WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

RENEE ARTERBERRY, *Applicant*

vs.

STATE OF CALIFORNIA DEPARTMENT OF SOCIAL SERVICES, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ10320048, ADJ10440572

Van Nuys District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on November 8, 2023, wherein the WCJ found in pertinent part that in case number ADJ10440572, applicant sustained injury arising out of and occurring in the course of employment (AOE/COE) to her cervical spine, lumbar spine, left wrist, and gastrointestinal system, and in the form of hypertension, and allergic rhinitis; that applicant did not sustain injury AOE/COE in the form of diabetes or hearing loss; that the injury caused 36% permanent disability; and that "There is legal, non-industrial apportionment to the applicant's hypertension, gastrointestinal system, and allergic rhinitis."

In case number ADJ10320048 the WCJ found in pertinent part that applicant sustained injury AOE/COE to her cervical spine, left shoulder, and left wrist; that she did not sustain injury AOE/COE to her lumbar spine; and that the injury caused 22% permanent disability.

Applicant contends that the reports from orthopedic qualified medical examiner (QME) Clive M Segil, M.D., and from internal medicine QME Anthony G. Rodas, M.D., are not substantial evidence; that the reports from treating physicians Arthur Harris, M.D., and Harout Balian, M.D., are substantial evidence; and that the record should be further developed with respect to treating physician Gary Zagelbaum, M.D.

We received a Report and Recommendation on Petition for Reconsideration (Report) from the WCJ recommending the Petition for Reconsideration (Petition) be denied. We received an Answer from defendant.

We have considered the allegations in the Petition and the Answer, and the contents of the Report. Based on our review of the record, for the reasons stated by the WCJ in the Report, which we adopt and incorporate by this reference thereto,[1] and for the reasons discussed below, we will grant reconsideration, and affirm the F&A in case number ADJ10320048; and we will affirm the F&A in case number ADJ10440572 except that we will amend the F&A to find that the injury caused 41% permanent disability (Finding of Fact #6); to find that there is no non-industrial apportionment regarding the gastrointestinal system/GERD (Finding of Fact #7); and to find the reasonable value of services rendered by the applicant's attorney is $9,048.00 (Finding of Fact #9).

BACKGROUND

Applicant claimed injury to her cervical spine, lumbar spine, left shoulder, and left wrist, while employed by defendant as a data entry clerk and driver, on August 10, 2015 (ADJ10320048). Applicant also claimed injury to her cervical spine, lumbar spine, left wrist, gastrointestinal system, and in the form of hypertension and diabetes while employed by defendant during the period from May 5, 2015, through May 5, 2016 (ADJ10440572).

Applicant underwent a course of treatment from several providers including orthopedist Arthur S. Harris, M.D., physical medicine and rehabilitation physician Harout Balian, M.D., and internist Gary L. Zagelbaum, M.D.

Orthopedic QME Dr. Segil initially evaluated applicant on April 19, 2017. (See Def. Exh. A, Clive M Segil, M.D., April 19, 2017.) Dr. Segil issued five reports, including his January 21, 2020 re-evaluation of applicant. (Def. Exh. D, Clive M Segil, M.D., January 21, 2020.)

Internal medicine QME Dr. Rodas evaluated applicant on August 4, 2018. (See Def. Exh. J, Anthony G. Rodas, M.D., August 4, 2018.) He submitted six reports, the last supplemental report was issued on July 8, 2021. (Def. Exh. I, Anthony G. Rodas, M.D., July 8, 2021.)

Applicant filed a declaration of readiness to proceed regarding both injury claims on April 12, 2023. The parties proceeded to trial on October 2, 2023. For both injury claims, the issues

[1] Except for the "Petitioner's Allegation that PQME Anthony Rodas' Report Does Not Offer Sufficient Reasoning Behind His Opinions Regarding Apportionment" portion of the Report (pp. 26 – 29), which we do not adopt and/or incorporate.

submitted for decision included parts of body injured, permanent disability, and apportionment. (Minutes of Hearing and Summary of Evidence (MOH/SOE), October 2, 2023, pp. 3 – 4.)

DISCUSSION

It is well established that the relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence and the Appeals Board may rely on the medical opinion of a single physician unless it is "based on surmise, speculation, conjecture, or guess." (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525]; *Market Basket v. Workers' Comp. Appeals Bd*. (1978) 86 Cal.App.3d 137 [46 Cal.Comp.Cases 913.) To be substantial evidence a medical opinion must be based on pertinent facts, on an adequate examination and accurate history, and it must set forth the basis and the reasoning in support of the conclusions. (*Granado v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 399 [33 Cal.Comp.Cases 647]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc).)

In his Report the WCJ provided a detailed discussion of the reports from orthopedic QME Dr. Segil (see Report, pp. 14 – 22) and the reports from internal medicine QME Dr. Rodas. (See Report, pp. 23 – 25.) Having reviewed the trial record, including the treating physicians' reports and the QMEs' reports, we agree with the WCJ's conclusions regarding the medical reports, except for Dr. Rodas' opinion regarding apportionment of the permanent disability caused by applicant's gastrointestinal system/GERD. In his July 8, 2021 report, Dr. Rodas stated:

> The applicant is now at MMI. She became MMI on the date of the endoscopy. ¶ ... Based upon my review of all factors and her prior history of GERD documented in the Kaiser records, I would apportion 25% of her GERD to industrial factors and 75% to non-industrial causation. ¶ I base this analysis on the fact that her obesity has been lifelong, and the presence of sleep apnea, which is preexisting, has also contributed to her reflux.
> (Def. Exh. I, Anthony G. Rodas, M.D., July 8, 2021, pp. 8 – 9.)

In order for a physician's opinion to constitute substantial evidence as to the issue of apportionment, the physician must identify 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. (*Escobedo v. Marshalls, supra.*) Also, the physician must explain the nature of the other factors, how and why those factors are causing permanent disability at the time of the evaluation, and how and why those factors are responsible for the percentage of disability assigned

by the physician. (*Escobedo v. Marshalls, supra.* at 621.) As noted, Dr. Rodas stated that applicant's permanent disability caused by the gastrointestinal system/GERD was 25% industrial and 75% non-industrial. (Def. Exh. I, pp. 8 – 9.) However, Dr. Rodas did not explain how and why the non-industrial factors were causing permanent disability at the time of the evaluation, nor did he explain how and why those factors were responsible for the percentage of disability he assigned. Thus, his opinion on the issue of apportionment as to the permanent disability caused by the GERD is not substantial evidence and cannot be the basis for rating applicant's disability.

Based thereon, applicant's permanent disability caused by the gastrointestinal system/ GERD is rated as follows: Gastrointestinal System: (06.01.00.00 - 5 - [1.4]7 - 251F - 7 - 9) 9% PD. That disability is then combined with the other factors of disability identified by the WCJ, resulting in 41% permanent disability.[2]

Accordingly, we grant reconsideration, and affirm the F&A in case number ADJ10320048; and we affirm the F&A in case number ADJ10440572 except that we amend the F&A to find that the injury caused 41% permanent disability; to find that there is no non-industrial apportionment regarding the gastrointestinal system/GERD; and to find the reasonable value of services rendered by the applicant's attorney is $9,048.00.

[2] The following represents the combined factors of permanent disability: 14 C 11 C 10 C 9 C 5 C 1 = 41. (see Formal Rating ADJ10440572; referenced by the WCJ but not in evidence).

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings of Fact and Award issued by the WCJ on November 8, 2023, is **GRANTED.**

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the November 8, 2023 Findings of Fact and Award is **AFFIRMED**, except that it is **AMENDED** in case number ADJ10440572 as follows:

FINDINGS OF FACT

* * *

6.The injury caused permanent disability of 41% equal to 222.75 weeks of indemnity payable at the rate of $290.00 per week in the total sum of $60,320.00, payable beginning March 24, 2021, less credits for sums previously paid, and less reasonable attorney fees in the amount of 15% of applicant's award, which are to be commuted from the far end of the award.

7.There is legal, non-industrial apportionment to the applicant's hypertension, and allergic rhinitis; there is no apportionment to non-industrial factors regarding applicant's gastrointestinal system (GERD).

* * *

9. The reasonable value of services rendered by the applicant's attorney is $9,048.00 which shall be commuted from the final weekly payments of the permanent disability indemnity award.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 29, 2024

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

RENEE ARTERBERRY
GLAUBER BERENSON VEGO
STATE COMPENSATION INSURANCE FUND

TLH/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

I
INTRODUCTION

1.	Applicant's Occupation:	Data Entry Clerk/Driver
	Applicant's Age on Date of Injury:	(1) 51 (2) 52
	Date of Injury:	(1) August 10, 2015 (2) May 5, 2015 – May 5, 2016
	Parts of Body Injured:	(1) Admitted cervical spine, left shoulder, left wrist; Disputed lumbar spine (2) Admitted cervical spine, lumbar spine, left wrist, gastrointestinal system, hypertension; Disputed diabetes
	Manner in Which Injury Occurred:	(1) Lifting a computer bag into the trunk of her car (2) Continuous and repeated physical trauma
2.	Identity of Petitioner:	Applicant filed the petition
	Timeliness:	The petition is timely filed
	Verification:	The petition is properly verified
3.	Date of Issuance of Findings of Fact & Awards:	November 8, 2023

4. Petitioner's Contentions:

A. That the five Orthopedic Panel Qualified Medical Evaluator reports of Clive Segil, M.D. do not constitute substantial evidence because the doctor does not review all diagnostic testing, does not conduct an adequate medical examination, does not comply with the AMA Guides, and does not sufficiently explain both the assigned whole person impairment and apportionment conclusions;

B. That the six Internal Medicine Panel Qualified Medical Evaluator reports of Anthony Rodas, M.D. do not constitute substantial evidence because the doctor does not sufficiently explain why the petitioner's diabetes is non-industrial, does not review the permanent and stationery report of treating physician Gary Zagelbaum dated April 3, 2023, and does not sufficiently explain the apportionment conclusions; and

C. That the court should rely on the medical conclusions of treating physicians Arthur Harris, M.D. (orthopedist) and Harout Balian, M.D. (physical medicine and rehabilitation) for the orthopedic component and that the court should develop the record with respect to treating physician Gary Zagelbaum, M.D. (internal medicine).

II
FACTS

These claims involve a date entry clerk and driver who was employed by the Department of Social Services. The first Application for Adjudication of Claim was filed nearly eight years ago on March 2, 2016, alleging a specific injury on August 10, 2015 as a result of the petitioner lifting a computer bag into the trunk of her car. Three months later, on June 3, 2016, she filed a cumulative trauma (CT) claim from May 5, 2015 to May 5, 2016 as a result of continuous and repetitive physical trauma causing injury. Parts of body alleged were in flux throughout the seven years of discovery. By the time of trial, however, with respect to the specific injury, injury arising out of and in the course of employment (AOE/COE) was admitted by the defendant to the petitioner's cervical spine, left shoulder, and left wrist, but not to the lumbar spine. With respect to the CT, the defendant admitted AOE/COE to the petitioner's cervical spine, lumbar spine, left wrist, gastrointestinal system, and hypertension, but not to the petitioner's claim of diabetes. Although not reflected at the time of trial, medical evidence was submitted by the petitioner that evaluated complaints in the form of hearing loss and allergic rhinitis.

Throughout the seven years preceding trial, the petitioner treated with orthopedist Arthur Harris, M.D., physical medicine and rehabilitation physician Harout Balian, M.D., and internist Gary Zagelbaum. The petitioner also was seen by consultant internist Arthur Lipper, M.D. and consultant otolaryngologist K. C. Salkinder, M.D. Acting as panel qualified medical evaluators (PQME) were orthopedist Clive Segil, M.D. and internist Anthony Rodas, M.D. All medical reports were admitted into evidence at the time of trial without objection. In order to address the findings of fact and the petitioner's contentions surrounding the issues of substantial evidence (or the lack thereof), it is best to summarize the medical reporting in chronological order.

Treating Orthopedist Arthur Harris' February 3, 2016 Report (Exhibit 1)

Dr. Harris' initial report evaluates the petitioner and takes a history that on August 10, 2015 she lifted a computer and injured her cervical spine, left upper extremity, and her left shoulder. There was no history taken that she injured her lumbar spine, and there was no finding of a CT injury, despite discomfort, numbness, and tingling in her left hand and wrist in January 2016. The petitioner complained of pain in her cervical spine and left shoulder, and also in her left wrist. X-rays were taken, and the report reflects diagnoses only to her cervical spine, left shoulder, and left wrist. Dr. Harris opined that the petitioner had not achieved maximum medical improvement (MMI) status. He recommended treatment and concluded she may continue to work.

Consulting Internist Arthur Lipper's November 23, 2016 Report (Exhibit 5)

The petitioner was evaluated one time as a consult with Dr. Lipper. Complaints were in the form of hypertension, borderline diabetes, headaches, sleep difficulty, and gastric pain. He took a history of the August 10, 2015 specific injury where the petitioner lifted a computer bag and felt a sharp pain in her left shoulder. There mention of no other body parts injured at the time of the specific injury. She received treatment in the form of physical therapy and medication, and she later noted acid reflux and abdominal pain. She sought private treatment at Kaiser for allergies, borderline

diabetes, and hypertension. Dr. Lipper noted that her acid reflux is improved, but that she has fluctuating hypertension and diabetes. The petitioner is diagnosed with, in pertinent part, hypertension, diabetes mellitus, and gastropathy. Current medications included ibuprofen, albuterol (for non-indus. asthma), nortriptyline, aspirin, lisinopril, mobisyl, and montelukast. Dr. Lipper concluded that the petitioner had achieved MMI status. He opined that the petitioner's acid reflux, gastropathy, and GI complaints were related to the NSAID medication she took for her pain, and he assigned a class 1 4% whole person impairment (WPI) with causation attributed 50% to the NSAIDs and 50% to her obesity. He opined that her hypertension is work related but did not assign a WPI to since he was awaiting the diagnostic test results. As for the diabetes, he notes that this was diagnosed after her injuries, and thus he defers further comment on AOE/COE until diagnostic testing is completed and her past records reviewed, even though he assigned a 6% WPI.

Physical Medicine and Rehabilitation Phys. Harout Balian's December 12, 2016 Report (Exhibit 3)

Dr. Balian's initial evaluation takes a history of the August 10, 2015 specific injury that occurred four months prior and that includes an expanded list of body parts injured including her back, shoulders, wrist, and hands. There is no history of a CT, and the petitioner's current complaints were to her back, neck, and both upper extremities. The doctor concluded that she was not able to perform her usual work.

PQME Orthopedist Clive Segil's April 19, 2017 Report (Exhibit A)

This initial PQME report reflects a history of the August 10, 2015 specific injury where the petitioner lifted a computer bag and injured her neck, left shoulder, left arm, and both wrists, although just below this section, the petitioner states she felt pain the next day in her neck, left shoulder, left, arm, and left wrist (as opposed to both wrists). She did not complain of any back pain. A full physical examination was performed which produced diagnoses to her cervical spine, left shoulder, left elbow, left wrist, and left hand. A Phalen's, Tinel's, and Finkelstein test were all performed on her left wrist, and all were negative. There was no history of a CT injury provided to the doctor, and he did not find such. His review of diagnostic studies with respect to the affected body parts, some of which are contained in the medical record review, include x-rays of the cervical spine, left shoulder, left elbow, left wrist, and left hand, a December 16, 2015 MRI of the left shoulder reflecting tendinosis and a tear, a March 25, 2016 abnormal EMG/NCV, and an August 15, 2016 abnormal MRI to the cervical spine. All WPIs assigned to the petitioner's cervical spine, left shoulder, right hand, and left hand were deemed caused by the specific injury entirely, without non-industrial causes (although the later reevaluation noted below herein provides the final WPI and a different conclusion as to apportionment).

Physical Medicine and Rehabilitation Physician Harout Balian's July 26, 2017 Report (Exhibit 4)

This report was inadvertently identified by the petitioner in the list of trial exhibits as that of July 27, 2019. It is actually dated July 26, 2017, and it issued about one year after the CT claim was filed, yet it is the first medical opinion to take a history of a CT claim wherein the petitioner states that the pain in her shoulders, arms, wrists, and hands started in May 2015 (about three months before the specific injury). It is noted that the August 10, 2015 injury was to her back, shoulders,

wrists, and hands (which is markedly different than earlier reports). Complaints were to her neck, left shoulder, left elbow, low back, and left wrist. She was rendered MMI with her cervical spine justifying a DRE II 5% WPI (apportioned 85% to the CT and 15% to non-industrial causes, without explanation), her lumbar spine justifying a DRE II 7% WPI (apportioned 85% to the CT and 15% to non-industrial causes, without explanation), her left wrist justifying a 1% WPI (apportioned 100% to the CT), and an overall 2% pain add-on. There was no provision for any right wrist WPI finding by this treating physician.

PQME Orthopedist Clive Segil's May 22, 2018 Report (Exhibit B)

As a result of an interrogatory by the defendant, the PQME agrees that the AMA Guides do not permit grip strength readings in terms of assigning a WPI for either the elbow or shoulder.

PQME Internist Anthony Rodas' August 4, 2018 Report (Exhibit J)

In this initial PQME report, Dr. Rodas notes that the petitioner alleges injury AOE/COE in the form of hypertension, asthma, diabetes, and gastrointestinal issues. The petitioner provides a history to Dr. Rodas of being diagnosed with both hypertension and diabetes 3 years earlier, and that her GI issues began in 2016. She has been obese most of her life since the age of 25, treats with Kaiser for all of her internal medicine issues. She advised the PQME that the she was told her weight and family history were contributing factors, and that she had been pre-diabetic for a long time. She stated that her sugars bumped a little bit after her three epidurals, but she does not check her sugars on a regular basis. There is a family history of hypertension and diabetes with both her parents, hypertension with her brother, and diabetes with her sister and aunt. The PQME considers her three epidurals, obesity, and family history, but defers any finding as to causation until such time as he can review her personal medical records from Kaiser. Her weight is measured at 230 pounds. Additionally he requests a GI consult with endoscopy for her GI and gastropathy complaints prior to finding her MMI.

PQME Internist Anthony Rodas' May 21, 2019 Report (Exhibit G)

1,293 pages of Kaiser medical records were reviewed by the PQME in order to sufficiently address that petitioner's hypertension, GI complaints, diabetes, asthma, and allergic rhinitis/sinusitis.

In terms of her hypertension, the PQME finds both industrial and non-industrials factors at play; work did contribute to her blood pressure aggravation. She was found to be MMI on the date of her evaluation of August 4, 2018, but her WPI was deferred until a 2D echocardiogram could be obtained. On page 17, the PQME concludes that " [g]iven the plethora of comorbidities, in addition to these comorbidities having a known effect on the development of hypertension, I would apportion 20% of her hypertension aggravation to industrial causation and 80% to non-industrial causation." Specifically, "…her family history is replete with representative family members having hypertension" (page 13). Furthermore, "…she has been chronically obese for many years" (page 14). The PQME reiterates "…that most of her hypertension is related to lifestyle, e.g. obesity, diabetes, pre-hypertension, high-salt diet and family history" (page 16). 20% is industrially related because the medication would have been deferred but for her work related stress.

In terms of her GI/GERD complaints, the petitioner was not MMI because she was still in need of an endoscopy.

In terms of her diabetes the PQME "[does] not find AOE/COE with respect to her diabetes" (page 20). The PQME specifically reviews the 2000+ pages of Kaiser records which include an analysis of her weight gain and the deterioration of her hemoglobin A1C which the doctor concluded is "…consistent with the natural progression of diabetes" (page 20). The PQME then went on to state on page 20 that "the administration of diabetogenic drugs, usually cortisone in the form of epidural injections, would have: led to only a transient exacerbation of her diabetes and not requiring any interdiction" and that "…although she did manifest chronic pain, she continued to maintain an active work schedule indicating that her pain level could not be considered debilitating to the point it led to worsening obesity or difficulty in glucose control."

In terms of her asthma, this condition was exacerbated, not aggravated, and thus non-industrial.

In terms of her allergic rhinitis/sinusitis, because of the exposure to patients who smoked and her driving that subjected her to fumes, smog, etc., this condition was aggravated and is thus industrial. The PQME deferred the WPI until he could review a CT scan of her sinuses but concluded that it was 20% industrial and 80% non-industrial due to the Kaiser records reflecting "…a long involved history with allergic sinusitis and rhinitis in addition to having demonstrable environmental allergies."

PQME Internist Anthony Rodas' May 28, 2019 Report (Exhibit H)

The PQME reviewed an additional 408 pages of records review which fails to result in any changes to his opinions. The petitioner remains in need of further studies (i.e., the endoscopy).

PQME Orthopedist Clive Segil's August 1, 2019 Report (Exhibit C)

The PQME reviews Dr. Balian's treating physician's MMI report, and based upon such, he alters his apportionment analysis. As to the left wrist, Dr. Segil concludes that 50% is caused by the specific injury and 50% by the CT. As to the cervical spine, Dr. Segil concludes that 50% is caused by the specific injury, 40% by the CT, and 10% by non-industrial degenerative changes.

PQME Orthopedist Clive Segil's January 21, 2020 Report (Exhibit D)

The PQME conducted his re-evaluation, along with a review of records. The petitioner was working modified duties. On page 6 under the caption of "current orthopedic complaints", parts of body include cervical spine (with left-sided radiculopathy), left shoulder, left elbow, left wrist, left hand (of "no pain"), and lumbar spine (with left-sided radiculopathy). There is no complaint to her right wrist or right hand at the time of this evaluation and there was no swelling, deformity, or tenderness, although she did have marked adiposity (i.e., body fat). During this re-evaluation, the PQME performed a Phalen's test and a Tinel's test on her left wrist, both of which were negative. Additionally, the petitioner denied numbness, tingling, or weakness in her lower extremities, and she was able to walk well without disturbance to her stance or gait, walk on her tiptoes and heels without difficulty, do repeated deep knee bends, and "duck walk" without any difficulty. The

doctor declared her MMI as of January 21, 2020. With respect to the petitioner's cervical spine, the PQME assigned an 8% WPI, apportioning 50% to the specific injury, 40% to the CT, and 10% to non-industrial degenerative changes. There was no discussion or analysis as to the non-industrial apportionment. With respect to the left shoulder, the PQME assigned 3% WPI, 100% apportioned to the specific injury. With respect to the left wrist, the PQME assigned an 18% WPI based upon diminished grip strength, 50% apportioned to the specific injury and 50% to the CT. With respect to the lumbar spine, the PQME assigned an 8% WPI, 100% apportioned to the CT.

Treating Orthopedist Arthur Harris July 20, 2020 Report (Exhibit 2)

Dr. Harris' final report renders the petitioner MMI and concludes that there is no non-industrial apportionment. However, under the captions of "apportionment" and "causation" on page 4, the doctor also concludes that the petitioner's symptoms and disability are "…100% related to the work-related injury" and "…have been caused by the work injury." The doctor did not discuss in this report the CT claim that was filed or the petitioner history of such to the other physicians, along with their conclusions. Furthermore, this report contains no review of records at all. The doctor's diagnosis is only to the petitioner's cervical spine, left shoulder, and left wrist. There is no diagnosis to her lumbar spine or right wrist, and thus there is no WPI provided for either of these parts of body.

In terms of WPI, the left shoulder is assigned 7% and the left wrist is assigned 14%. Despite a physical examination to her cervical spine reflecting tenderness to palpation, flexion at 40 degrees, right and left lateral bending at 40 degrees, right and left lateral rotation at 50 degrees, extension at 30 degrees, a negative Spurling, Adson, and Wright maneuver, 50% sensory deficit in the left upper extremity, and a non-surgical condition, the doctor assigns the highest possible DRE category 5 at 38% WPI. A 3% pain add-on is assigned as well. The doctor then goes on to state that the total WPI, for all body parts, amounts to only 37%, a figure that does not make sense.

Consulting Otolaryngologist K.C. Salkinder's July 20, 2020 Report (Exhibit 8)

Dr. Salkinder acted as a consultant and found no history of exposure to loud noise at work, thereby rendering his conclusion that any allegation of hearing loss is non-industrial. Furthermore, there was no indication that she developed an allergy to trees, grasses, and bushes while visiting assisted-living facilities, and thus her allergic rhinitis was found to be non-industrial as well.

PQME Orthopedist Clive Segil's September 8, 2020 Report (Exhibit E)

As a result of reviewing the reports and conclusions of treating physician Arthur Harris, the PQME stood by his opinions as set forth in his January 21, 2020 report in regards to AOE/COE, WPI, and apportionment.

PQME Internist Anthony Rodas' September 8, 2020 Report (Exhibit K)

After reviewing another 168 pages of medical records, the PQME commented on the petitioner's hypertension, allergic rhinitis, and GI/GERD.

In terms of her hypertension, the 2D echocardiogram was reviewed, and it confirmed left ventricular hypertrophy but not heart failure. As such, the PQME assigns a Class 3, 30% WPI.

In terms of her allergic rhinitis, the PQME reviews the final consultation report of K. C. Salkinder dated July 20, 2020, disagrees with him, finds injury AOE/COE, reviews the CT scan of the sinuses, and assigns a 2% WPI based upon her compromised nasal airways.

In terms of her GI/GERD complaints, he makes no further assessment until he is able to review a GI consult with endoscopy.

Consulting Otolaryngologist K.C. Salkinder's October 7, 2020 Report (Exhibit 9)

As a result of an interrogatory, the PQME reiterated that there was no industrial component to the petitioner's ear condition.

Treating Internist Gary Zagelbaum's February 2, 2021 Report (Exhibit 6)

In the doctor's initial evaluation and report, he takes an incorrect history that the petitioner injured her left shoulder on May 15, 2016. Nonetheless, he also notes that she has a two-year history of hypertension, as well as a history of GERD and diabetes. Her mother, father, and uncle are hypertensive. The history of the alleged injuries does not include anything about the plead CT and is awfully brief, without details. Current medications are reviewed, and the physical examination states that she is overweight. Reflected as "pending" are a total of 10 tests as follows: Chest x-rays, complete lung function tests, a bronchial inhalation challenge test with methacholine, complete transthoracic echocardiogram of the heart with doppler, nocturnal polysomnogram, sedimentation rate, helicobacter pylori urea breath test, hemoglobin A1c, immunoglobulin E, and ANA screen, IFA with refl titer and pattern.

The "Impression" consists of hypertension, diabetes, asthma, and GERD with a five-step treatment plan -- but there is no comment at all on causation. Additionally, the doctor does not review any medical records, which, by the time of this evaluation, totaled approximately 2,000 pages.

PQME Internist Anthony Rodas' April 27, 2021 Report (Exhibit F)

The PQME reviews further medical reports. He ultimately defers any hearing loss issue to Dr. K. C. Salkinder and concludes that the petitioner's asthma was exacerbated but not aggravated. Most importantly, however, is the fact that the doctor reviewed a GI consult (that he had previously recommended) from Dr. Said Rahban dated March 19, 2021 that states the petitioner was to undergo a GI endoscopy. The PQME remained steadfast in his opinion that he must review the endoscopy before opining on WPI, apportionment, and future medical care. He reiterated that she would be MMI on the date of the endoscopy.

PQME Internist Anthony Rodas' July 8, 2021 Report (Exhibit I)

The PQME, in his final report, reviewed the petitioner's endoscopy that was taken on March 23, 2021. He finds her to be MMI as of that date. The test, as the doctor states, reflects that "[s]he has

a completely normal upper GI tract". He concludes that NSAIDs played a role in her injury and disability, along with non-industrial factors of obesity, sleep apnea). The PQME assigned a 5% WPI to her GI tract and GERD condition, with 25% apportioned to the industrial factor of NSAIDs use and 75% to the non-industrial factors. It is also this report that reviews the petitioner's historical weight readings. On May 28, 2008 she weighed 212 pounds. Two weeks after her specific injury she weighed 229 pounds (only one pound less than at the time of Dr. Rodas' initial evaluation on August 4, 2018).

Treating Internist Gary Zagelbaum's April 3, 2023 Report (Exhibit 7)

This report results from a request to provide a supplemental report addressing WPI, apportionment, and future medical care. Nowhere in the report does it state that the doctor conducted a physical examination or evaluated the petitioner at that time. Furthermore, the doctor still does not review the approximate 2,000 pages of medical records and does not comment on whether the 10 tests he had "pending" were administered or what the results were. Nonetheless, he issued his final report.

In terms of hypertension, he provides for a Class 3 35% WPI based upon hypertensive cardiovascular disease. He then apportions 20% to the work-related NSAIDs, steroid injections, and stressors, and then 80% to the non-industrial factors of excess weight, lifestyle and dietary discretions, genetics, and aging.

In terms of her GI/GERD and upper digestive tract, he provides for a Class 2 15% WPI. He then apportions 35% to work-related NSAIDs and pain, and then 65% to dietary indiscretions, lifestyle, excess weight, and a positive H. pylori bacteria infection.

Of particular importance is the fact that the doctor does not comment or discuss at all the petitioner's diabetic condition, including but not limited to AOE/COE, PD, apportionment, or future medical care. He is completely silent as to her diabetes.

End of Medical Record Review

On March 17, 2022 the petitioner filed a Declaration of Readiness to Proceed (DOR) on both claims and on all issues, to which there was no objection by the defendant. A Mandatory Settlement Conference (MSC) was held on June 8, 2022 at which point the matter went off calendar based upon a joint motion for the petitioner to be reevaluated by her treating physician.

Having conducted further discovery (as reflected above in terms of additional treating physician reports and also PQMEs), the petitioner, on April 12, 2023 filed a DOR again on both claims and on all issues, to which there was, again, no objection by the defendant. An MSC was held on July 19, 2023. Six days prior to that the parties uploaded a joint Pre-Trial Conference Statement on both claims, and thus the matter was set for trial on October 2, 2023.

At trial the parties were unable to resolve the matter, and given the absence of any objections or motions otherwise, both moved to proceed with testimony and submission, despite the court's attempt at informal resolution. The petitioner's testimony was brief. She described her job duties in terms of typing and driving (due to the disputed occupational group number) and her August

10, 2015 injury to her left side, neck, left shoulder, and left wrist as a result of lifting her computer bag into the trunk of her car. She also described her CT injury from repetitive work activities to her neck, low back, and left wrist, the development of stomach issues, diabetes, and hypertension, the fact that she had no issues of diabetes, hypertension, or acid reflux prior to her employment, and that she retired on January 31, 2020.

With Formal Rating Instructions and a Formal Rating having issued without objection or a request to cross-examine the disability evaluator, the matter resulted in this court's Findings of Fact and Awards on November 8, 2023.

With respect to the August 10, 2015 date of injury, the court relied on the reports of the orthopedic PQME, Clive Segil, M.D. to find that the petitioner sustained injury AOE/COE to her cervical spine, left shoulder, and left wrist, but not to her lumbar spine, that her cervical spine and left wrist/grip was apportioned between this injury and the CT, but that the non-industrial apportionment was invalid.

With respect to the CT injury from May 5, 2015 to May 5, 2016, the court relied on the reports of the orthopedic PQME, Clive Segil, M.D. and the internist PQME Anthony Rodas, M.D. to find that the petitioner sustained injury AOE/COE to her cervical spine, lumbar spine, left wrist, gastrointestinal system, hypertension, and allergic rhinitis, but not in regards to her diabetes or hearing loss conditions. This court further found that her cervical spine and left wrist/grip was apportioned between this CT injury and the specific injury, and that her hypertension, gastrointestinal system, and allergic rhinitis was apportioned between this CT and non-industrial conditions.

From these two findings and awards, the petitioner seeks reconsideration on the grounds that both PQME reports are flawed as a result of neglecting to review all evidence, to conduct an adequate evaluation, and to sufficiently explain their opinions. Conversely, the petitioner seeks a finding on the medical reports of treating physicians Arthur Harris, M.D. and Harout Balian, M.D. (despite their overlap) and seeks an order to develop the record as to treating physician internist reports of Gary Zagelbaum (presumably with the intent that the court ultimately rely on same), even though the case has been subject to over seven years of litigation and discovery, and even though the treaters and consults did not review over 2,000 pages of medical records that both the PQMEs did. The court respectfully disagrees with the petitioner's contentions.

III
DISCUSSION

The Standard of Review

The Appeals Board's award, order, or decision must be supported by substantial evidence in light of the entire record. *Lamb v. Workmen's Comp. Appeals Bd. (1974) 11 Cal.3d 274, 280–281, 113 Cal.Rptr. 162, 520 P.2d 978; Garza v. Workmen's Comp. App. Bd. (1970) 3 Cal.3d 312, 317, 90 Cal.Rptr. 355, 475 P.2d 451; Bracken v. Workers' Comp. Appeals Bd. (1989) 214 Cal.App.3d 246, 255, 262 Cal.Rptr. 537.*

To constitute substantial evidence, medical opinions must be based upon facts that are germane, an adequate medical history and examination, correct legal theories, and not be based upon surmise, speculation, conjecture, or guess. *Zemke v. WCAB (1968) 33 CCC 358; Bracken v. WCAB (1989) 54 CCC349; Place v. WCAB (1970) 35 CCC 525; Hegglin v. WCAB (1971) 36 CCC93; Insurance Company of North America v. WCAB (Kemp) (1981) 46 CCC 913; Baptist (1982) 47 CCC 1244; Guerra v. WCAB (1985) 50 CCC 270; Escobedo v. Marshalls (2005) 70 CCC 604; E.L. Yeager Construction v. WCAB (Gatten) (2006) 71 CCC 1687.*

The entire report and testimony must demonstrate that the doctor's opinion is based upon reasonable medical probability. *McAllister v. WCAB (1968) 33 CCC 660; Lamb (1974) 39 CCC 310.* A physician's mere legal conclusion is insufficient. *Zemke*, *supra*. The physician's medical report, in order to constitute substantial evidence, must set forth the reasoning behind the physician's opinion, not merely his or her conclusion. *Id.*

With the legal standard in place, the court now turns to the petitioner's contentions that the PQME reports relied upon by the court do not constitute substantial evidence and that instead only the treating physicians' reports do.

Petitioner's Allegation that PQME Clive Segil's Reports are Based on an Inadequate Medical History

The petitioner contends that the PQME failed in two regards. First, that he did not review all relevant medical diagnostic testing, i.e., a lumbar spine MRI dated April 26, 2017 and a left wrist MRI dated April 28, 2017, and that he did not request updated wrist MRIs or EMG/NCV studies at the time of his reevaluation. Second, that he did not address causation for the petitioner's right wrist.

Regarding the lumbar spine, contained within the PQME's initial report is his "Review of Medical Records" wherein he reviews 34 medical reports. One of those is a lumbar spine MRI dated April 14, 2016. Contained within Dr. Rodas' internal medicine report dated August 4, 2018 is a medical record review as well which contains an April 26, 2017 lumbar spine MRI. The PQME did not review this later MRI. That, however, does not render the report insubstantial evidence when considering the fact that the petitioner did not complain of any back pain, let alone low back pain, at the time of Dr. Segil's initial evaluation. At the time of Dr. Segil's reevaluation on January 21, 2020, she did complain about her lower back but that "[s]he denies numbness, tingling or weakness in lower extremities" (page 6, 1/21/2020 report). The doctor notes that she had treatment, and he conducted a physical examination that mentions a large amount of adiposity involving her buttocks, tenderness and spasm on the left side, her ability to walk well without disturbance to her stance or gait, walk on her tiptoes and heels without difficulty, do repeated deep knee bends, and "duck walk" without difficulty. Lumbosacral motion was noted, as were other tests. Another 53 medical reports were reviewed, and the doctor assigned an 8% WPI to her lumbar spine, apportioning all disability to the CT. Nowhere in the report is there any justification that reviewing an April 26, 2017 renders the report insubstantial evidence, or even flawed for that matter. It is up to the PQME to determine the need for an MRI, and after the clinical examination, there appears to be no need for one (otherwise he would have so said).

The petitioner's prayer for relief is for the court to rule on Dr. Harris' and Dr. Balian's conclusions. If that were to happen, the petitioner's lumbar spine disability would actually be *less* than the PQME she seeks to void. Dr. Harris does not review either MRI, and he does not provide for any lumbar spine WPI or even injury AOE/COE to the petitioner's lumbar spine. His report justifies a finding of non-industrial injury. As to Dr. Balian's reporting, only that dated July 26, 2017 reviews any medical records at all (which total a mere four reports). One of them is indeed the MRI of April 26, 2017. But Dr. Balian, assigns an even lower WPI at 7%. He bases his opinion on his clinical history and examination as well as the MRI. That said, he still reviews none of the other medical reports that the PQME did. Dr. Balian fails to constitute substantial evidence, but even assuming it did, again, it is a lower WPI than the PQME provided.

Regarding the left wrist, along the same lines is the petitioner's argument that the PQME should not be relied on because he did not review an April 28, 2017 left wrist MRI and did not secure an updated EMG/NCV test at the time of his reevaluation. Just as with the lumbar spine, it is up to the PQME to determine if updated testing is necessary, and given the examination at the time, there is no reason to believe that the doctor should have reviewed an MRI or ask for current EMG/NCV tests. Just with the lumbar spine issues, Dr. Harris did not review the left wrist MRI either, nor did he review any EMG/NCV studies. Furthermore, Dr. Harris provided a lower WPI at 14% for the left wrist than the PQME did at 18% WPI. And just with the lumbar spine, Dr. Balian did review the left wrist MRI but gave only a 1% WPI. The fact that the PQME did not review an MRI, yet gave the highest WPI of the three physicians makes the petitioner's argument obscure and unwarranted. If this court were to grant the petitioner's prayer for relief and rely on either of the treating physicians' reports, the WPI to the petitioner's left wrist would be less than the current findings and award.

Regarding the petitioner's right wrist, the doctor indeed did not comment. Grip loss readings produced positive findings for only the left wrist, and although the petitioner had marked adiposity only, she had no swelling, deformity, or tenderness, and range of motion was normal (pages 9-10, 1/21/20 report). In short there was nothing to assess. Just as with the lumbar spine and left wrist analysis, Dr. Harris also did not comment on the right wrist. The same goes, again, for Dr. Balian. Dr. Balian also did not address the right wrist. For the petitioner to seek avoidance of the PQME report for the failure to address the right wrist, when both of her treating physicians similarly did not address the right wrist, is obscure and unwarranted.

Notwithstanding the above, the glaring reality is that the petitioner lodges complaints about insufficient medical evidence which could have been addressed with all the doctors during the seven years of discovery by way of either supplemental reports or cross-examinations, rather than raising them for the first time on appeal, subsequent to a desire to proceed forward with trial. In light of the entre record, the PQME reports of Dr. Segil constitute substantial evidence.

<u>Petitioner's Allegation that PQME Clive Segil's Report is Based on an Inadequate Medical Examination and Does Not Comply with the AMA Guides</u>

The petitioner contends that the PQME did not perform Spurling, Adson, and Wright maneuver tests and did not obtain current EMG/NCV studies of the bilateral upper extremities (presumably at the time of his final evaluation) in order to adequately address the cervical spine, that he did not

obtain EMG/NCV studies of the bilateral lower extremities in order to adequately address the lumbar spine, that he did not perform the Phalen, Tinel's and Finkelstein tests at the time of the final evaluation on both wrists (or use the grading system as opposed to grip strength to assign the left wrist WPI), and that he did not obtain an updated MRI at the time of his reevaluation of the left shoulder.

Turning first to the cervical spine, the petitioner's representation that Dr. Segil did not perform a Spurling, Adson, or Wright test is not completely accurate. Whereas it is true that he did not conduct a Spurling or Wright test, he did conduct an Adson test during both his initial and final evaluations, both of which were negative (see p. 9 of the 4/19/2017 report and p. 8 of the 1/21/2020 report). Petitioner's claims must also be taken in context. She argues that the PQME's failure to do so renders his opinion insubstantial evidence which supports her prayer that the reports of Dr. Harris and Dr. Balian be relied upon. The problem with that reasoning is that Dr. Balian did not perform any of those three tests at all. And as for Dr. Harris, he did perform all three tests – but all three were *negative* (see p. 4 of the 2/3/2016 report and p. 1 of his 7/20/2020 report). Thus there is no substance to the petitioner's complaints, especially since the PQME reviewed the reports of Dr. Harris and Dr. Balian.

The petitioner also argues that the PQME should have reviewed an updated bilateral upper extremity EMG/NCV study. It is true that there is only one such study. It is dated March 25, 2016, and *only* the PQME reviewed (in his initial report). Neither of Dr. Harris' reports contain a review, although he was the one who ordered it. He too did not order an updated EMG/NCV at the time of his final evaluation. Had he felt it necessary, he could have said so. As for Dr. Balian, he also did not review the only EMG/NCV. If not expressly stated, it is impliedly stated that none of three physicians felt another EMG/NCV was necessary.

As for the PQME's explanation of the 8% WPI to the petitioner's cervical spine, Dr. Segil indeed did so. The August 15, 2016 MRI was reviewed on page 22 of his initial report wherein he states that the MRI shows "multiple degenerative changes throughout of the cervical spine." Details in Rodas' report 5/28/19 shows "[l]oss of normal cervical lordotic curve with straightening…[c]orrelate with muscle spasm…4-5 mm disc bulge C6-C7…[m]oderate left and mild to moderate right neural foraminal narrowing…4 mm disc bulge C3-C4…3-4 mm broad disc bulge C7-Tl causing mild to moderate bilateral neural foraminal narrowing…3 mm central disc protrusion C5-6 with annular tear effacing an anterior CSF space and abutting the cord." One year later, on August 17, 2017, an MRI showed "[m]oderate disc degeneration C5-C6 through C7-Tl with 2-3 mm disc protrusions…2 mm disc protrusion C2-C3, C3-C4…[m]ultilevel uncovertebral and/or facet joint degenerative changes [and]…[t]hyromegaly with a 1.2 cm left thyroid nodule". Comparing the two MRIs demonstrate that the petitioner's condition had improved during those 12 months; the disc bulges were smaller.

In looking at the physical examination of all three reports, and in particular that of the PQME, the PQME's conclusions are supported by substantial evidence, even if there is a disagreement with the others. The PQME allows for an 8% WPI, but Dr. Balian allows for just 5%. Dr. Harris is the issue because he assigns the highest possible figure at 38% WPI. After considering several other parts of body and their respective WPI, Dr. Harris concludes that the petitioner's total WPI is 37%.

The figures do not align, and no party ever sought clarity. A DRE Category V of 38% should demonstrate, according to the AMA Guides:

> "[s]ignificant upper extremity impairment requiring the use of upper extremity external functional or adaptive device(s); there may be total neurologic loss at a single level or severe, multilevel neurologic dysfunction ***or*** fractures: structural compromise of the spinal canal is present with severe upper extremity motor and sensory deficits but without lower extremity involvement."

None of these criteria exist – not one. Dr. Harris' conclusion does not withstand scrutiny, and it is actually the opinion that fails to constitute substantial evidence.

Turning next to the lumbar spine, the petitioner argues that the failure of the PQME to review an EMG/NCV of the bilateral lower extremities renders it useless. The position is misplaced for reason similar to the upper extremities in that no physician ordered such a test or felt that one was necessary, and that includes both the treating physicians. In the PQME's initial report, page 6 notes complaints of paid radiating to the left ankle but no numbness, tingling, or weakness in her lower extremities. Pages 11 and 12 review the neurological examination in that it is normal with no atrophy; all she has is marked adiposity in both LEs. Neither of Dr. Harris' reports demonstrate any lumbar spine complaints at all, and that alone is enough to answer why such a test is unwarranted. As for Dr. Balian, his report of July 26, 2017 reflects that her lumbar range of motion is causative of pain, but that "[s]ensation to pinwheel sharp/dull differentiation is normal in all lower extremity dermatomes," and that she has full motor strength bilaterally. It is clear that there is no reason to secure an EMG/NCV to both lower extremities.

Turning to both wrists, Dr. Segil performed a Phalen, Tinel, and Finkelstein test at the time of his initial evaluation, and that all three were negative. He then performed a Phalen and Tinel test during his final evaluation, both of which were negative. Dr. Segil then provided an 18% WPI to the petitioner's left wrist. The other two doctors, however, gave a *lower* WPI (i.e., Dr. Harris at a 14% WPI and Dr. Balian at a 1% WPI), and thus it makes no sense for the petitioner to complain about an inaccurate or inadequate WPI on this body part. She received the highest possible rating based upon grip loss. Using a grading system is not relevant when looking at the entire medical record. As to the right wrist, the petitioner had no complaints at the time of the PQME's final evaluation and is why there is no WPI. Same goes for Dr. Harris and Dr. Balian. Neither of these physicians' final reports demonstrate complaints to the petitioner's right wrist.

Turning to the left shoulder and whether the PQME should have reviewed an updated MRI, it should first be noted that he is the only physician who reviewed the one MRI taken on December 16, 2015 (which was actually ordered by Dr. Harris) and was interpreted by the PQME as having no fractures or dislocations or loose body formation, a normal shoulder joint, degenerative changes, and a slight rotator cuff tear. Dr. Segil's January 21, 2020 final report provides that "[t]he MRI of her left shoulder revealed a small tear in her rotator cuff…[t]he doctor prescribed physical therapy and acupuncture treatment with relief noted…[s]he indicates that the acupuncture treatment is what really helped alleviate her pain…Dr. Harris is trying to avoid surgery to her left shoulder by treating her conservatively." As for Dr. Balian, he does not review the MRI at all. And

as for Dr. Harris, neither of his two reports reflect a review of the MRI he ordered, and his final report, just like Dr. Segil's, does not recommend a current MRI either. In fact he states that "the patient does have a satisfactory range of motion with only limitation in the extremes of motion…[n]either the patient's limitation of motion or pain interfered with manual muscle testing…[t]he patient was able to apply maximal muscle forces and put forth maximal effort during manual muscle testing…[b]ased on the above, the patient's rotator cuff weakness represents true muscle weakness…". None of the three doctors seek another MRI. Dr. Harris ultimately gives a 7% WPI by concluding that the 5% provided for by the AMA Guides is not an adequate consideration of her loss of strength. Dr. Segil allows for 3%, pursuant to "pp. 476-479, Tables 16-40 to 16-46" of the AMA Guides.

Petitioner's Allegation that PQME Clive Segil's Report Does Not Offer Sufficient Reasoning Behind His Conclusions and is Based on an Incorrect Legal Theory

The petitioner contends that the PQME did not adequately explain his conclusions in terms of apportionment to the two plead injuries (i.e., the specific injury and the CT), and that he did not adequately explain why the cervical spine takes the same WPI of 8% as the lumbar spine.

Turning to the apportionment issue first, the PQME Labor Code §4663 provides in pertinent part:

> (a) Apportionment of permanent disability shall be based on causation.
>
> (b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.
>
> (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries

"Shall" is mandatory and "may" is permissive. *Labor Code* § 15

In the en banc decision of *Benson v. The Permanente Medical Group* (2007) 72 CCC 1620, the Board held that apportionment based on causation does not permit combined permanent disability awards, and that the physician must parcel the disability and consider each separate injury, although the Board also acknowledged there may be times when a physician would find that duty to be impossible or inequitable because it would be based upon speculation and guesswork. The Board's decision was upheld in its entirety by the 1st District Court of Appeal (2009) 170 Cal. App. 4th 1535, 74 CCC 113.

Such was the situation in the recent decision of *Vizcarra v. Master Toys and Novelties* (ADJ 7810002, ADJ7982917, November 21, 2023) where two PQMEs were unable to apportion between a specific injury and a CT because both were inextricably intertwined. The panel held that

the PQMEs addressed causation, and because apportionment could not be had, the Labor Code §4663 mandate was satisfied, with the defendant failing to carry its burden of proof.

The petitioner argues that the Benson mandate was not applied correctly. The court finds this argument lacking, given the multitude of medical evidence that the PQME reviewed, and the clarity with which he issued his decision. It must be pointed out that Dr. Harris' reports apportion all WPI to the petitioner's specific injury, but this is because nowhere in the reporting does he take a history of a CT, despite the pleadings and allegations, and despite the petitioner's testimony at the time of trial the she sustained a CT injury as well. It must also be pointed out that Dr. Balian's reporting is to the complete contrary in that he apportions only to the CT and non-industrial factors, despite Dr. Balian well aware of the specific injury. To have the two treating physician reports at odds with one another is troubling, especially in light of the fact that neither of them reviewed the approximate 2,000 pages of medical records. As to the PQME report that the petitioner takes issue with, Dr. Segil apportioned the petitioner's cervical spine 50% to the specific injury, 40% to the CT, and 10% to non-industrial causes, and then her left wrist 50% to the specific injury and 50% to the CT. The court found the non-industrial apportionment to inconsistent with legal principles in that he failed to explain his reasoning anywhere in the medical reporting or the record review. With respect to the addressing causation between the specific injury and the CT, the doctor's opinion conforms to the petitioner's testimony as well as the history and findings contained throughout the medical records he reviewed. Unlike the case of *Vizcarra*, the PQME clearly stated he did have the ability to apportion.

In *SCIF v. WCAB (Dorsett)* (2011) 76 CCC 1138, the court of appeal, in a published decision, held that in the event a specific injury and a CT injury achieve permanent and stationary status at the same time, even if the CT is a compensable consequence of the specific injury, *Benson* apportionment is proper. In our case the PQME found the petitioner MMI on January 21, 2020 as to all parts of body and injuries. His apportionment conclusions comply with *Dorsett*.

In the unpublished case of *Continental Casualty v. WCAB (Goodin)* (2009) 74 CCC 435 (Court of Appeal opinion unpublished in official reports), the Fourth District Court of Appeal held that the trial judge erred when failing to apportion non-industrial factors given that the only medical evidence on record provided for same. The relevancy of that decision to our case is that the court was concerned with the non-physicians replacing the medical experts' opinions with their own. Here, if we follow petitioner's objections, not only does this non-physician court have to choose between two diametrically opposed treating physician reports, but it also then has to disregard the medical expert opinion of the PQME. The PQME in this case took a history of both injuries from the petitioner herself, reviewed voluminous medical reports, and found that both injuries contributed to her disability (which is consistent with her trial testimony, unlike both Dr. Harris and Dr. Balian.

We next turn our attention to the petitioner's restated argument that the PQME did not sufficiently explain why the 8% WPI was provided to her cervical spine when the same WPI was assigned to her lumbar spine. The petitioner argues that the 8% WPI to both parts of body are inconsistent because lumbar spine "…surgery is not recommended…" whereas cervical spine "…surgery was warranted." (page 7, lines 24-28). To clarify this point, the PQME did not state that cervical spine surgery was warranted. The PQME did, however, allow for future medical care in the form of

cervical spine surgery. He did not say that surgery was warranted currently. All he did was leave open the possibility in the future. Furthermore, Dr. Harris' final report (a report that assigns a 38% WPI) does not allow for surgery in terms of future medical care. So, if the petitioner believes that a conclusion as to future medical care should bootstrap the level of WPI afforded by the PQME, then so must go for the treater who did not allow for future surgery yet assigned the highest possible WPI.

In looking at the context, and as discussed above, Dr. Balian assigned an even lower WPI to the petitioner's cervical spine of 5%, yet Dr. Harris' assigned the highest possible figure at 38% WPI. Also stated above is the fact that Dr. Harris concludes that all parts of body allow for a total of 37% WPI, and thus there is a significant disconnect in his calculation, to which no party sought clarification. The standard for a DRE Category V 35% - 38% is reviewed above, and again, none of these criteria exist. Without the petitioner seeking clarification by way of interrogatory or cross-examination, there is no basis to reject the PQME's 8% WPI assignment. The petitioner had seven years of discovery, and because the PQME did adequately address the cervical spine, it is the medical opinion relied upon by the court.

Petitioner's Allegation that PQME Anthony Rodas' Report Does Not Offer Sufficient Reasoning Behind His Opinions that the Petitioner's Diabetes is Non-Industrial

The petitioner contends that it was error for the court to rely on PQME Dr. Rodas' reporting to find no "…industrial injury for diabetes and hearing loss." In terms of the hearing loss, the petitioner is incorrect; the court did not base its finding on Dr. Rodas' report. The court did, however, base its finding of non-industrial hearing loss on the petitioner's consultation reports of Dr. K. C. Salkinder. In his first report dated July 20, 2020, the doctor concludes that any allegation of hearing loss is non-industrial. His next, and only other report, dated October 7, 2020, resulted from an interrogatory from the petitioner's attorney and reiterated his finding that "…there was no industrial causation for the petitioner's ear condition." The petitioner did not sustain her burden of proof, and the court's finding was based on the medical reporting on her own behalf.

In terms of the diabetes, the petitioner's argument is twofold. First, that the PQME should have analyzed her weight gain from May 22, 2008 to August 4, 2018, and not limited his analysis from the August 10, 2015 date of injury through August 4, 2018. Second, that the PQME should have explained "…how many epidural injections would in fact rise to the level of industrial aggravation…". The first argument fails because it requests the PQME to rely on facts that are not germane and are irrelevant. The second argument fails because it requests an opinion from the PQME that would necessarily be based upon surmise, speculation, conjecture, and guess.

The competing reports are those of PQME Dr. Rodas, consultant Dr. Lipper, and treater Dr. Zagelbaum. Dr. Rodas does indeed ultimately conclude that the petitioner's diabetes is nonindustrial. In looking at Dr. Lipper's report, he issued but one, and in that report, he deferred any comment on causation until diagnostic testing is completed. No further reports issued from Dr. Lipper.

A review of Dr. Zagelbaum's reporting leads to a similar result. Dr. Zagelbaum's first report takes a history of the petitioner having diabetes, but there is no comment on causation. He notes that

there are 10 tests "pending". His only other report results from an interrogatory asking him for a report that addresses WPI, apportionment, and future medical care. This report mentions absolutely nothing about the 10 pending tests, and the doctor did not reevaluate the petitioner. Although he comments as to the hypertension and the GI/GERD complaints, he is absolutely and completely silent as to the diabetes. The petitioner's prayer for relief seeks a development of the record.

The line of cases are well known. The judge and the Appeals Board have a duty to further develop the record when there is insufficient evidence on an issue. *McClune v. WCAB (1998) 62 Cal.App.4th 1117, 63 CCC 261; Tyler v. WCAB (1997) 56 Cal.App.4th 389, 62 CCC 924.* If a party fails to meet its burden of proof in obtaining and introducing competent evidence, it is not the job of the appeals board to rescue that party by ordering the record developed. *[Lab. Code § 5502; San Bernardino Community Hospital v. WCAB (McKernan) (1999) 74 Cal.App.4th 928, 64 CCC 986; Telles Transport Inc. v. WCAB (2001) 92 Cal.App.4th 1159, 66 CCC 1290].* The judge may not order further discovery if it is not needed. In *Townsend v. Combined Insurance Co., 2013 Cal. Wrk. Comp. P.D. LEXIS 342.*

The case of *Tyler* assists our situation. There, the petitioner claimed a work-related psychiatric injury. Two psychiatrists (one on behalf of the petitioner and one as an AME) found that the petitioner did not sustain an industrial injury. A neurologist, however, did, but the judge rejected this report based on the field of specialty being that of neurology. The judge found the AME psychiatric report to be flawed but concluded he had no authority to appoint a physician for further evaluation. The court of appeal held that the appeals board did, and that there was a duty to do so in that case, given the insufficient evidence.

In the case at bar, we are not completely lacking in substantial evidence. The PQME's report is sufficient. What the petitioner seeks is for the court to rescue her and attempt to secure additional evidence from Dr. Zagelbaum with the hope that he will find favorably and then with the hope that the court rule as such. Setting aside the fact that the petitioner filed the DOR, requested trial be set at the time of the MSC, and desired to move forward on the day of trial, development of the record is not needed.

There were over 2,000 pages of medical records that Dr. Rodas reviewed. Neither Dr. Lipper nor Dr. Zagelbaum reviewed any of those records. Those records contain a plethora of examinations and blood tests that were directly on point with the alleged diabetes. Without reviewing those records, Dr. Zagelbaum's report is woefully lacking. Dr. Rodas issued a total of six reports. He meticulously reviewed all records, and he meticulously reviewed the petitioner's weight readings throughout the years. In the end he concludes that the petitioner had no significant weight gain from the time of her specific injury, up to the time of her initial evaluation on August 4, 2018 (an increase of two pounds, from 228 to 230), and thus there was no work-related component to her diabetes. The petitioner takes issue with that timeline and argues that the PQME should have looked at her weight starting on from May 22, 2008 (a reading of 212 pounds). The petitioner argues in favor of an 18 pound weight gain. But the argument is flawed because the petitioner argues that it was the lack of physical activity due to her specific injury that caused the weight gain, which in turn played a role in her diabetes. Thus, the analysis of her weight readings from the date of the specific injury up to the time of the evaluation is the proper metric. As such, a two pound weight gain was not found to have played a role in the petitioner's diabetic condition. Giving

the petitioner the benefit of the doubt, the court looked at her weight reading at the time of Dr. Zagelbaum's only evaluation on February 2, 2021. She weighed 227 pounds. So, when compared to her weight of 228 at the time of her specific injury, she was actually one pound lighter. Dr. Rodas' analysis is on point.

The petitioner's alternative argument surrounds Dr. Rodas' conclusion that the three epidural injections did not aggravate her diabetes. After taking note of this conclusion, the petitioner then takes note that "…Dr. Rodas failed to discuss how many epidural injections would in fact rise to the level of industrial aggravation…" (page 11, lines 1-3). It is implied that the doctor should have done so in order for his report to constitute substantial evidence. The court finds this contention to be irrelevant and one that would require surmise, speculation, conjecture, and guess. The PQME cannot be asked to guess whether four, or five, or any number of epidural injections for that matter, would have aggravated the petitioner's underlying diabetes. Furthermore, there is no relevancy to this position. Whether there may have been an aggravation upon receiving more than three epidurals is not before us; it didn't happen in this case. And for that, the position taken by the petitioner is neither germane nor useful.

With the PQME's reporting constituting substantial medical evidence, there is no reason and there is no duty to develop the record further.

Petitioner's Allegation that PQME Anthony Rodas' Report is Based on an Inadequate Medical History

The petitioner argues that the PQME's reporting is not substantial evidence because he did not review the final MMI report of Dr. Zagelbaum.

Under normal circumstances, the argument appear cogent. But Dr. Zagelbaum's final report does not present a normal situation. That report is dated April 3, 2023 and finds the petitioner MMI. But it did not result from a re-evaluation. The doctor was asked to produce an MMI report, and so he did. He did not conduct a physical examination, did not review any of the 2,000+ pages of medical records, and did not review the 10 tests he wanted to as set forth in his February 2, 2021 initial report. PQME Dr. Rodas' medical record review contains a February 24, 2021 report from Dr. Zagelbaum where he also indicates a desire to have an EKG done and once testing is done, specifically states that he wants to "[r]eevaluate once results are known". Nowhere in Dr. Zagelbaum's reports reflect that those 11 tests were done. The fact that the doctor issued an MMI report without a review of the tests he asked for and without a reviewing the multitude of medical records renders his report insubstantial evidence, not that of the PQME. Given the foregoing, there is no point for the PQME to review Dr. Zagelbaum's final report.

[Deleted: Petitioner's Allegation that PQME Anthony Rodas' Report Does Not Offer Sufficient Reasoning Behind His Opinions Regarding Apportionment]

Petitioner's Prayer for Relief to Find on the Medical Reports of Treating Physicians Arthur Harris and Harout Balian (despite their overlap) and an Order to Develop the Record as to Treating Physician Internist Gary Zagelbaum

The PQME reports are the only reports that constitute substantial medical evidence. They are the only reports that take an accurate history, that painstakingly review the 2000+ pages of medical records, and that meticulously reason to their conclusions. The petitioner's treating physicians and consults do not.

The petitioner attempts to argue a variety of deficiencies with the PQMEs and argues in favor of a finding on the treating physicians for her orthopedic disability and then a finding to develop the record for her internal medicine diabetic condition. There is no justification for either. Discovery lasted for seven years. An MSC held as a result of her own DOR was taken off calendar for further discovery. The petitioner had years and years to request supplemental reports or cross-examine any of the physicians, including the PQMEs. A host of issues are more like queries and hypotheticals that could have been and should have been handled during the preceding seven years. Any disagreements with the PQME's conclusions could have been addressed then – not on appeal. PQME Dr. Clive Segil and Dr. Anthony Rodas are the only physicians who produce opinions and reports that constitute substantial evidence. There cannot be reliance on the others, and there need not be any further development of the record.

IV
RECOMMENDATION

It is respectfully recommended that the petitioner's Petition for Reconsideration dated November 27, 2023 be denied.

DATE: December 11, 2023

TODD T. KELLY
WORKERS' COMPENSATION JUDGE