WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

NIKKI HANNA, *Applicant*

vs.

COMPASS HEALTH, Permissibly Self-Insured, *Defendant*

Adjudication Numbers: ADJ11869146, ADJ11869093, ADJ13784137, ADJ16575818, ADJ11869120
Goleta District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of April 17, 2026, wherein it was found that while employed as a certified nursing assistant during a cumulative period ending November 1, 2016 in case ADJ11869146[1], applicant sustained injury to her lumbar spine, thoracic spine, and in the form of a hernia causing permanent disability of 71% and the need for further medical treatment. In finding permanent disability of 71%, it was found that no apportionment of permanent disability was indicated, despite a prior spine condition that required surgical intervention.

Defendant contends that the WCJ erred in (1) finding 71% permanent disability arguing that the WCJ erred in not applying the apportionment determination of independent medical evaluator orthopedist Peter Newton, M.D. with regard to applicant's spine disability and with regard to the hernia disability and in (2) not finding defendant entitled to a credit towards its permanent disability liability in the amount of an alleged overpayment of temporary disability indemnity. We have received an Answer from applicant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.

[1] Applicant originally alleged a number of specific injuries in addition to the cumulative injury. The case numbers assigned to these injuries appear in the caption of the defendant's Petition for Reconsideration. However, in the decision of April 17, 2026, it was found that all disability and medical treatment was attributable to a cumulative injury. No issues are raised regarding the alleged specific injuries which were found noncompensable.

As explained below, we will grant reconsideration and amend the WCJ's decision to defer the issues of permanent disability, apportionment, and credit for the alleged overpayment of temporary disability indemnity. Although we agree with the WCJ that apportionment is not supported on the current record, given applicant's documented prior spine condition, the record should be further developed on the issue of apportionment of applicant's spine permanent disability.

Preliminarily, we note that 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.
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> (b)
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> (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.
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> (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 May 15, 2026 and 60 days from the date of transmission is July 14, 2026. This decision is issued by or on July 14, 2026, so 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 May 15, 2026, and the case was transmitted to the Appeals Board on May 15, 2026. 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 May 15, 2026.

Turning to the merits, applicant had sustained a non-industrial spine injury while hiking in 2013, prior to commencing her employment with defendant. Applicant underwent two surgical interventions and complained of worsening back pain despite these interventions before commencing her employment with defendant. (April 8, 2025 report of Peter Newton, M.D. at p. 46.)

In the Report, the WCJ writes:

> Dr. Newton, in the capacity of a "regular physician", authored two (2) medical reports but was not deposed. In his April 8, 2025, medical report, on page 52, Dr. Newton writes,
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> > "To a reasonable degree of medical probability, 50°/ of this applicant's lumbar spine, thoracic spine, and left lower abdominal hernia condition/disability/impairment is apportioned to non-industrial factors including non-industrial activities of daily living and her preexisting scoliosis, and the 2013 injury, which resulted in two surgeries, and 50% to the continuous trauma of her work through 11/16/18, which significantly aggravated the applicant's condition. If there was an incident in November 2016 and November 2018, these should be considered inextricably intertwined with her continuous trauma injury."
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> In Dr. Newton's June 19, 2025, medical report, starting at the bottom of page 7 and continuing on page 8,
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> > "On 0l/14/24, this applicant underwent surgery to repair an abdominal hernia. Apparently, the hernia formed as a sequela of the 2020 lumbar surgery. In 2020, this applicant underwent an anterior cervical fusion with placement of prosthetic graft. On 01/14/20, this applicant underwent an anterior and posterior spinal fusion at L2-L3, L5-S1. As a result of the anterior approach, there was dissection through the abdominal wall. The

applicant subsequently developed an incisional abdominal hernia, which required correction in 2024. The applicant's development of abdominal hernia is compensable condition caused by the treatment of her lumbar condition. To a reasonable degree of medical probability, factors contributing to this applicant's abdominal condition are non-industrial activities of daily living and pre-existing scoliosis, the 2013 non-industrial injury, which resulted in two prior surgeries before she started working for Vineyard, and the continuous trauma through 11 /06/18, for which the applicant underwent additional surgery in 2020. To a reasonable degree of medical probability, 50% of her abdominal hernia and the need for surgery, and her current impairment is apportioned to non-industrial factors including non-industrial activities of daily living and her pre-existing scoliosis, the prior 2013 injury, and the two prior surgeries, and 50% to the subsequent CT through 11/16/18.

Apportionment for the abdominal hernia and whole person impairment is the same as apportionment for the thoracic and lumbar spine. The applicant developed an abdominal hernia because of her spinal condition. The 2020 surgery was affected by her prior non-industrial injuries and the two prior surgeries, and the abdominal hernia was a sequela of that 2020 surgery. The need for that 2020 surgery was caused by factors both industrial, specifically the CT through 2018 and non-industrial, specifically the prior injuries and two prior surgeries."

There are numerous problems with Dr. Newton's opinions on apportionment. First, he lumps in both the non-industrial factors or activities of daily living and her pre-existing scoliosis, the prior 2013 injury, and the prior surgeries. He then apportions 50% collectively to all of these factors.

Dr. Newton needs to apportion to each non-industrial factor- separately apportion to the 2013 injury, and also separately apportion to the two surgeries. He cannot just apportion 50% to four different events collectively.

Secondly, Dr. Newton does not explain the "how" or "why" the prior conditions, injuries, surgeries, etc. caused or contributed to her current overall permanent disability

Additionally, the apportionment for the abdominal hernia does not constitute substantial medical evidence. Dr. Fonseca, reporting as a PQME, opined in his April 9, 2024 report, while referencing Dr. Sparkhul, that the hernia was 100% industrially related as a compensable consequent of employment.

Dr. Newton's apportionment on the hernia related does not constitute substantial medical evidence on the issue of apportionment. The hernia occurred as a result of spine surgery, and the apportionment for that cannot follow the same

apportionment (is explained legal) as for spine surgeries with a history of spine issues.

As the WCAB has written,

> "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:
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> [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.
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> 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. (*Ibid.*, italics added.)

While we agree with the WCJ that the current record does not support a finding of apportionment, given applicant's documented surgeries and condition that predated her employment with defendant, we believe that further development of the record is required on this issue. Dr. Newton opined that applicant's permanent impairment in this matter consisted of a DRE

Category IV lumbar impairment and a DRE Category II thoracic impairment. (April 8, 2025 report at p. 50.) In the further proceedings, Dr. Newton should explain in depth how and why factors other than the industrial injury are contributing to these impairments and explain the nature of the factors contributing to applicant's permanent impairment.

With regard to apportionment of the hernia condition, although we do not decide the issue, we note that qualified medical evaluator Michael D. Sparkuhl, M.D. found that the hernia was a new condition caused as a side-effect of applicant's industrial spinal surgery. Dr. Sparkuhl wrote in his April 9, 2024 report, "The hernia injury is inextricably linked to the industrial back injury which required an anterior retroperitoneal approach combined with a posterior approach for revisional lumbar spine surgery. It was the anterior retroperitoneal approach which led to development of an incisional hernia and subsequent disability due to the hernia injury." (April 16, 2024 report at p. 16.) This scenario appears to invoke *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] and subsequent cases discussing it. Although we need not discuss the exact reach of the *Hikida* decision, subsequent discussion of the opinion appears to hold that when industrial medical treatment causes an entirely different condition, the permanent disability caused by the new condition is not apportionable to the factors causing the medical treatment. (*Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686, 695-697 [Appeals Bd. panel].)[2] Although we do not decide the issue here, any discussion of apportionment of the hernia condition in the further proceedings should contain an analysis of this issue.

Finally, with regard to the issue of credit for the alleged overpayment of temporary disability, under Labor Code section 4909, the WCAB is allowed to "take[] into account," i.e. to allow a credit, for any payment, allowance, or benefit paid by the defendant to the injured employee when it was not then due and payable or when there was a dispute or question concerning the right to compensation.

In *State Comp. Ins. Fund v. Industrial Acc. Comm. (Verden)* (1955) 30 Cal.Comp.Cases 132 (writ den.), the defendant overpaid temporary disability indemnity through its own inadvertence. Its subsequent request for credit against the applicant's permanent disability indemnity was denied because the credit would have totally exhausted the applicant's permanent

[2] Although the Vigil case was designated as an en banc opinion of the Appeals Board with regard to other issues, the portion of the decision relating to *Hikida* was expressly excluded from this designation and therefore is not binding precedent. Nevertheless, as a panel decision it may still be cited as persuasive authority.

disability indemnity and therefore would have frustrated the Legislature's purpose in providing for permanent disability indemnity. Our Supreme Court has stated that the allowance of credit is within the WCAB's discretion. (*Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382].) As we said in *Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429 (Appeals Bd. panel), "Whether a credit is to be allowed is a matter directed to the discretionary authority of the [WCAB] to be weighed in the light of the circumstances of the particular case and should not be subjected to a harsh dictate that avoids the equities presented."

In *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, 836-838 [45 Cal.Comp.Cases 1106], the Court of Appeal, citing *Verden* and *Cordes*, among other authorities, stated that equitable principles are frequently applied to workers' compensation matters, that equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of a credit of overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit, and that the injured employee should not be prejudiced by defendant's actions when the employee received benefits in good faith with no wrong-doing on her part.

"An employer or carrier may be estopped from obtaining a credit for overpayment of temporary disability benefits where the employer or carrier fails to properly and timely challenge the worker's entitlement to benefits." (*Kemper National Ins. Co. v. Workers' Comp. Appeals Bd. (Spangler)* (1999) 65 Cal.Comp.Cases 78, 80 [writ den.].) At the same time, courts have recognized a "strong public policy against double recovery in … tort and workers' compensation actions." (*Abdala v. Aziz* (1992) 3 Cal.App.4th 369, 378 [57 Cal.Comp.Cases 94].)

In the further proceedings, the WCJ should decide this issue in the first instance, in light of the authorities discussed above.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) medical evidence on an issue. The WCAB has a constitutional mandate to ensure "substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) In accordance with that mandate, we will grant reconsideration and amend the WCJ's decision to defer the issues of permanent disability, apportionment and credit for the alleged payment of temporary disability

pending further development of the evidentiary record and analysis. We express no opinion on the ultimate resolution of any outstanding issue in this matter.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of April 17, 2026 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award of April 17, 2026 in case ADJ11869146 is **AMENDED** as follows:

FINDINGS OF FACT
ADJ11869146 (MF)
(November 1, 2016 through January 1, 2019)

1. It is found Nikki Hanna, age 48 on the date of injury, while employed during the period of November 1, 2016, through January 1, 2019, as a CNA, Occupational Group No.: 311 at Grover Beach, California, by Vineyard Hills Health Center, sustained injury arising out of and in the course of employment to her lumbar spine, thoracic spine, and in the form of a hernia.

2. It is found at the time of the injury, the employer's workers' compensation insurance carrier was permissibly self-insured, administered by Brentwood Services Administrators.

3. It is found at the time of the injury, the employee's earnings were $1,528.76 per week, warranting indemnity rates of $1,019.18 for temporary disability and $290.00 for permanent disability.

4. It is found the last payment of temporary disability was December 30, 2020.

5. It is found the employer has furnished some medical treatment.

6. It is found Peter Newton, M.D., was appointed pursuant to Labor Code § 5701.

7. It is found Michael D. Sparkhul, M.D., reported in the capacity of a PQME.

8. It is found Peter Newton, MD., found liability on the continuous trauma claim and no companion specific injuries.

9. It is found Applicant became permanent and stationary April 8, 2025.

10. It is found Applicant is entitled to temporary disability benefits for the period of January 2, 2019, up to April 8, 2025, less benefits paid and subject to the 104-week cap per the Labor Code.

11. The issues of permanent disability and apportionment are deferred, with jurisdiction reserved.

12. It is found Applicant is entitled to further lifetime medical treatment to cure or relieve the effects of the industrial injuries.

13. It is found Applicant is entitled to be reimbursed for all out-of-pocket expenses, in an amount according to proof.

14. The issue of attorneys' fees is deferred, with jurisdiction reserved.

15. The issue of any credit towards permanent disability indemnity liability for any overpayment of temporary disability indemnity is deferred, with jurisdiction reserved.

AWARD
ADJ1869146 (MF)

Award is made in favor of **Nikki Hanna** against **Vineyard Hills Health Center**, permissibly self-insured, as follows:

A. Parts of body as provided in Findings of Fact No. 1;

B. Temporary disability as provided in Findings of Fact No. 10;

C. Further medical treatment as provided in Findings of Fact No. 12;

D. Reimbursement for out-of-pocket medical expenses as provided in Findings of Fact No. 13.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PAUL F. KELLY, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 14, 2026

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

NIKKI HANNA
WOLFF-WALKER LAW
MURPHY, BEANE, MCKERNAN
EMPLOYMENT DEVELOPMENT DEPARTMENT

DW/oo

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