WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

SILVESTRE MELCHOR, *Applicant*

vs.

KENYON PLASTERING, INC.; ACE INSURANCE COMPANY, administered by ESIS; *Defendants*

Adjudication Number: ADJ17728882
Santa Barbara District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Finding of Fact and Award (F&A) issued on July 11, 2025 by the workers' compensation administrative law judge (WCJ) which found in pertinent part that applicant is entitled to an unapportioned award.

Defendant contends that there is substantial medical evidence in support of apportionment.

We did not receive an Answer from applicant. The WCJ filed a Report and Recommendation (Report) on the Petition for Reconsideration recommending that we deny reconsideration.

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 in the WCJ's Report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

I.

Preliminarily, we note that 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:

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

> (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 July 30, 2025 and 60 days from the date of transmission is Sunday, September 28, 2025, a weekend. 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 was issued by or on September 29, 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.

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[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.

Here, according to the proof of service for the Report and Recommendation by the WCJ, the Report was served on July 30, 2025, and the case was transmitted to the Appeals Board on July 30, 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 July 30, 2025.

II.

In addition to the analysis set forth in the WCJ's Report, we observe the following.

Section 4663 requires any report addressing permanent disability to also address apportionment of disability. Defendant carries the burden of proof on apportionment. (§ 5705.) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611, 620- 621 (Appeals Board 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." (*Id*. at p. 621.) Causation of disability is not to be confused with causation of injury. (*Id*. at p. 611.)

Here, defendant argues that the right shoulder apportionment opinion of the panel qualified medical evaluator (QME), Thor Gjerdrum, M.D., constitutes substantial medical evidence. We disagree. Dr. Gjerdrum's apportionment analysis is as follows:

> The right shoulder impairment apportionment is estimated by comparing the current range of motion to the 2013 findings which suggests that the loss of mobility to the right shoulder is increased by 25 percent Therefore, the applicant's 8 percent whole person impairment for the right shoulder currently is 25 percent due to the current claim and 75 percent due to prior injury Therefore, the total impairment for the right shoulder after apportionment to disability is 2 percent whole person impairment. Therefore, the total impairment for this claim after apportionment to disability would be equal to 9 percent whole person impairment.

(Exhibit 4, at p. 6.)

The QME is presuming that the prior permanent disability exists at the time of this injury and he is deducting pre-existing permanent disability based on range of motion measurements.

This presumption of existing permanent disability is not the appropriate standard of review for a section 4663 analysis.

The QME indicated that, in general, applicant's loss of right shoulder mobility has increased by 25 percent since 2013. Accepting the right shoulder range of motion measurements to be true, there is no explanation of how and why applicant's loss of right shoulder mobility stayed uniform and unchanged since 2013 and increased by 25 percent during the specific, industrial event on February 15, 2023. The QME's apportionment opinion rests on the presumption that applicant's loss of mobility increased by 25 percent and not on the specific facts of this case. An evaluator is free to explain how range of motion measurements can show a change in mobility as the starting point of an analysis, but it cannot also be the end point of an analysis. The evaluator must detail the specific facts of the case that support why the principles apply to the case at hand. The QME did not do this. Thus, the QME's apportionment opinion is not substantial medical evidence and defendant did not meet its burden of proof on apportionment.

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 29, 2025

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

SILVESTRE MELCHOR
WOLFF-WALKER FIRM
COLANTONI, COLLINS, MARREN, PHILLIPS & TULK

SL/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 PETITION FOR RECONSIDERATION AND NOTICE OF TRANSMITTAL

I
INTRODUCTION

1.	Applicant's Occupation:	Lather foreman
	DOB of Applicant:	[..]
	Date(s) of Injury:	February 15, 2023 (45)
	Parts of Body Injured:	Cervical spine, right shoulder and right elbow
	Manner in Which Injury Occurred:	Not in dispute
2.	Identity of Petitioner:	Defendant
	Timeliness:	The Petition is timely.
	Verification:	The Petition is verified.
	Service:	The Petition was served on all parties.
3.	Date of Issuance of Order:	July 11, 2025
4.	Petitioner's Contention:	WCJ erred in not finding apportionment.

II
FACTS

Applicant sustained a specific industrial injury to his cervical spine, right shoulder and right elbow on February 15, 2023, while employed with Kenyon Plastering, Inc.

Applicant was evaluated by Thor Gjerdrum, M.D., in the capacity of a PQME. This was the only medical evidence submitted.

The matter proceeded to trial and while many issues were raised and decided, the only issue being disputed by Defendant is the WCJ's finding that the physician's opinion on apportionment does not constitute substantial medical evidence.

III
DISCUSSION

It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cures those defects. Grounds for removal are set forth in removal section 8CCR10955 formerly 8CCR10843.

Dr. Gjerdrum's opinion on apportionment is found in his last report, dated November 13, 2024. I have quoted the doctor's entire discussion on apportionment. No deposition was taken of the doctor.

> "The records provided do lead me to change my opinion on apportionment to disability and therefore the impairment rating for this claim.
>
> The records confirm a prior previous injury to the right shoulder January 18, 2012. This injury led to a period of disability as well as right shoulder surgery He also received a $40,000 settlement predicated on pam and stiffness in the right shoulder. Review of medical records suggests some loss of mobility since the time of the original injury of about 25 percent.
>
> There is no evidence of a cervical spine injury in 2012. Therefore, the cervical spine injury as well as the right elbow injury is related to the current claim and not to the previous claim.
>
> Therefore, in regard to the causation, the cervical spine is entirely due to the current claim.
>
> This is also true of the right elbow.
>
> The right shoulder impairment represents a permanent aggravation of a preexisting condition.
>
> The cervical spine is 100 percent work related. Therefore, impairment remains as previously stated 5 percent whole person impairment.
>
> The right elbow was 100 percent related to the current claim or 2 percent whole person impairment.
>
> The right shoulder impairment apportionment is estimated by comparing the current range of motion to the 2013 findings which suggests that the loss of mobility to the right shoulder is increased by 25 percent Therefore, the applicant's 8 percent whole person impairment for the right shoulder currently is 25 percent due to the current claim and 75 percent due to prior injury Therefore, the total impairment for the right shoulder after apportionment to disability is 2 percent whole person impairment. Therefore, the total impairment for this claim after apportionment to disability would be equal to 9 percent whole person impairment."

As the WCAB has cited in the decisions,

> "In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*).) However, the mere fact that a physician's report addresses 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* summarized 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."

The problem with Dr. Gjerdrum's opinion on apportionment is although he goes through mathematical calculations by comparing range of motion numbers to determine apportionment and has reviewed records, he never explains how and why the first injury caused or contributed to the present industrial injury.

The physician's opinion on apportionment does not constitute substantial medical evidence and it is Defendant's burden on this issue. Having failed to prevail, Applicant is entitled to an unapportioned award.

IV
RECOMMENDATION

For the reasons stated, it is respectfully recommended that Defendant's Petition for Reconsideration be denied as to all contentions raised.

DATE: July 30, 2025

Scott. J. Seiden
PRESIDING WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE