsideration, and affirm the F&A except that we amend it to find that applicant's injury caused permanent disability of 96 percent.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of April 7, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of April 7, 2025 is **AFFIRMED**, except that it is and **AMENDED** as follows:

FINDINGS OF FACT

1. The opinions of Dr. Christopher Pallia constitute the most substantial evidence of applicant's degree of permanent disability based on impairments listed in the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition*, Labor Code section 4660.1, and the current rating schedule.

2. The opinion of Dr. Christopher Pallia concerning apportionment of applicant's disabilities does *not* constitute substantial evidence, and does not provide a sufficient legal basis for apportionment.

3. The opinion of Dr. Christopher Pallia concerning the applicability of *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc) constitutes substantial evidence, is consistent with legal requirements, and

accordingly the disability of the left shoulder, the right shoulder, the left knee, and the right knee, should all be added together.

4. Based on Dr. Pallia's opinions regarding applicant's permanent partial disability and addition thereof, applicant is entitled to an increased, unapportioned award of 96 percent permanent disability.

AWARD

Award is made in favor of SERVANDO ALVAREZ and against STATE COMPENSATION INSURANCE FUND of the following:

1. Permanent partial disability of 96%, entitling applicant to 849.25 weeks of indemnity at the stipulated rate of $238.79 per week, for a total of $202,792.41, less all advances and payments on the reopened award of November 7, 2017, and less a reasonable attorney fee of $30,418.86, less fees previously awarded and paid. Following the last payment of permanent disability, applicant is entitled to a life pension commencing at the rate of $193.42 per week and increasing on the first of January every year thereafter by a percentage commensurate with any increase in the State Average Weekly Wage (SAWW) during the previous year, less a reasonable attorney fee equal to 15 percent of the present value of the life pension, to be calculated by the Disability Evaluation Unit and commuted from the side of the award of life pension;

2. Further medical treatment reasonably required to cure or relieve from the effects of the injury.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 23, 2025

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

SERVANDO ALVAREZ
LAW OFFICE OF JOHN A. DON
STATE COMPENSATION INSURANCE FUND

CWF/*cs*

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