WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHAUNDONNA KELSO, ***Applicant***

vs.

COUNTY OF FRESNO;
ACCLAMATION SACRAMENTO, ***Defendants***

Adjudication Number: ADJ12508262
Fresno 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 and the Opinion on Decision 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 and the Opinion on Decision, both of which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

I.

Preliminarily, we note that former 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.

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 September 5, 2025 and 60 days from the date of transmission is November 4, 2025. This decision is issued by or on November 4, 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 September 5, 2025, and the case was transmitted to the Appeals Board on September 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 September 5, 2025.

II.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal. Comp. Cases 310]; *Garza, supra*; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal. Comp. Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion … It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence "… 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." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

The defendant has the burden of proof on apportionment. (Lab. Code, § 5705; *Pullman Kellogg v. Workers Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd. (Kopping)* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls (Escobedo)* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc).) To meet this burden, the defendant "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd. (Gay)* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo, supra,* at p. 620.)

For the reasons stated in the Report and Opinion on Decision, we agree with the WCJ that the opinion of agreed medical evaluator (AME) Peter Mandell, M.D., is not substantial medical evidence on the issue of apportionment.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

NOVEMBER 4, 2025

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

SHAUNDONNA KELSO
LAW OFFICE OF TIMOTHY D. BARTELL
BRADFORD & BARTHEL

PAG/bp

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 TRANSMITTAL DATE: 9/5/25

I
INTRODUCTION

1. Applicant's Occupation: Office Assistant
   Age at Injury: 44
   Date of Injury: 11/26/2016
   Parts of Body Alleged Injured: cervical, thoracic, lumbar spine, bilateral shoulders, bilateral knees and Gerd
   Manner in Which Injury Alleged Occurred: Trip and fall
2. Identity of Petitioner: Defendant County of Fresno
   Timeliness: The Petition was timely filed on 8/25/25
   Verification: The Petition was Verified.
3. Date of Award: 7/31/25
4. Petitioner contends:
   A. That the evidence does not justify the findings of fact.
   B. That the findings of fact do not support the order, decision, or Award; and
   C. That the trial judge, by virtue of the award and decision, acted in excess of his powers.

II
FACTS

This case was submitted for decision, without any testimony, after trial on 7/1/25. The issues for trial were:

1. Permanent and stationary date:
   a. Employee claims 7/17/20, based on AME Dr. Mandell's 4/16/25 Deposition, and PTP Dr Fletcher's Report that is not listed as an Exhibit, but is discussed in Ex J.
2. Apportionment
3. Attorney fees
4. Other issues: Defendant's entitlement to credit for TD overpayment of $14, 387.76.

III
DISCUSSION

I. APPLICANT'S MMI DATE WAS 7/17/20 WHICH ELIMINATED THE TEMPORARY DISABILITY OVERPAYMENT CREDIT

Joint Exhibit J (EAMS Doc ID # 50402825) is the 7/1/21 Report of AME Dr. Mandell. Dr. Mandell notes on page 2 of 6 Applicant last worked on 11/27/28. Dr. Mandell states on page 4 of 6 of Applicant's shoulder condition is permanent, stationary and ratable as of 2/18/20.

Dr. Mandell's record review is at the end of Exhibit J. Dr. Mandell reviewed PTP Dr. Fletcher's report dated 6/19/20. This report lists physical complaints to Applicant's left low back/upper buttock pain; right arm pain to elbow as well as neck and thoracic back area pain. Dr. Fletcher completed a thorough exam. Dr. Fletcher diagnosed Applicant with tear of left medial meniscus, left knee pain, right shoulder rotator cuff tear or rupture, pain in left foot, and acute pain due to trauma. Dr. Fletcher opined Applicant was TTD.

AME Dr. Mandell was deposed multiple times. The last deposition was on 4/16/25 Joint Exhibit QQ (EAMS Doc ID # 58328789). On page 12; 6-23, Dr. finding Applicant TTD. However, on page 14; 2-17 Dr. Mandell testified with the time frame of a year post-surgery is a reasonable time frame to conclude that underwent left knee surgery on 2/19/19.

Reasonable medical probability is a legal standard. Probably is a general term suggesting something is likely to be true or occur. Dr. Mandell including the word probably with his reasonable medical probability opinion makes his MMI opinion less credible than Dr. Fletcher's opinion. Dr. Fletcher's TTD opinion is unequivocal.

Furthermore, the inconsistent, ambiguous and speculative characteristics of Dr. Mandell's MMI opinions are summarized in the following questions and answers during the 4/16/25 deposition. Page 15; 21 to page 16; 14: Q. Okay. The problem we're having is you previously testified that it would be reasonable to assign the P & S date to when she went back to work after this procedure just as you did in the 2023 report but now we're back to the one-year status. So I'm a little confused as to what we're going off of to make that decision and is it within a reasonable medical probability? A. Well, I was being abundantly cautious when I said that she was permanent and stationary when she returned to work because obviously, she's back at work, she's not disabled anymore, and so that makes that clear. But if – if you want to be more granular about this and zoom in a little more rather than taking the – the very high-level views, the one – year permanency date is the correct one. Q. In general? A. Yes.

Applicant returned to work on 10/3/22. Dr. Mandell's inconsistent MMI opinions causes his final MMI opinion to be ambiguous in this case. This ambiguous MMI opinion is not substantial. Dr. Mandell's answer to the last question also shows he is speculating about the MMI date. He's applying a general standard about when a person, not applicant, should be MMI after surgery. If a doctor's opinion is ambiguous, it may not be substantial evidence (Beaty v. WCAB (1978) 43 CCC 444). Dr. Mandell's 4/16/25 deposition MMI opinions are inconsistent, ambiguous and speculative. The permanent and stationary date is 7/17/20. Defendant is not entitled to assert a credit for any temporary disability overpayment.

II. 54% IS THE STIPULATED LEVEL OF PERMANENT DISABILITY WITHOUT APPORTIONMENT

Stipulation number 10 is as follows: The combined level of all PD without apportionment is 54%. Defense Counsel fails to cite the most recent en banc decision concerning apportionment of causation; Sammy Vigil v. County of Kern (ADJ11201607, ADJ11201608) (en banc). AME Dr. Mandell discusses apportionment in his 3/3/21 Deposition, Joint Exhibit SS, EAMS Doc ID # 58328787. Dr. Mandell also discusses apportionment in his report dated 3/16/24, Joint Exhibit FF EAMS Doc ID # 58328791. This Court reviewed all of AME Dr. Mandell's remaining reports in

this case: joint exhibits GG, HH, II, J, KK, LL, and MM. None of these reports provide any reasoning to support AME Dr. Mandell's non-industrial apportionment opinions. Dr. Mandell never provides any how and why explanations as required by the en banc Vigil decision.

Dr. Mandell makes conclusory statements. Dr. Mandell then states he relies on his training, experience, judgement, and skill. Therefore, Defendant failed to meet its burden of proof for the affirmative defense of apportionment. Applicant is entitled to an un-apportioned award of 54%.

III. DEFENDANT FAILED TO SATISFY ITS BURDEN OF PROOF ON APPORTIONMENT PURSUANT TO THE EN BANC VIGIL DECISION

This Court incorporates the arguments set forth in Section II into this Section.

IV. LABOR CODE SECTION 4663 DOES NOT REQUIRE DEVELOPMENT OF THE RECORD BECAUSE PERMANENT DISABILITY HAS BEEN ESTABLISHED AND APPORTIONMENT IS AN AFFIRMATIVE DEFENSE

This Court incorporates the arguments set forth in Section II into this Section.

IV

RECOMMENDATION

It is recommended that the Petition for Reconsideration be denied.

Respectfully submitted,

WILLIAM R McCLELLAND
Workers' Compensation Judge

OPINION ON DECISION

Permanent and Stationery Date, Credit for TD Overpayment

Substantial evidence means evidence "which, if true, has probative force on the issues. It is more than a mere scintilla and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. It must be reasonable in nature, credible, and of solid value". (*Braewood Convalescent Hospital v. WCAB (Bolton)* (1983) 48 CCC 566). To constitute substantial evidence "…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." (Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board En banc).) "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. A Medical opinion also fails to rise to the level of substantial medical evidence if it is based on surmise, speculation, conjecture or guess." (Hegglin v. Workmen's Comp. Appeals Bd. (1971) 4 Cal.3d 162, 169 [93 Cal.Rptr. 15, 480 P.2d 967, 36 Cal.Comp.Cases 93, 97].)

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However, on page 14; 2-17 Dr. Mandell testified with reasonable medical probability as follows: "But as I think about it again, probably the time frame of a year post-surgery is a reasonable time frame to conclude that she would be permanent and stationary." The parties stipulated at trial Applicant underwent left knee surgery on 2/19/19.

During trial, Defense Counsel brought up the TD objection letter Defendant sent dated 6/11/18 (JT Exhibit DD, EAMS Doc ID # 58328794). Defense Counsel also argued the case of *Power v. WCAB* (1986) 51 CCC 114, 117. Defense Counsel correctly states the *Power* case established the principle that AME opinions should be given great weight in workers' compensation proceedings due to the presumed expertise and neutrality of AMEs. However, the *Power* case also explained that AME opinions are not binding and can be rejected if they are unpersuasive or do not constitute substantial evidence.

Dr. Mandell's 4/16/25 deposition MMI opinion was made with reasonable medical probability but included the word probably. Dr. Mandell also testified he had no reason to disagree with Dr. Fletcher's 6/19/20 report finding Applicant TTD. Applicant did not return to work until 10/3/22. This Court finds Applicant's permanent and stationary date is 7/17/20. Defendant is not entitled to assert a credit for any temporary disability overpayment.

Apportionment

The Board panel decisions in Nunes v. Department of Motor Vehicles (Nunes I) (2023) 51 CWCR 113, 88 CCC 741, and Nunes v. Department of Motor Vehicles (Nunes II) (2023) 51 CWCR 165, 88 CCC 894; as well as the en banc decision in Escobedo v. Marshalls/CNA Ins. Co (2005) 33 CWCR 100, 70 CCC 604, explain that apportionment of causation must address both how and why an injured worker's residual permanent disability is caused by non-industrial factors.

Moreover, as the WCAB stated in Sammy Vigil v. County of Kern (ADJ11201607, ADJ11201608) (en banc), to constitute substantial evidence ". . . 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**." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc), (emphasis added).)

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DATE: 7/31/25

William R McClelland
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE