

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

SHARON C. NUNLEY, *Applicant*

vs.

**STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS,
permissibly self-insured, adjusted by STATE COMPENSATION INSURANCE FUND,
*Defendants***

**Adjudication Numbers: ADJ10836901; ADJ12672934
Riverside District Office**

**OPINION AND ORDER
GRANTING PETITION FOR
RECONSIDERATION
AND DECISION AFTER
RECONSIDERATION**

Applicant seeks reconsideration of the Joint Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on June 16, 2025, wherein the WCJ found that while employed by defendant as a correctional counselor on October 7, 2016, applicant sustained industrial injury to the bilateral knees with an award of 32% permanent disability after apportionment in case number ADJ10836901, and cumulative injury during the period from February 23, 2004 to December 6, 2017 in the form of hypertension/cardiovascular disease, hearing loss, lumbar spine, and psyche with an award of 67% permanent disability after apportionment in case number ADJ12672934.

Applicant contends that defendant did not meet its burden with respect to apportionment of the disability to applicant's knees in case number ADJ10836901.¹

We did not receive an Answer from defendant. We received a Report and Recommendation from the WCJ that recommends that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and the contents of the Report. Based on our review of the record, and for the reasons stated herein, we will grant the

¹ Since there is no challenge to the decision in ADJ12672934, our discussion of the merits in this opinion is limited to ADJ10836901. (See Lab. Code, § 5904.)

Petition for Reconsideration and amend the F&A to find that there is no apportionment of the disability to applicant's right knee, and that applicant's injury caused permanent disability of 42%. (ADJ10836901, Findings of Fact #s 3, 4, and 7; Award a and c.) We otherwise affirm the F&A.

FACTS

The WCJ found that "[t]here is legal apportionment to the right knee" and indicated in her opinion on decision that the report of Panel Qualified Medical Evaluator (PQME) David H. Doty, M.D., dated July 7, 2020 justifies apportionment 25 percent of applicant's right knee disability to nonindustrial causes in case number ADJ10836901. (Joint Opinion on Decision dated June 16, 2025, page 3, paragraphs 3-4.)

In his report dated August 20, 2019, which was admitted into evidence as Defendant's Exhibit F, Dr. Doty first addressed apportionment of the right knee as follows:

With regard to apportionment, I would provide 15% nonindustrial apportionment to the progressive aging process and the remaining 85% to the date of injury of October 7, 2016.

This is based on interview with the examinee, physical examination, review of all medical records, imaging studies, and my 35-plus years of treating orthopedic patients and performing WC evaluations within a reasonable medical probability.

(Joint H, Report of Orthopedic PQME Dr. Doty dated August 20, 2019, at page 2, paragraphs 1-2.)

In his next report, based on a re-evaluation of July 7, 2020, Dr. Doty changed his apportionment opinion to the following:

It is my understanding that upon a total knee surgery there is no longer apportionment to industrial or nonindustrial post traumatic arthritis, therefore, apportionment should be 100% to industrial causation. However, I will leave it to the interested parties to parse out whether or not, if that theory is discounted, then it would be this expert's opinion that a minimum of 25% would be apportioned to the effects of all nonindustrial activity contributing to the early arthritis first evident on her initial x-rays and MRIs prior to her arthroscopic surgery. The remaining 75% would be apportioned to the injury of October 7, 2016.

This is based on interview with the examinee, physical examination, review of all medical records, imaging studies, and my 35-plus years of treating orthopedic patients and performing WC evaluations within a reasonable medical probability.

(Joint I, Report of Orthopedic PQME Dr. Doty dated July 7, 2020, at page 4, paragraphs 4-5.)

In his next two reports, Dr. Doty did not change his opinion regarding apportionment with regard to the right knee. (Joint J, Report of Orthopedic PQME Dr. Doty dated July 7, 2020, pages 1-2; Joint K, Report of Orthopedic PQME Dr. Doty dated January 28, 2021, page 5, penultimate paragraph.) However, his last report, a supplemental report dated June 8, 2021, includes an apparently contradictory statement that “[t]here would be no impairment for the right knee, therefore no discussion for apportionment.” This statement regarding the absence of right knee impairment and apportionment appears to be an unintended error, as the report contains nothing to contradict Dr. Doty’s previous opinion assessing 20 percent whole person impairment of the right knee using Tables 17-33 and 17-35 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition. (Joint I, Report of Orthopedic PQME Dr. Doty dated July 7, 2020, page 2, paragraph 2.) On the contrary, Dr. Doty’s last report confirms the previous assessment of impairment based on applicant’s total knee replacement, because it repeats the previous diagnoses of right medial meniscus tear and patellofemoral chondromalacia secondary to the specific injury of October 7, 2016, with an arthroscopic meniscectomy and tricompartmental chondroplasty on December 7, 2017, followed by a total knee arthroplasty on October 3, 2019. (Joint L, Report of Orthopedic PQME Dr. Doty dated June 8, 2021, page 2.)

Dr. Doty’s reports in evidence contain no apportionment analysis other than what is quoted above.

Applicant has filed a timely, verified Petition for Reconsideration of the June 16, 2025 Joint Findings and Award, contending that the evidence does not justify Finding of Fact #4 in case number ADJ10836901 that “there is legal apportionment to the right knee,” and challenging the resulting reduction of applicant’s award to 32 percent after nonindustrial apportionment.

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 July 29, 2025 following the Petition for Reconsideration, and 60 days from the date of transmission is Saturday, September 27, 2025. The next business day that is 60 days from the date of transmission is Monday, September 29, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)² This decision is issued by or on Monday, September 29, 2025, so that we have timely acted on the Petition for Reconsideration 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 of Workers’ Compensation Administrative Law Judge on Petition for Reconsideration, the Report was served on July 29, 2025, and the case was transmitted to the Appeals Board on July 29, 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

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.

5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on July 29, 2025.

II.

Here, the sole contention of the Petition for Reconsideration is that the evidence does not justify the finding of apportionment to degenerative changes in the right knee in case number ADJ10836901. While Dr. Doty does provide an opinion regarding cause of permanent disability of the right knee, he states only that he would apportion “a minimum of” 25 percent of current impairment to “the effects of all nonindustrial activity contributing to the early arthritis first evident on her initial x-rays and MRIs prior to her arthroscopic surgery.” (Joint I, Report of Orthopedic PQME Dr. Doty dated July 7, 2020, page 4, paragraph 4.) He does not explain how and why “all nonindustrial activity” and “early arthritis” are causing approximately 25 percent of present disability. This does not meet the standards for substantial medical evidence of apportionment explained in *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc):

...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.

(*Id* at p. 621.)

Because Dr. Doty did not explain how and why the effects of nonindustrial activity and arthritis are causing approximately 25 percent of applicant’s present disability of the right knee, as opposed to some greater or lesser percentage, his opinion that these factors caused “a minimum of” 25 percent of current right knee impairment does not constitute substantial medical evidence. (*Ibid.*, page 4, paragraph 4.) As such, the evidence does not justify the finding of apportionment to degenerative changes in the right knee in case number ADJ10836901.

Without the unsubstantiated nonindustrial apportionment, the right knee impairment assessed by Dr. Doty adjusts to 42 percent permanent disability under Labor Code section 4660.1 and the current rating schedule, as shown in the following rating string:

17.05.10.08 – 20 - [x1.4] 28 - 490I – 36 - 42

Under Labor Code section 4658, permanent disability of 42 percent warrants indemnity of 215.00 weeks at the stipulated rate of \$290.00 per week, in the total sum of \$62,350.00. (Minutes of Hearing and Summary of Evidence of March 17, 2025, page 3, lines 1-3.) As the WCJ has already determined that an attorney's fee of 15% is appropriate, we find that a reasonable attorney fee is \$9,352.50, which is to be commuted from the far end of the amended permanent disability indemnity award and paid as a lump sum to applicant's counsel of record.

Accordingly, we grant the Petition for Reconsideration, affirm the F&A, except that we amend it to find that there is no apportionment of the disability to applicant's right knee, and that applicant's injury caused permanent disability of 42%. (ADJ10836901, Findings of Fact #s 3, 4, and 7; Award a and c.)

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the decision issued on June 16, 2025 by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the decision of June 16, 2025 is **AFFIRMED, EXCEPT** that Finding of Fact #4 in Case Number ADJ10836901 is **AMENDED** to read as follows:

4. There is no legal apportionment to the right knee.

IT IS FURTHER ORDERED that based on the amendment to Finding of Fact #4 in Case Number ADJ10836901, Findings of Fact #3 and #7 are **AMENDED** to read as follows:

3. Applicant's injury caused permanent disability of 42%, entitling applicant to 215.00 weeks of disability indemnity payable at the rate of \$290.00 per week in the total sum of \$62,350.00.

* * *

7. The reasonable value of the services rendered by Applicant's Attorney is \$9,352.50, which shall be commuted from the final weekly payments of the permanent disability indemnity award.

IT IS FURTHER ORDERED that based on the amendments to Findings of Fact #3 and #7 in Case Number ADJ10836901, the Award in Case Number ADJ10836901 is **AMENDED** to read as follows:

AWARD ADJ10836901 (MF)

AWARD IS MADE in favor of SHARON C. NUNLEY against STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS of:

- a. Permanent disability of 42%, entitling applicant to 215.00 weeks of disability indemnity at the rate of \$290.00, in the total sum of \$62,350.00, less credit to Defendant for all sums heretofore paid on account thereof, if any.
- b. Future medical treatment reasonably required to cure or relieve from the effects of the injury herein.
- c. A reasonable attorney fee of \$9,352.50, which shall be commuted from the final weekly payments of permanent disability and paid to applicant's counsel of record, Whiting, Cotter & Hurlimann, LLP.

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

SEPTEMBER 25, 2025

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

**SHARON NUNLEY
WHITING, COTTER & HURLIMANN
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