

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

FELIPE PALOMERA, *Applicant*

vs.

**MARIN SANITARY SERVICES, INC.; ALASKA NATIONAL SERVICES COMPANY,
*Defendants***

**Adjudication Numbers: ADJ11685909, ADJ12857821
Santa Rosa District Office**

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

Applicant, who is representing himself, seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Joint Findings and Award and Order of January 11, 2024, wherein it was found that while employed on October 31, 2016 in case ADJ11685909, applicant sustained industrial injury to the neck and right shoulder causing permanent disability of 60% after apportionment. It was also found that while employed on March 26, 2019 in case ADJ1287821, applicant sustained industrial injury to his right ankle and right foot causing permanent disability of 15% after apportionment.

Applicant contends that the WCJ erred in finding that he sustained industrial injury to the neck on October 31, 2016, arguing that he sustained his neck injury at a later date, not as part of the incident that also caused his right shoulder injury. We have received an Answer, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

We will affirm the finding that the neck was injured as a result of the October 31, 2016 incident, for the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below. However, we believe that the WCJ erred in applying apportionment to applicant's two injuries. "[I]t is settled law that 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. [Citations.]” (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 [Appeals Bd. en banc].) We therefore grant reconsideration, and amend the WCJ’s decision to find permanent disability of 69% in case ADJ11685909 and permanent disability of 19% in case ADJ12857821.

In these matters, applicant’s cervical spine disability was evaluated by agreed medical evaluator neurologist Fredric H. Newton, M.D. and applicant’s right shoulder, right ankle and right foot and ankle disability was evaluated by orthopedist Michael A. Sommer, M.D.

With regard to apportionment of the cervical spine disability, Dr. Newton wrote in his April 22, 2022 report:

Turning now to Apportionment, there is no history of any documented or known preinjury problem with the cervical spine itself. There is no evidence generated of any prior or subsequent injury of the cervical spine. Noted is a description of multi-level cervical spondylosis “*superimposed on congenital narrowing of the central canal.*”

With this fact pattern, there is some contribution to the overall disability from the pre-existing, although asymptomatic cervical spine disorder. The specific injury of 10/31/16 in all medical probability directly caused approximately 85% of the disability. The remaining 15% is attributable to the pre-existing pathology.

My opinion in this regard follows the principles set out in the *Escobedo* decision. I have considered all potential contributory factors. My opinions are to a degree of reasonable medical probability.

(April 22, 2022 report at pp. 28-29.)

Dr. Sommer wrote in his August 24, 2022 report:

I have considered apportionment and specifically apportionment of permanent disability (shall be) based on causation. I have had the opportunity to review both the *Escobedo* and *Yeager* decisions with respect to their instruction as to apportionment. In both cases, it is plain that permissible apportionment has been expanded, provided the clinician offering an apportionment opinion adheres to the concept of substantial medical evidence. I have done so here, and have avoided guess, speculation or surmise in reaching my conclusions, all of which are constructed to a reasonable degree of medical probability.

Apportionment considerations are none as to other work/non-industrial injuries, or physical conditions such as obesity. However, this gentleman has significant

diabetes which caused major delays/interruptions of treatment; he's also a (minor) abuser of nicotine. Both these are known to negatively affect musculoskeletal tissue metabolism and healing. Because of them, I conclude non-industrial apportionment is approximately 30% while approximately 70% is from the respective work injuries.

(August 24, 2022 report at pp. 45-46.)

In a subsequent supplemental report of January 12, 2023, Dr. Sommer wrote:

On review, the 30% was excessive as I erred in not considering the gentleman's nicotine consumption was small (at 3 cigarettes a day). Presuming that has been his usual pattern for many years (as opposed to being a pack or more until just recently) I conclude 20% non-industrial apportionment is more appropriate for Mr Palomera.

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

[A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]

Moreover, in the context of apportionment determinations, the medical opinion 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, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]

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*, 70 Cal.Comp.Cases at p. 621.)

Here neither Dr. Newton nor Dr. Sommer explained in the requisite detail “how and why” non-industrial conditions were contributing to applicant’s permanent disability and did not adequately explain the level of apportionment decided upon. We therefore amend the decision to reflect that applicant is entitled to unapportioned awards of permanent disability in both cases.

We otherwise affirm the WCJ’s decision for the reasons stated by the WCJ in the Report, which we adopt, incorporate and quote below:

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION**

**I
INTRODUCTION**

Applicant, Felipe Palomera, acting in pro per, filed a timely, verified Petition for Reconsideration challenging the Joint Findings and Award dated January 11, 2024.

Mr. Palomera sustained two injuries while working as a driver for Marin Sanitary Services. The first injury was on October 31, 2016 to his right shoulder and neck while lifting a recycling bin filled with water (ADJ11685909). The second injury was on March 26, 2019 to his right ankle and right foot when he slipped inside of the truck (ADJ12857821). At the time of the 2016 injury, Mr. Palomera was 49 years old. At the time of the 2019 injury, Mr. Palomera was 52 years old.

In a Joint Findings and Award dated January 11, 2024, the undersigned WCJ found that the applicant sustained injury to his right shoulder and neck on October 31, 2016 resulting in 60% permanent disability (PD) after apportionment, with a need for future medical care. The undersigned WCJ also found injury to the applicant's right foot and ankle on March 26, 2019 resulting in 15% PD after apportionment, with a need for future medical care. Attorney’s fees were deferred with WCAB jurisdiction reserved in both cases.

The petitioner, Mr. Palomera, asserts that the neck injury was not caused by the October 31, 2016 injury, but by a separate injury on August 2, 2018. *Petition, page 1*. Mr. Palomera would like the neck injury to be acknowledged as a separate injury, not with the 2016 shoulder injury in ADJ11685909. *Id.* It does not appear that Mr. Palomera is taking issue with the findings or award for the March 26, 2019 right ankle and foot injury in ADJ12857821.

II **FACTS**

The applicant sustained injuries to his right shoulder and neck on October 31, 2016, and to his right foot and ankle on March 26, 2019, while working for Marin Sanitary Services as a recycling truck driver. The applicant was represented by Chalk Law up until Trial. Chalk Law was dismissed as attorney of record on October 19, 2023. (Order Dismissing Applicant’s Counsel, EAMS Doc. ID. 77272340.)

The applicant was evaluated by Agreed Medical Evaluators Dr. Fredric Newton in neurology and Dr. Michael Sommer in orthopedics for the 2016 and 2019 dates of injury. Dr. Newton issued five reports. (Joint Exhibit JI thru JS.) Dr. Sommer issued three reports. (Joint Exhibit J6 thru JS.) In his report dated April 22, 2022, Dr. Newton confirmed that causation for the right shoulder and neck was due to the October 31, 2016 injury. (Joint Exhibit J2, page 28.) Dr. Sommer agreed with Dr. Newton and discussed causation of the neck as a progression of the right shoulder injury on October 31, 2016. (Joint Exhibit 6, pages 4, 45.) Dr. Sommer reported that the applicant underwent neck treatment in 2019 and 2021 including diagnostics and a recommendation for an anterior cervical discectomy and fusion. (Id.) The applicant ultimately underwent neck surgery with Dr. Athanassious on July 26, 2021. (Id. at page 4 thru 5; MOH/SOE, page 5, line 47.)

Drs. Newton and Sommer found the applicant permanent and stationary for the October 31, 2016 injury on April 5, 2022. (Joint Exhibit JI, page 6; Joint Exhibit J2, page 28.) Dr. Newton reported a 31% whole person impairment (WPI) for applicant’s neck, inclusive of a 3% pain add-on, apportioning 85% to the October 31, 2016 injury. (Joint Exhibit JI, page 28.) Dr. Sommer reported an 11% WPI for applicant’s right shoulder under *Almaraz/Guzman*, apportioning 80% to the October 31, 2016 injury. (Exhibit J6, pages 45 thru 46; Exhibit J7.)

The petitioner, Mr. Palomera, disagrees with the neck being part of the 2016 injury. *Petition, page 1*. It is from this Findings & Award that Mr. Palomera seeks reconsideration.

III **DISCUSSION**

THERE IS SUBSTANTIAL MEDICAL EVIDENCE TO AWARD PERMANENT DISABILITY FOR THE NECK UNDER THE OCTOBER 31, 2016 INJURY

“The chief value of an expert’s testimony ... rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusion; ... it does not lie in his mere expression of a

conclusion; ... the opinion of an expert is no better than the reasons upon which it is based.” *People v. Bassett* (1968) 69 Cal.2d 122. A medical report is not substantial medical evidence unless it sets forth the reasoning behind the physician’s opinion, not merely his or her conclusions.” *Milpitas Unified School District v. WCAB (Guzman)* (2010) 75 Cal. Comp. Cases 837. A finding of AOE/COE must be supported by substantial evidence. (Labor Code section 5952(d).)

In this case, causation for the neck (AOE/COE) was not at issue for Trial. The parties stipulated to injury to the right shoulder and neck on October 31, 2016. (MOH/SOE, page 2, lines 7 thru 14.) The issues for Trial were permanent disability, apportionment, and attorney’s fees. (Id. at page 3, lines 3 thru 12.) The undersigned WCJ found Drs. Newton and Sommers’ reporting to be substantial medical evidence regarding permanent disability, apportionment and applicant’s need for future medical care for both the 2016 and 2019 injuries. (Joint Findings and Award, page 4.) As part of the substantial medical evidence analysis, Dr. Newton and Dr. Sommer discussed causation of the neck injury, and found it stemmed from the October 31, 2016 injury. (Joint Exhibit J2, page 28; Joint Exhibit 6, pages 4, 45.) No medical evidence was submitted to contradict this.

Mr. Palomera testified that he injured his neck in 2018 (MOH/SOE, page 5, lines 11 thru 12.) However, the only trial exhibit submitted by Mr. Palomera that referenced an injury on August 2, 2018 stated that the applicant injured his right shoulder and back on that date, not the neck. (Applicant's Exhibit 2.) If there is additional evidence, it should be noted that the finding of injury to Mr. Palomera’s neck on October 31, 2016 does not preclude him from filing an additional claim/case for a neck injury in 2018.

For the foregoing reasons,

IT IS ORDERED that Applicant's Petition for Reconsideration of the Joint Findings and Award and Order of January 11, 2024 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Award and Order of January 11, 2024 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

ADJ11685909 (October 31, 2016 Injury)

1. Felipe Palomera, age 49 on the date of injury, while employed on October 31, 2016 as a driver (Occupational Group 560), while working in Marin, California and employed by Marin Sanitary Services, sustained injury arising out of and in the course of employment to the neck and right shoulder.
2. At the time of injury, the employer's workers' compensation carrier was Alaska National Insurance Company.
3. At the time of injury, the applicant's earnings were \$1,362.99 per week, warranting a permanent disability rate of \$290.00 per week.
4. Dr. Sommer and Dr. Newton's Agreed Medical Evaluator reports are substantial medical evidence regarding permanent disability, but not substantial medical evidence regarding apportionment.
5. Applicant sustained 69% permanent disability for this injury.
6. Applicant's attorney fees are deferred with WCAB jurisdiction reserved.

ADJ12857821 (March 26, 2019 Injury)

1. Felipe Palomera, age 52 on the date of injury, while employed on March 26, 2019 as a driver (Occupational Group 350), while working in Marin, California and employed by Marin Sanitary Services, sustained injury arising out of and in the course of employment to the right ankle and right foot.
2. At the time of injury, the employer's workers' compensation carrier was Alaska National Insurance Company.
3. At the time of injury, the applicant's earnings were \$1,532.90 per week, warranting a permanent disability rate of \$290.00 per week.

4. Dr. Sommer and Dr. Newton's Agreed Medical Evaluator reports are substantial medical evidence regarding permanent disability, but not substantial medical evidence regarding apportionment.

5. After apportionment, Applicant sustained 19% permanent disability for this injury.

6. Applicant's attorney fees are deferred with WCAB jurisdiction reserved.

AWARD

AWARD IS MADE in favor of FELIPE PALOMERA against ALASKA NATIONAL INSURANCE COMPANY of:

1. For the October 31, 2016 injury (ADJ11685909), Applicant is awarded 69% permanent disability in the amount of \$122,742.50 at \$290.00 per week starting April 5, 2022 and less credit for permanent disability advances and applicant's attorney's fee (if any).

2. For the March 26, 2019 injury (ADJ12857821), Applicant is awarded 19% permanent disability in the amount of \$20,445.00 at \$290.00 per week starting April 5, 2022 and less credit for permanent disability advances and applicant's attorney's fee (if any).

3. Applicant is entitled to future medical care for the cervical spine and right shoulder in ADJ11685909.

4. Applicant is entitled to future medical care for the right ankle and right foot in ADJ12857821.

5. Applicant's attorney fees are deferred with WCAB jurisdiction reserved. Defendant is ordered to hold the following amounts in trust pending resolution of the prior attorney fee/lien:

a. \$17,222.56 in ADJ11685909 (representing 15% of the present value of the award) and,

b. \$3,066.75 in ADJ12857821 (representing 15% of the fully accrued award)

ORDER

Applicant's Exhibits 2 through 6 are admitted into the evidentiary record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 3, 2024

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

**FELIPE PALOMERA
LAUGHLIN, FALBO, LEVY & MORESI**

DW/abs

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