WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ELIZABETH BUCZKOWSKI, *Applicant*

vs.

MACY'S, INC., permissibly self-insured, administered by SEDGWICK CMS, INC., *Defendants*

Adjudication Number: ADJ10906751; ADJ12038068
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration (Petition) and the contents of the report of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

I.

Former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

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

> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 13, 2024 and 60 days from the date of transmission is Sunday, January 12, 2025. The next business day that is 60 days from the date of transmission is Monday, January 13, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, January 13, 2025, so that we have timely acted on the petition as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 13, 2024, and the case was transmitted to the Appeals Board on November 13, 2024. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 13, 2024.

[2] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

II.

In addition to the WCJ's comprehensive and well-written report, we observe the following.

Defendant contends the WCJ erred in awarding reimbursement to the Employment Development Department (EDD) pursuant to a lien filed for state disability benefits paid to the applicant during a period of temporary disability. (Petition, at p. 15:18.) Defendant acknowledges the EDD filed a lien but asserts that it is inappropriate for the WCJ to adjudicate the lien because the EDD did not participate in trial or offer its lien at trial. However, as the WCJ's Report observes, the parties stipulated to the periods and amounts of temporary and permanent disability indemnity paid by defendant and to the periods and amounts of benefits paid by the EDD. (Report, at p. 22; Minutes of Hearing and Order of Consolidation, dated March 28, 2024, at p. 3:15.) We also note that the parties specifically framed the issue of "[l]ien claims consisting of the Employment Development Department for the period of State Disability Benefits paid…." (*Ibid*.) Because the record reflects no objection lodged by defendant to either the framing or submission of the issue of the EDD lien for decision, we agree with the WCJ that the issue was regularly submitted and appropriately decided. (Report, at p. 23; Joint Findings of Fact Nos. 6 & 11.)

The WCJ also determined that applicant was entitled to an unapportioned award because defendant did not meet its burden of establishing apportionment to prior industrial or nonindustrial factors. (Joint Finding of Fact No. 9.) The WCJ's Opinion on Decision observed that the apportionment opinions described in the medical-legal reporting of Dr. Galloni were couched in terms of possibility, rather than reasonable medical probability, and in any event, lacked an explanation of how and why the identified factors of apportionment were causing current disability. (Opinion on Decision, at pp.17-18.)

Defendant's Petition contends that even if the physician's apportionment analysis is framed in words of conjecture, the report "must be construed in the proper context as statements of medical probability." (Petition, at p. 13:7.) However, we agree with the WCJ that to the extent that Dr. Galloni's apportionment opinions are merely conclusory and do not substantively discuss the medical basis for the physician's conclusions, they do not constitute substantial evidence. Accordingly, defendant has not met its burden of establishing apportionment to nonindustrial factors as a result. (Report, at p. 19; see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc) (*Escobedo*) ["even where a medical report "addresses" the issue of causation of the permanent disability and makes an 'apportionment determination' by finding

the approximate relative percentages of industrial and non-industrial causation under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence.].)

Although we do not reach the issue because the underlying apportionment analysis does not constitute substantial evidence, we observe that apportionment for the left lower extremity would also be inapplicable to the extent that applicant's disability arose out of industrial medical treatment. In *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], the Court of Appeal held that an injured worker was entitled to a permanent disability award without apportionment where her disability was due entirely to a new condition of chronic regional pain syndrome (CRPS) that she developed as a result of failed carpal tunnel surgery. The Court observed that just as the medical treatment an employer is required to provide is not subject to apportionment, new disability developing as a result of that medical treatment is likewise not subject to apportionment. Here, any newly developing disability arising out of applicant's industrial medical treatment and resulting CRPS would not be subject to apportionment. (*Hikida, supra*, at p. 1262; Formal Rating Instructions, dated June 27, 2024.) Thus, while we agree with the WCJ that the apportionment opinions described by the QME do not constitute substantial evidence, we also note that facts of this case are also amenable to an analysis under *Hikida*. Under either rubric, defendant has not met its burden of establishing apportionment to prior industrial or nonindustrial factors. (Lab. Code, § 5705; *Escobedo, supra*, 70 Cal.Comp.Cases 604, 620.)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 13, 2025

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

ELIZABETH BUCZKOWSKI
ANHALT LAW OFFICE
GOLDMAN, MAGDALIN & STRAATSMA
EMPLOYMENT DEVELOPMENT DEPARTMENT

SAR/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

1. Applicant's Occupation: Sales Associate

   Applicant's Age on Date of Injury: (1) 58
   (2) 59

   Date of Injury: (1) October 5, 2016
   (2) Alleged January 1, 2012 – March 10, 2017

   Parts of Body Injured: (1) Left foot, left big toe, low back, complex regional pain syndrome to both lower extremities
   (2) Alleged neck, back, hips, left lower extremity, psyche

   Manner in Which Injury Occurred:
   (1) Repetitive walking, standing, stooping, lifting, as well as compensable consequences
   (2) Trash can fell onto her left foot and big

2. Identity of Petitioner: Defendant filed the petition
   Timeliness: The petition is timely filed
   Verification: The petition is properly verified

3. Date of Issuance of Joint Findings of Fact & Award & Order:
   October 7, 2024

4. Date of Transmission to the Appeals Board Pursuant to Labor Code § 5909
   November 13, 2024

5. Petitioner's Contentions:

   A. Whether the record needs to be further developed because the PQME's findings, opinions, and conclusions, upon which the court relied, are not substantial evidence;

   B. Should the PQME report constitute substantial evidence, whether non-industrial apportionment should have been found by the court;

   C. Should the PQME report constitute substantial evidence, whether a cumulative trauma injury should have been found by the court;

   D. Should the PQME report constitute substantial evidence, whether the doctor erred in assigning a Class 4 50% whole person impairment rating for station and gait, as opposed to a Class 3 provision; and

E. Whether the court erred in awarding reimbursement to the EDD.

II
FACTS

The applicant, Elizabeth Buczkowski, sustained an industrial injury on October 5, 2016 as a result of a trash can falling onto her left foot and left big toe. She also alleged an injury to her low back and in the form of complex regional pain syndrome to both lower extremities (CRPS) that was disputed by the defendant. In addition to the specific injury, the applicant also alleged a cumulative trauma (CT) industrial injury from January 1, 2012 through March 10, 2017 to her neck, back, hips, left lower extremity, and psyche. The defendant disputed the CT altogether up to the time of trial submission.

The facts are not disputed. Subsequent to the admitted specific injury, the applicant sought treatment on her own and advised Macy's of this fact. On February 23, 2017, Macy's, for the first time, five months later, referred her for treatment. She saw Dr. Robert Spencer on March 1, 2017, a foot specialist with US Healthworks, who provided work restrictions. On March 2, 2017, the defendant offered light duty with work restrictions consisting of a sit down job and no standing or walking.

That Return to Work Letter, however, is not signed by either the applicant or the employer, and it offered a position for the time period between February 24, 2017 and February 28, 2017 (i.e., dates *before* the date of the letter itself). Side-stepping this oddity, the restrictions are nonetheless clear, and the applicant's testimony supports a finding that Macy's was unable to comply with them.

Specifically, she testified that her last day of work was in March 2017. The second report of Dr. Spencer dated March 15, 2017 kept her work restrictions in place and temporary disability (TD) benefits commenced on that date.

While off work, she continued to treat with Dr. Spencer who recommended and performed left big toe surgery on September 11, 2017. She was thereafter provided with a walking boot, physical therapy, and acupuncture which did not provide symptomatic relief. The doctor nevertheless attempted to return her to work, but that lasted for only part of a day on May 18, 2018. Dr. Spencer's report dated April 25, 2018 [as reviewed in the panel qualified medical evaluator (PQME) report dated October 10, 2019] is clear and unambiguous when it states as follows: "WORK STATUS: RTW/modified duty. RESTRICTIONS: Sit-down job and must keep left foot

elevated and allow to stand as needed due to her back." He reiterated this opinion in his report dated May 23, 2018 when he said: "WORK STATUS: RTW/modified duty. RESTRICTIONS: Sit-down job and must keep left foot elevated and allow to stand as needed." Furthermore, defendant's second Return to Work letter dated April 20, 2018 reflects that the defendant offered a modified position based upon a "sit down job, keep left foot elevated, allow to stand as needed."

The applicant testified that when she returned to work, she asked for a stool or a chair, and it was denied by the store manager. Later that day, Macy's approved her leaving because of her pain and not feeling well. No witnesses from Macy's testified.

Due to worsening pain, Dr. Spencer referred the applicant to Dr. Mattar, a pain specialist, who she first saw on October 15, 2018, who diagnosed complex regional pain syndrome (CRPS).

Turning to the medical-legal portion of this claim, the parties utilized Robert Andrade, D.C. as a PQME, who issued but just one report dated July 10, 2018. In that lone report, the doctor takes a history, performs a physical examination, and review records. He concludes that the applicant had reached maximum medical improvement (MMI), has a 15% whole person impairment (WPI) to her left foot and big toe due to gait derangement, has 75% non-industrial apportionment, and should be afforded future medical care, including left big toe surgery. As reflected above, the applicant had that procedure two months after this report.

The parties did not return to Dr. Andrade but instead secured a replacement panel and utilized orthopedic PQME Luigi Galloni. This much is confirmed in Dr. Galloni's May 11, 2023 report as follows:

> On March 15, 2023, my office received a QME appointment request from the Applicant Attorney. Flor de Maria Yanez requested an evaluation for claimant Elizabeth Buczkowski. Flor de Maria Yanez indicated that I was the last provider left on the panel list after a strike process. My role therefore for this evaluation is of the Panel Qualified Medical Evaluator.

Having moved on from Dr. Andrade, Dr. Galloni thereafter issued a total of 12 PQME reports and was cross-examined once. A review of the reporting is necessary to fully address the issues at hand.

August 22, 2019 – In this initial evaluation report, the PQME takes a history and then diagnoses, among others, a lumbosacral spine strain and a strain of both hips. He had no records and requested same "…in order to assess what may be going on". Causation was not expressly provided. He also found that "[t]he patient at this point has not reached a point of maximal medical

improvement and when I receive the medical records, I probably will be able to make a better assessment of what may be going on."

October 10, 2019 – In this record review report which took him 11 hours to complete, the PQME concluded that a re-evaluation was necessary.

January 27, 2020 – In this re-evaluation report, the PQME takes a history of current complaints to her low back, hips, left foot, and left big toe, and he then diagnoses, among others, a lumbosacral spine strain, strain of both hips, and CRPS to the left lower extremity. Causation is reasonably implied when he states that past treatment is reasonable, that she needs more, that she has not achieved MMI status, and that her "…current condition is consistent with the history and physical findings." Moreover, he provides that "[c]ertainly, the patient has not reached a point of maximal medical improvement and needs to continue the treatment for complex regional pain syndrome and when that treatment is done, I will have to reevaluate the patient."

March 27, 2020 - In this record review report, the PQME reviews treatment records to the applicant's left foot and right knee. He maintains the same diagnoses and conclusions that the "…afforded treatments are medical necessary and appropriate to alleviate her symptoms to the left foot."

June 13, 2020 - In this record review report, the PQME reviews more records and finds "…that the treatments afforded for her continued symptoms were all medically necessary and reasonable [and that he concurs] with Dr. Mattar's treatment recommendations of the provision of sympathetic blocks to relieve and cure the effects of her *industrial* injury." (emphasis added)

January 25, 2021 - In this re-evaluation report, the PQME concludes as follows:

> The patient has now developed pain at the level of the right foot because of again the antalgic gait and has developed a neuroma. It is really funny to see this patient ambulating without a cane where the patient tries to ambulate on the left foot and the lateral aspect of the foot and on the right foot in the posterior aspect of the foot, because of the areas that are painful to weightbearing. Obviously the more time waited to treat the regional pain syndrome, the worse it will get and the more difficult it will be to obtain some improvement in this type of problem. Eventually it is clear that the final disability will be much worse at the end of all of this.

Moreover, the PQME took a history of a subsequent fall and the lack of treatment authorized, and he then opined that she "…remains temporarily totally disabled and remains awaiting the appropriate treatment in the hope that this will improve her condition." He goes on to

diagnose, among others, a lumbosacral spine strain and possible CRPS of the left lower extremity. Continuing with a conclusion of TTD status, the doctor then again states that "[t]he past medical treatment was appropriate and necessary with a reasonable degree on medical certainty [and that] [t]he claimant's current condition is consistent with the history and physical findings."

August 18, 2021 - In this re-evaluation report, the PQME once again takes a current history, notes her current complaints, conducts a full physical examination, and reviews the applicant's current medical reports. The diagnoses were more expansive but still included a lumbosacral spine strain and CRPS of the left lower extremity. The term "possible" that was seen in his January 25, 2021 report was removed, thereby compelling his firm diagnosis of CRPS. Additionally, the doctor now notes that the applicant has developed pain in her right foot and a neuroma because of the antalgic gait. In this report that, on its face, renders the applicant MMI, he expressly concludes on page 15 that "[c]ausation is industrial" and that:

> In the process of formulating opinions pertaining to causation, I take into account numerous factors. These include the mechanism of injury, the type of temporal onset of symptoms, the history given by the examinee, the response to various treatments, the physical examination findings, radiographic findings and the results of other pertinent objective tests, knowledge of the pathology and the pathophysiology of specific disease or injuries, knowledge of the overall health of the individual, and other pertinent information including my experience, knowledge and training.

The PQME purports to find the applicant MMI, yet he continues to state that the applicant "…is deteriorating and is getting worse and I do not understand the position of not treating a complication of the surgery as complex regional pain syndrome is one of the worst complications that can appear and certainly there is very little treatment, if any, and one of the treatments is certainly an epidural injection and blocks, which are usually performed by a pain management specialist like Dr. Mattar."

He goes on to provide that the prior PQME's opinions are not accurate and that the applicant has developed new problems. Furthermore, he clearly states that "[e]ventually it is clear that the final disability will be much worse at the end of all of this." He concludes that "[a]t this point, as the patient is being denied all treatment, I do not see any other solution but considering this patient permanent and stationary and rate her accordingly", despite his conclusion that she continues to deteriorate.

Nevertheless, the PQME provides a 7% WPI to her low back and a 15% WPI for her lower extremity gait derangement. In terms of apportionment, he states that:

> "[t]here *may be* some apportionment because of the degenerative changes at the level of the lumbosacral spine which may have favored the appearance of symptomatology due to the problems at the level of the left lower extremity. I will say that would be in the range of 20%." (emphasis added)

October 2, 2021 – In this supplemental report that results from an interrogatory from the applicant's attorney, the PQME provides that although his diagnoses are unchanged, the WPI was increased to 20% for the station and gait disorder on the basis that the prior 15% WPI was based upon Table 17-5 of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), but the current rating should be based upon Table 13-15.

March 4, 2022 - In this supplemental report that results from an interrogatory from the applicant's attorney, the PQME reiterates that his diagnoses remain unchanged and then concludes as follows:

> Based upon my review of the prior medical records and the applicant's history, I opine that there is medical probability of a specific trauma injury to the great toe while working for Macy's West Stores, Inc., on October 5, 2016. It is also my opinion that there is medical probability that the applicant developed complex regional pain syndrome that arose out of the surgery performed by the left great toe.
>
> *****
>
> It is my opinion that there is medical probability of industrial causation of a specific industrial injury to the left great toe on October 5, 2016. The applicant also developed complex regional pain syndrome as a compensable consequence of the industrial injury in the cervical spine, thoracic spine, and *lumbosacral spine* as well as the *hip and left lower extremity*. Complex regional pain syndrome (CRPS) generally remains restricted to one limb but occasionally may spread to other limbs. Her symptoms progressed with the development of neuropathic pain disproportionate to the inciting event. In this case, she had gait changes. She mechanically ambulates not in a good alignment and this will bring up the symptomatology at the level of different areas. She has now developed pain at the level of the *right foot* because of again the antalgic gait and has developed a neuroma. As noted in my prior supplemental report, the more time waited to treat the regional pain syndrome, the worse it will get and the more difficult it will be to obtain some improvement in this type of problem. (emphases added)

March 15, 2023 Deposition Testimony – During this proceeding, the PQME testified "…it is my opinion that there is no continuous trauma prior to that accident." (see p. 26, lines 7 to 9). He goes on to testify that even though the applicant worked for Macy's after the specific injury that "[t]he patient has this problem with the problem of an antalgic gait even when she was *not working* after that time. The patient all these years has been doing an aggravation of this problem because of the complex regional pain syndrome." (emphasis added). He then stated that this matter involves only one injury. (see p. 29, line 15). He also testified on page 22, lines 9 to 11 that "[t]he counselor or the insurance company is calling that continuous trauma, not Luigi Galloni."

Furthermore, the PQME testified that problems to the applicant's back and hips are derived from the toe injury (i.e., an indirect injury because "they started to come up shortly after"). The PQME maintains his position that the applicant did not sustain an industrially-related CT injury, only a specific from which her consequences relate and flow. The PQME was also asked about WPI, with relevant questioning and answering as follows (based upon work restrictions that the applicant cannot engage in standing or walking for more than 10% of the working day):

> Q. Ambulation, walking, standing, carrying, that kind of thing. So 90 percent loss. And when you go to the - - to the AMA's, it says that the impairment ratings for the station -- the criteria for rating impairments of station, gait, and movement disorders, page 336, 13.5 table - - 1315. Table 1315. You use 20 percent, which is Class 3 at the lowest. The lowest. But this lady has 90 percent loss of her ability to stand and walk. And the criteria on this guideline states that, for impairment ratings where gait and station disorders are determined according to the effect of ambulation. To the effect on ambulation. So the effect on ambulation in our case is 90 percent loss.
>
> Why using 20 percent, which is the lowest of the range and not 39, which is the highest of the range? Because if we go over 90, we go to Class 4. In other words, the guidelines tell you that to rate and to find a rating for station and gait disorder, you have to determine the effects on ambulation. That's on page
> 336. Third paragraph. To the right side of the page. That's my only concern, Doctor --
>
> A. Okay. That is what I ask you for. Please send me a letter requesting the changes that you want to be evaluated, and I would be pleased to send you to (sic) a supplemental report. But I'm going to tell you -- I'm going to tell you that probably what would be best would be to reevaluate the patient. Because anyhow this report is -- how old is this -- is two years almost. I mean, a year and a half. And though
>
> Q. Two years. Yeah, two years.

> A. Two years. And the patient obviously must have changed during those two years. There is – we need to rate the right foot as well. So I think that the best thing would be to reevaluate the patient and issue a second supplemental report.
>
> By the way, if eventually this patient is going to have a spine stimulator, it's going to have to be a third rating because that will change the picture all together. Because that will require surgical procedure. And then, you know, this case is going to be a major, major problem.

May 6, 2022 - In this record review report, the PQME reiterates his conclusions set forth in his March 4, 2022 report and that his diagnoses are unchanged. He does not address WPI or apportionment.

May 11, 2023 - In this final re-evaluation report, the PQME takes a current history, notes complaints, reviews current medical records and then without question, more poignantly, comments as follows:

> This very pleasant female unfortunately continues to have problems and certainly, somebody who develops complex regional pain syndrome is not expected to improve mostly. I do not understand why the sympathetic blocks have been denied and also why it has been denied the possible implantation of a spinal cord stimulator as these are the typical treatment of complex regional pain syndrome. I think that the sympathetic blocks should be performed before that as if the claimant will have enough resolution of symptomatology. I think that the implantation of the spinal stimulator should be weighed and as a protocol, the implantation of the spinal cord stimulation is not done without a psychological evaluation as there are psychological involvements of the complex regional pain syndrome, and not every patient is a candidate. This claimant sustained the injury to the foot at a later date because of the problems with the ambulation the claimant felt and sustained problems at the level of the cervical spine, shoulder, and lumbosacral spine. So all of these areas are due consequently to the injury that the claimant had at the level of the foot. The claimant uses a cane and uses the cane practically 24/7. When the claimant does not use the cane, the claimant is seen in the office, moving around holding onto anything that she can reach, the wall, the chair, and the bed, so that she can ambulate. Because of overloading the right side, the claimant has developed a neuroma on the right foot and possible complex regional pain syndrome. Complex regional pain syndrome once it affects one area it is not unusual to see the complex regional pain syndrome moving around to other areas and certainly, there is nothing that can control this.

Causation to the low back and both lower extremities is clear. The PQME renders her MMI, and he now allows for the same 7% WPI to her low back and the same 20% WPI for station and gait derangement based upon Table 13-15.

June 20, 2023 - In this supplemental report that results from an interrogatory from the applicant's attorney and includes the PQME's deposition transcript, the PQME first provides for "unchanged diagnoses" and no further changes to causation. But in terms of the PD, the change is significant and is contained under the caption of "discussion" as follows:

> The applicant attorney letter indicates, "with respect to the assigned whole person impairment given to Ms. Buczkowski in the lowest range of Class 3 in Table 13-15 of the AMA *Guides,* that only requires difficulty and assistance to rise and maintain the standing position. The need for an assistive device for support falls only in Class 4."
>
> Prior to responding to the issue raised, I revisited all my previous reports.
>
> Per my Re-evaluation on May 11, 2023, the applicant use a cane on the right hand. She has an uneven gait as a result of her back and left foot/big toe injury.
>
> Under Activities of Daily Living, page 6 the applicant has difficulty standing, walking, and climbing.
>
> On my examination, page 10, the applicant has a severely antalgic gait. The gait is laborious because she has pain now on the right foot as well. This also affects the gait with the cane because of the pain he has also on the right side.
>
> In my discussion, page 25, I noted that the applicant uses the cane practically 24/7. When she does not use the case, she is seen in the office moving around holding onto anything that she can reach, the wall, the chair, and the bed so that she can ambulate.
>
> The applicant is not currently working and in the report of Dr. Le dated April 19, 2023, she should be sitting 80% of the time, sit and stand as tolerated.
>
> Given the applicant's severely antalgic gait and current condition as stated above, I would like to amend my previous impairment rating. I believe that the applicant accurately fits Class 4 with 40-60% impairment of the whole person, per Table 13-15 on page 336. The applicant cannot stand without ambulation (uses a cane), yet she requires other objects when moving around (holding onto anything that she can reach) to be able to ambulate. With this, I amend my previous gait derangement rating of 30% whole person impairment (WPI), Class 3 to 50% whole person impairment (WPI), Class 4.

There are no further PQME reports, and no party, including the defendant, challenged the findings or conclusions of this final report by way of interrogatory or cross-examination.

Over a month later on July 31, 2023, because informal resolution could not be achieved, the applicant filed a Declaration of Readiness to Proceed (DOR). No objection was filed, and at the October 31, 2023 Mandatory Settlement Conference (MSC), the parties jointly requested a trial date. The first trial day was held on January 22, 2024, but given the lack of compliance with exhibits being filed, only the stipulations and issues were read into the record. The second day of trial on May 22, 2024 resulted in the admission of evidence and then a continuance due to the parties requesting further time to informally resolve the case.

By the third trial date on June 24, 2024, settlement was not possible, and thus testimony was secured from the applicant only. Not only did she testify as set forth above, she also testified, under cross- examination, that she experienced back pain with radiculopathy prior to her specific injury, but she denied any kind of plantar fasciitis, left foot, or left heel pain prior to the specific injury. She was confronted with medical records from Healthcare Partners which contradicted her testimony and demonstrated prior symptoms and testing. She also testified that after her specific injury and before her last day of work in March 2017 her pain got worse, and she felt it was because she was on her feet at her job. Upon completion of the applicant's testimony, the matter was submitted.

Based upon the court's rating instructions, the Disability Evaluation Unit (DEU) produced a 79% recommended permanent disability rating. The defendant lodged a timely objection and requested cross-examination of the Disability Evaluator (rater). On October 2, 2024 the parties cross-examined the DEU rater. In terms of the CRPS rating instruction at 50% WPI, the rater testified that the 50% WPI was rated and taken at face value due to that being the court's specific instruction. The rater stood by her recommendation of 79% PD, and the matter was again submitted for decision.

On October 4, 2024, the court issued its Joint Findings of Fact & Award & Order based upon the PQME conclusions of Dr. Galloni to the effect, in relevant part, that the applicant sustained injury arising and out and during the course of employment (AOE/COE) on October 5, 2016 to her left foot, left big toe, low back, and in the form of complex regional pain syndrome to both lower extremities, that she did not sustain an industrial CT injury, that she was temporarily disabled for the period March 10, 2017 through May 11, 2023, less credit for TD benefits paid,

time worked, and EDD benefits paid (subject to Labor Code § 4656 and less reasonable attorney fees), that she was entitled to an unapportioned 79% permanent disability (PD) award, and that the EDD was entitled to recover for sums paid from March 18, 2017 through September 9, 2017 plus interest.

It is from these findings that the defendant seeks reconsideration in arguing that the record requires further development in that the PQME reporting is not substantial evidence, and assuming it is, then the court should have found non-industrial apportionment and a CT injury. Furthermore, the defendant argues that the PQME erred in assigning a Class 4 50% whole person impairment rating (and that the applicant actually falls into a Class 3 range), that the EDD should not be reimbursed, and that the findings of fact and orders are such that there is uncertainty as to what is owed the EDD.

III
DISCUSSION

A. THE PQME'S FINDINGS, OPINIONS, AND CONCLUSIONS, UPON WHICH THE COURT RELIED, ARE SUBSTANTIAL EVIDENCE, AND THE RECORD NEED NOT BE FURTHER DEVELOPED.

The defendant argues in favor of developing the record due to the allegation that the PQME's reports do not constitute substantial evidence on the basis that the applicant did not provide an accurate history to the doctor, that the PQME fails to understand the legal principles of a CT and apportionment, and that his reports do not justify using Table 13-15 of the AMA Guides (a table that justifies a WPI between 40% and 60%). The court disagrees for not only substantive but procedural reasons as well.

Dr. Galloni issued 12 medical reports consisting of five evaluations, four record reviews, and three supplemental reports as a result of interrogatories. He was also cross-examined for nearly a full hour. During that cross-examination, the PQME recommended a re-evaluation and an interrogatory to address the concerns raised by the parties. Both were accomplished. In the end, the doctor issued his final conclusions by way of his reports dated May 11, 2023 and June 20, 2023. Over a month later, the applicant filed a DOR. It was not objected to, and the MSC resulted in a *joint* motion to set the matter for trial. At no time after the final report did the defendant seek

a supplemental report by way of an interrogatory or seek to cross-examine the PQME. The defendant, for the first time on appeal, makes the argument to reopen the record on the basis that the PQME is flawed. The attempt to do so should be denied.

Workers' compensation laws shall be carried out "…to the end that the administration of such legislation shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." *California Constitution, article XIV, section 4.* Here, we have a case involving a date of injury that is now over eight years old with the PQME addressing the issues at hand on 13 different occasions (i.e., 12 reports and one cross-examination). For the defendant to argue that further discovery is warranted, after eight years, 12 reports, and a cross-examination, contravenes the basic foundation of our state's constitutional mandate.

Nonetheless, it is true that there may be cases where the court has a duty to further develop the record in the absence of sufficient evidence on an issue, or when the record does not contain substantial evidence, or when it is appropriate to provide due process, or when it is appropriate to fully adjudicate the issues. *McClune v. WCAB* (1998) 62 Cal.App.4th 1117, 63 CCC 261; *Tyler v. WCAB* (1997) 56 Cal.App.4th 389, 62 CCC 924. It is also true, however, that when 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]; *Velma Lankster v. WCAB* (2023) 88 Cal. Comp. Cases 1076, 2023 Cal. Wrk. Comp. LEXIS 53 (writ denied). The WCJ may not order further discovery if it is not needed. *Townsend v. Combined Insurance Co.,* (2013) Cal. Wrk. Comp. P.D. LEXIS 342. This matter is clear. The parties asked the PQME over and over again about the issues at hand (i.e., causation, parts of body, TD, MMI, PD, and apportionment). The issues are not complicated, as the defendant suggests. The true problem that the defendant has with this case is its value. The PQME made clear throughout his reports that treatment is needed or else the CRPS findings will worsen and will spread from the left lower extremity to her right. That is what happened. The court will not speculate as to why such treatment was not authorized or provided, but the fact of the matter is that the applicant has worsened because of it.

Regardless, at the time the DOR was filed and the MSC held, the defendant had no issue setting the case for trial, preparing a Pre-Trial Conference Statement (PTCS), and closing

discovery. There was no motion whatsoever at either of those events, or at any of the trial days either, to move for an order taking the matter off calendar for further discovery. The defendant sought a finding on the original PQME of Dr. Robert Andrade. Given that his report was stale, it certainly was insubstantial evidence. The defendant wants the court to rescue them. Such a rescue is unwarranted and should be denied. The defendant had the opportunity to present all medical reports and all subpoenaed records, and they had the opportunity to cross-examine the applicant and produce their own witnesses. From a procedural standpoint, based upon the defendant's agreement to seek a trial without any objection whatsoever, and having secured 13 written opinions and conclusions from the PQME over the course of this eight-year claim, the defendant's request to develop the record should be denied.

Turning to the defendant's substantive arguments, it is well settled that 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, 39 CCC 310; *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. 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, 39 CCC 310; *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. Medical opinions are not substantial evidence if based upon facts that are no longer germane, an inadequate medical history or examination, an incorrect legal theory, or on 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 v. WCAB* (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. In our situation, we have a single PQME report by the prior PQME, Dr. Robert Andrade dated July 10, 2018. Although the defendant does not argue in favor of a finding on Dr. Andrade's report in its Petition for Reconsideration, it did argue for such a finding during the trial proceedings. Subsequent to Dr. Andrade's evaluation, the applicant underwent left big toe surgery, was prescribed a walking boot, developed CRPS first in her left lower extremity and then in her

right lower extremity, saw her condition deteriorate throughout the years. The applicant's testimony was credible and unrebutted in this regard. As the years had passed, the applicant became reliant upon her cane at almost all times – "practically 24/7" as noted by the PQME. As early as August 18, 2021, the PQME opines that should treatment not be provided to the applicant, she would deteriorate and her disability would worsen. Such is the case. The conclusions that do not constitute substantial evidence are those of Dr. Andrade, not those of Dr. Galloni.

The board must accept as true a witness' testimony if it is both uncontradicted and unimpeached. *McAllister v. WCAB* (1968) 33 CCC 660, 662; *LeVesque v. WCAB* (1970) 35 CCC 16, 26; *Lamb v. WCAB* (1974) 39 CCC 310, 314; *Western Electric Co. v. WCAB (Smith)* (1979) 44 CCC 1145, 1152; *San Amico v. WCAB* (1974) 39 CCC 845. In the case at bar, the applicant was the only witness to testify. No one from Macy's presented themselves in order to contest the applicant's allegations surrounding her complaints or work history. But that fact alone is not the final say.

It remains true that even if the applicant is the only witness, the appeals board is not required to accept their testimony. See *Alexander v. WCAB* (1968) 33 CCC 341, 343; *Carpenter v. IAC* (1965) 30 CCC 264 (writ denied). The board is free to disbelieve an applicant's testimony, even though it is uncontradicted by other witnesses, if there is a rational reason for doing so and it does not act arbitrarily. Careful cross-examination may be used to challenge an applicant's credibility, which also may be impeached by the medical record. [*Kocalis v. WCAB* (1997) 62 CCC 1299 (writ denied); *Garcia v. WCAB* (2014) 79 CCC 356 (writ denied)].

In our case, the defendant correctly points out that the applicant did not admit to prior symptoms and pain involving her left foot to the PQME. But that defect was cured because the subpoenaed medical records demonstrating such were forwarded to and reviewed by the PQME. And in fact, those are the records that support the defendant' argument that non-industrial apportionment should be found.

Had the PQME not reviewed those records, an argument could be made that the PQME's report contains a false and inaccurate history and thus does not constitute substantial evidence. But those are not the facts before us. The PQME *does* review those records, and as a result, he knows all about the applicant's prior symptoms and complaints. Even if the applicant herself failed to disclose those prior issues to the PQME or to the trial court, the records will impeach her, at best, but that is all.

Given the admitted nature of this injury, those records would be relevant to apportionment only, not causation. The PQME has a complete and accurate history as a result of evaluating the applicant five times, reviewing all treating doctor reports, and reviewing all subpoenaed records. His report is substantial evidence.

In terms of his finding no CT injury, his opinions also constitute substantial evidence. Preliminarily, however, it must be stated that the defendant had denied injury AOE/COE for the plead CT claim. They now, for the first time on appeal, seek to argue that one should be found by the PQME. The argument should be denied on this ground alone. Aside from that, however, the PQME is clear in finding no CT. Not only do his reports support such a conclusion, so does his testimony. During cross-examination, he testified that it was opinion that here was no CT prior to the specific injury.

He went on to testify that even though the applicant worked for Macy's after the specific injury, he rejects the notion of injurious exposure during that time period because the applicant's problem of an antalgic gait continued even when she was *not working* after that time, and in fact she developed CRPS and has continued to deteriorate without any work exposure at all. The doctor went on to conclude that her back and hips are derived from the toe injury (i.e., an indirect injury because "they started to come up shortly after"). The PQME unambiguously concludes that the applicant did not sustain a work-related CT injury; she sustained only a specific injury from which her consequences relate and flow. Inasmuch as the question of injury AOE/COE and injurious exposure are left to the PQME to decide, the PQME's opinion should not be disturbed on appeal. His report constitutes substantial evidence in this regard.

B. THE NON-INDUSTRIAL APPORTIONMENT AFFORDED BY THE PQME WAS ILLEGAL AND IMPROPER, AND THUS SHOULD NOT HAVE BEEN FOUND BY THE COURT.

The defendant argues that the non-industrial apportionment found by the PQME should be allowed, if it is found the reports constitute substantial evidence. The court disagrees. The court, as reflected herein, finds that the PQME's reports indeed constitute substantial evidence because of the multiple evaluations, the thoroughness exhibited by the PQME, and the review of all medical and subpoenaed records. The doctor found that 20% of the applicant's low back and lower extremity PD should be apportioned to non-industrial factors. This came as a result of reviewing

the applicant's prior medical records. But even though the PQME had a complete history of the applicant's complaints and symptoms over the years, he failed to *legally and properly* apportion to non-industrial factors.

"The burden of proof rests on the party or lien claimant holding the affirmative of the issue." *Labor Code* § 5705. To meet its burden, a party is required to prove each fact supporting its claim by a preponderance of the evidence. "'Preponderance of the evidence' means that evidence that when weighed with that opposed to it, has more convincing force and the greater probability of truth." *Labor Code* § 3202.5. The defendant has the burden of proof as to apportionment as well as proving the percentage of permanent disability caused by factors other than the injury. *Escobedo v. Marshalls* (2005) 70 CCC 604, 613-14 (appeals board *en banc*); *Pullman Kellogg v. WCAB (Normand)* (1980) 45 CCC 170.

Labor Code § 4663 mandates that permanent disability "shall" be apportioned. See *County of Santa Clara v. WCAB (Justice)* (2020) 85 CCC 467. As set forth in *Labor Code* § 15 "shall" is mandatory and "may" is permissive. Moreover, 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 court, in that case, was concerned with the non-physicians replacing the medical experts' opinions with their own.

In the case of *Escobedo v. Marshalls* (2005) 70 CCC 604, the WCAB en banc held that apportionment of permanent disability based on "causation" pursuant to Labor Code § 4663 refers to the causation of the applicant's permanent disability, not causation of the injury. As such, the board held that apportionment to pathology, an asymptomatic prior condition, or even a retroactive prophylactic work restriction is legal. The Board's findings were supported and specifically adopted by the Court of Appeal in *E.L. Yeager Construction v. WCAB (Gatten)* (2006) 71 CCC 1687. In the case of *Kos v. WCAB* (2008) 73 CCC 529 (writ denied), the Fifth District Court of Appeal, upheld a decision holding that the proper test for legal apportionment under Labor Code § 4663 is no longer whether the applicant would now have permanent disability at the time of the injury. In a February 25, 2022 decision, WCAB panel in reasoned that the doctor must explain the basis for apportionment. If there is no explanation, then the apportionment will fail. See *City of San Jose Human Resources Department v. WCAB (Junge)* (2022) 87 CCC 502 (writ denied). And

in the case of *Burton v. WCAB* (2009) 74 CCC 775 (writ denied) where the AME's apportionment to degenerative asymptomatic pathology was found to constitute substantial evidence, even though it was somewhat conclusory. The WCAB went on to hold that when the report was read as a whole, and in conjunction with applicant's deposition testimony, there was sufficient explanation to substantiate the AME's opinion.

On the other hand, the legal trend is that the medical practitioner must explain "how" and why" the nonindustrial condition would have produced disability. Furthermore, 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 v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 280–281, 113 Cal.Rptr. 162, 520 P.2d 978, 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.*

In the writ denied case of *DeGaribaldo v. WCAB* (2008) 73 CCC 508, to be substantial evidence, a medical report must disclose familiarity with concepts of apportionment, describe in detail the exact nature of apportionable disability, and set forth the basis for the opinion. A plethora of cases have concluded similarly, i.e., a doctor cannot make a mere conclusion; he or she must explain the "how" and the "why" as mandated by *Escobedo*. Whether the physician accomplishes same is the defendant's burden of proof. *Escobedo, supra; Pullman Kellogg v. WCAB (Normand)* (1980) 45 CCC 170.

The defendant argues that the apportionment should not be doomed just because the PQME failed to use the actual verbiage of "how" and "why". It is not, however, the failure to use these buzz words that renders the non-industrial apportionment invalid. In fact, had the PQME merely added these words, the apportionment would still fail. On their face, the PQME reports dated August 18, 2021 and May 11, 2023 allow for 20% apportionment to the applicant's back and left great toe/foot. The medical records offered by defendant (i.e., those of Dr. Benedict Ching, Healthcare Partners, and New Hope Imaging Center) discuss various alleged nonindustrial or prior complaints consisting of a slight bunion on her left foot, a plantar heel spur, a diagnosis of plantar fasciitis, varicose veins, painful veins, a referral to a vascular surgeon for her varicose veins, a bilateral venous Doppler test that was performed, an x-ray reflecting a moderate-sized plantar spur, and degenerative osteoarthrosis of her first metatarsophalangeal joint, subchondrol

cysts/osteoarthritis along the great toe metatarsophalangeal joint and medial to the implant with edema and inflammation.

The applicant, in this case, was not terribly credible when it came to defendant's questions about her prior lower extremity issues. She basically denied telling doctors that she had prior problems, despite the records reflecting such prior complaints. In short, she was impeached, although she also said she would not doubt the records. Dr. Galloni's reasoning as to the 20% nonindustrial apportionment, however, is not supported by the current, correct legal standard.

The two reports that discuss apportionment are those dated August 18, 2021 and May 11, 2023. The first is a fictional MMI report during a time when the applicant's condition was worsening, when she needed treatment, and when treatment was denied. Nonetheless, for sake of argument, the PQME provides:

> There *may be* some apportionment because of the degenerative changes at the level of the lumbosacral spine which *may have* favored the appearance of symptomatology due to the problems at the level of the left lower extremity. I *will say* that would be in the *range of* 20%. (emphases added)
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> Under SB899 (Escobedo) however, apportionment now can be based on non-industrial pathology, if it can be demonstrated by substantial medical evidence that the non-industrial pathology has caused permanent disability.
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> To be substantial evidence on the issue of apportionment, the medical report must be framed in terms of reasonable medical probability and must not be speculative. My report is based upon the pertinent facts and after adequate examination and history I have set forth my reasoning in support of my conclusions, this is required by the Escobedo decision.

The doctor's opinion is conclusory and haphazard about the concept of apportionment. To include verbiage such as "may" and "range" does not allow his opinion to be framed in terms of reasonable medical probability. It might very well be the case that apportionment is "possible", but that is not the appropriate legal standard. There is, furthermore, no attempt to explain "how" and "why" her degenerative changes produced any disability at all, let alone 20%.

In the second report dated May 11, 2023 the apportionment analysis is as follows:

> There, is apportionment again because of the degenerative changes that were present at the level of the great toe and were present at the level of the lumbosacral spine, and cervical, spine. There is apportionment of 20%.

Once again the analysis is conclusory. Regardless of any diagnostic testing, the doctor cannot make a mere conclusion. Here, there is no explanation whatsoever and no attempt at all to explain the required "how" and "why" as required.

The apportionment to all parts of body fails; the defendant has not met their burden of proof.

C. THERE IS SUFFICIENT AND SUBSTANTIAL EVIDENCE THAT NO CUMULATIVE TRAUMA INJURY OCCURRED.

The defendant next argues in favor of a CT finding by pointing out that the applicant worked after her specific injury and was symptomatic. The defendant's position is at odds with the position it took during the trial that no CT injury occurred. The PTCS clearly reflects the defendant's posit[i]on that injury AOE/COE was disputed when it came to the CT. Aside from that, however, nowhere does the PQME find a CT injury to have occurred. In fact he is clear and unambiguous in finding only a specific injury, and that the consequences afterwards are a direct result thereof.

As set forth above, his reports support such a conclusion. So does his testimony wherein he opined that there was no CT both prior to and after the specific injury. The doctor explained that just because she was symptomatic after returning to work from her specific injury, work did not produce any injurious exposure because the applicant's antalgic gait problem continued even when she was *not working* after that time. He went on to explain that she developed CRPS and has continued to deteriorate without any work exposure at all. In terms of her back and hips, the PQME explained that those injuries derive from her toe injury because "they started to come up shortly after". The PQME unambiguously concluded that the applicant did not sustain a work-related CT injury; she sustained only a specific injury from which her consequences relate and flow.

Although the defendant seeks reconsideration on the ground that significant evidence supports a CT, the defendant had its opportunity during the last eight year of this claim to change the PQME's mind. They did not do so, and any theory of a CT is now concluded. The PQME is clear.

D. THE PQME DID NOT ERR IN ASSIGNING A CLASS 4 50% WHOLE PERSON IMPAIRMENT RATING, AS OPPOSED TO A CLASS 3 PROVISION, FOR STATION AND GAIT.

The defendant contends that the PQME was "mixed up" over which WPI Class to apply. The court disagrees. Preliminarily, however, the defendant seeks to have the applicant placed from a Class 4 (WPI between 40% and 60% WPI) and into a Class 3 (20%-39%). In order to do that though, since the PQME has not provided a set WPI figure, the record would have to be reopened and the defendant again "rescued". There is no good cause to do so. The defendant had the opportunity to seek clarification and ask the doctor if he was mixed up by way of an interrogatory or by way of cross-examination. They did neither. They did not object to the applicant's DOR that was filed about five weeks after the PQME's final report. They did not object to the MSC moving forward to trial; in fact, they made a joint request to set the matter for trial and close discovery. The defendant cannot now be heard to complain of the PQME's opinion when it had every right to question same but neglected to do so.

As to the substance, the PQME is clear. He said many times that the applicant's condition was deteriorating, and she would get worse if treatment was not provided. Treatment was not, and indeed the applicant got worse. Her need for a cane "practically 24/7" developed. She had to hold onto walls and anything else to ambulate in the PQME's office. The objective findings supported same. The applicant developed CRPS in her left lower extremity, and it thereafter spread to her right lower extremity.

The AMA Guides' Class 3 description is: "Rises and maintains standing position with difficulty; cannot walk without assistance." The AMA Guides' Class 4 description is: Cannot stand without help, mechanical support, and/or an assistive device."

The PQME conducted the physical examination. It is the PQME who assigns the WPI. There is no suggestion that Class 3 is appropriate. His final report, unquestioned by the defendant until now is as follows:

> Given the applicant's severely antalgic gait and current condition as stated above, I would like to amend my previous impairment rating. I believe that the applicant accurately fits Class 4 with 40-60% impairment of the whole person, per Table 13-15 on page 336. The applicant cannot stand without ambulation (uses a cane), yet she requires other objects when moving around (holding onto anything that she can reach) to be able to ambulate. With this, I amend my previous gait derangement rating of 30% whole person impairment (WPI), Class 3 to 50% whole person impairment (WPI), Class 4.

If the defendant had an issue with this classification, then the defendant could have argued its position with the PQME. They did not, and there is no reason to rebut and question the Class 4.

The physical examination and the applicant's condition nevertheless support the Class 4 50% finding.

E. THE COURT DID NOT ERR IN AWARDING REIMBURSEMENT TO THE EDD, AND THE FINDINGS ARE CLEAR AS TO WHAT IS OWED.

The defendant's final issue surrounds the court's TD finding, which also allows for reimbursement to the EDD. The defendant takes the position that because the EDD was not present at trial and did not introduce exhibits, its lien must be denied. The court feels otherwise. During the four trial dates, it is true that the EDD representative did not enter a formal appearance. But that is because one was unnecessary. The parties had already stipulated to the payments made when it placed the lien at issue. On day one, the parties stipulated to the TD paid, the PD paid, and the EDD benefits paid.

Both parties stipulated that the EDD paid benefits from "March 18, 2017 to September 9, 2017 at $389 per week for a total of $9,780.58." The defendant argues that the EDD did not offer its lien into evidence and even if it had, that the mere filing of only a lien is not sufficient proof. Again, however, no such lien or evidence was necessary since the parties agreed as to the rate, time period, and total paid by the EDD. The defendant knew exactly what the EDD paid; there was no question. The EDD's period of payment is supported by the PQME reports, and the parties were aware of the EDD's payments, contrary to the defendant's assertion that they did not know how much the EDD actually paid. The only issue was whether the EDD was entitled to reimbursement. Based upon the medical evidence, they are.

As to the alleged uncertainty that the defendant claims in Findings of Fact numbers 6 and 11, those findings are as follows:

> 6. The applicant was temporarily disabled for the period March 10, 2017 through May 11, 2023, payable at the rate of $452.12, less credit for temporary disability benefits paid, less credit for time worked, and less credit for EDD benefits paid, subject to Labor Code § 4656, and less reasonable attorney fees.
>
> 11. The Employment Development Department is entitled to recover for sums paid from March 18, 2017 through September 9, 2017, at the rate of $389.00 per week, plus applicable interest.

When read together, the findings are clear as to the EDD payment. The parties stipulated that the applicant's TD rate was $452.12, and so the EDD rate, being less than that, is to be reimbursed

in full. The EDD clearly paid within the 104 week period (since they paid right after the applicant's last day of work), and thus the period is without question as well. The defendant needs to include interest to the EDD. The findings do not create uncertainty. Payment to the EDD is warranted and based upon the medical evidence.

IV

RECOMMENDATION

It is respectfully recommended that the Defendant's Petition for Reconsideration dated October 31, 2024 be Denied.

DATE: November 10, 2024

TODD T. KELLY
WORKERS' COMPENSATION JUDGE