WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

EVYETTE GAINES, *Applicant*

vs.

RIVERSIDE UNIVERSITY HEALTH SYSTEM, permissibly self-insured, *Defendant*

Adjudication Number: ADJ15875626
Riverside District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the April 11, 2025 Findings, Award, and Orders (FA&O) wherein the workers' compensation administrative law judge (WCJ) found, in relevant part, that "with the exception of apportionment[,]" the reporting of panel Qualified Medical Evaluator (PQME), Dr. Albert Simpkins, is substantial medical evidence and that applicant, while employed by defendant as an eligibility specialist II during the period from November 11, 2001 to March 3, 2022, sustained injury arising out of and in the course of employment (AOE/COE) to the cervical spine, lumbar spine, and psyche with a resulting 38% permanent disability and need for future medical to the cervical and lumbar spine. (FA&O, p. 1.)

Defendant contends that based upon medicals in the record, the apportionment findings of Dr. Simpkins are in fact substantial medical evidence and in accordance with *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc). Defendant further contends that the WCJ "substituted lay opinion for unrebutted medical evidence" and "misapplied *Yeager* and *Escobedo*." (Petition, p. 3.)

We have not received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition for Reconsideration (Petition) be denied.

We have considered the Petition and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will deny the Petition.

FACTS

Applicant claimed that, while employed by defendant as an eligibility specialist during the period from November 11, 2001 through March 3, 2022, she sustained injury AOE/COE to psyche, head (headaches), sleep issues, internal body system (high cholesterol), cervical spine, lumbar spine, bilateral arms, right shoulder, left leg, left foot, and psyche.

The parties retained Dr. Albert Simpkins as the orthopedic PQME. In a report dated June 11, 2024, Dr. Simpkins found 25% whole person impairment to the cervical spine and 8% whole person impairment to the lumbar spine with 45% apportionment to age related degeneration and preexisting injury for the cervical spine. (Joint Exhibit 1, pp. 16-18, 20.) Future medical was recommended for both the cervical and lumbar spine. (*Id*. at p. 19.) Dr. Simpkins did not find injury AOE/COE for the right shoulder or left foot.

On November 13, 2024, defendant filed a Declaration of Readiness to Proceed to a mandatory settlement conference on the issues of temporary and permanent disability, apportionment, and future medical.

On February 12, 2025, the matter proceeded to Trial on the issues of body parts injured, permanent disability, apportionment, need for future medical, necessity of an additional QME panel in neurology, need for a reevaluation by Dr. Simpkins, and an employment development department (EDD) lien.

On April 11, 2025, the WCJ issued an FA&O wherein the WCJ found, in relevant part, that "with the exception of apportionment[,]" the reporting of PQME, Dr. Simpkins, was substantial medical evidence and that applicant, while employed by defendant as an eligibility specialist II during the period from November 11, 2001 to March 3, 2022, sustained injury AOE/COE to the cervical spine, lumbar spine, and psyche with a resulting 38% permanent disability and need for future medical to the cervical and lumbar spine. (FA&O, p. 1.)

DISCUSSION

I.

Preliminarily, 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

[1] All further statutory references will be to the Labor Code unless otherwise indicated.

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.
>
> (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 under the Events tab 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 April 30, 2025, and 60 days from the date of transmission is June 29, 2025, which is a Sunday. The next business day that is 60 days from the date of transmission is Monday, June 30, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision was issued by or on June 30, 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 shall constitute notice of transmission.

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

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

Here, according to the proof of service for the Report, it was served on April 30, 2025, and the case was transmitted to the Appeals Board on April 30, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on April 30, 2025.

II.

Turning now to the merits of the Petition, it is well established that defendant carries the burden of proof on the issue of apportionment. (Lab. Code, § 5705; *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo*, *supra*, at p. 613.) To meet this burden, defendant "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, *supra*, at p. 620.)

Ultimately, "[a]pportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay*, *supra*, at p. 564.) The WCJ has the authority to determine the appropriate amount of apportionment, if any. Any decision issued by a WCJ, however, must be based upon substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].)

"The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) In *Escobedo*, the Appeals Board outlined the following requirements for substantial evidence on the issue of apportionment:

> "[I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that

> the Board can determine whether the physician is properly apportioning under correct legal principles. (citations.)
>
> Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions."

(*Escobedo*, *supra*, at p. 621.)

Pursuant to *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687], "[a] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (citations.) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (citation.)" "A medical report which lacks a relevant factual basis cannot rise to a higher level than its own inadequate premises. Such reports do not constitute substantial evidence to support a denial of benefits. (citation.)" (*Kyle v. Workers' Comp. Appeals Bd* (*City and County of San Francisco*) (1987) 195 Cal.App.3d 614, 621.)

In the instant matter, Dr. Simpkins indicated that for the cervical spine, he would apportion "25% of the current level of impairment to the presence of age-related degeneration, 20% of the current level of impairment to preexisting injury, and 55% of the current level of impairment to the direct result of the injuries arising out of and occurring in the course of her employment on a continuous trauma basis." (Exhibit 1, p. 20.) Dr. Simpkins explained that "available diagnostic studies reveal[ed] moderate to severe spondylosis" and that "at least two MVAs" resulted in "injury to the cervical spine[.]" (*Ibid*.) Reference to the specific dates and findings of the alleged studies were not indicated. Specifics regarding the dates of the MVAs and corresponding injuries and diagnoses were also not provided.

As noted above, a medical opinion proffered as substantial evidence must set forth reasoning in support of its conclusions and not be speculative. (*Gatten*, *supra*, at pp. 922, 928; *Escobedo*, *supra*, at p. 604.) Given the lack of reasoning in Dr. Simpkins's apportionment findings, we agree that Dr. Simpkins's opinions are "conclusory" and not written in accordance with requirements outlined in *Escobedo* and *Gatten*. (Opinion on Decision, p. 4.)

Defendant alleges that Dr. Simpkins "reviewed over 4000 pages of records" and "identified age-related degeneration (via imaging), prior trauma (MVAs), and documented treatment (Kaiser) as nonindustrial contributors." (Petition, p. 3.) We find defendant's statements to be disingenuous. Although Dr. Simpkins reviewed extensive records, including diagnostics, subpoenaed medicals, and information pertaining to prior motor vehicle accidents, specific references to the said records were not made by Dr. Simpkins with respect to his discussion on apportionment in his June 11, 2024 report.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the April 11, 2025 Findings, Award, and Orders is **DENIED.**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

I DISSENT,

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 30, 2025

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

EVYETTE GAINES
ABRAMSON LABOR GROUP
LAW OFFICES OF PARKER & IRWIN
EMPLOYMENT DEVELOPMENT DEPARTMENT

RL/*cs*

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

DISSENTING OPINION OF COMMISSIONER JOSÉ RAZO

I respectfully dissent. I would have granted the Petition for Reconsideration to rescind and substitute the April 11, 2025 Findings, Award, and Orders to reflect that the apportionment findings of orthopedic PQME, Dr. Albert Simpkins, are in fact substantial medical evidence.

Labor Code section 4663 sets out the requirements for apportionment of permanent disability. It provides, in relevant part, as follows:

> (a) Apportionment of permanent disability shall be based on causation.
>
> (b) Any physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall in that report address 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, it 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. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(Lab. Code, § 4663.)

Further, the Court in *Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72 Cal.Comp.Cases 565] explained that "the new approach to apportionment [since the April 19, 2004 adoption of Senate Bill 899] is to look at the current disability and parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the amount directly caused by the current industrial source. This approach requires thorough consideration of past injuries, not disregard of them."

In the instant matter, Dr. Simpkins apportions "25% of the current level of impairment to the presence of age-related degeneration, 20% of the current level of impairment to preexisting injury, and 55% of the current level of impairment to the direct result of the injuries arising out of

and occurring in the course of her employment on a continuous trauma basis." (Exhibit 1, p. 20.) These findings are in accordance with section *4663* and *Brodie*.

As noted in the majority opinion, any medical opinion, including those concerning apportionment, must also be based upon substantial evidence. "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion…It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) Moreover, medical opinions proffered as substantial evidence should be framed in terms of reasonable medical probability, be based on pertinent facts, an adequate examination, and history, set forth reasoning in support of its conclusions, and not be speculative. (*E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *Escobedo v. Marshalls* (*Escobedo*) (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Reasonable medical probability, however, does not require that applicant prove causation by "scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700- 1701 [58 Cal.Comp.Cases 313].)

The WCJ argues that Dr. Simpkins's findings contain "very little analysis and no documentation of the reasoning or facts." (Report, p. 4.) In his June 11, 2024 report, however, Dr. Simpkins explains that "diagnostic studies reveal mild to moderate spondylosis, an umbrella term of different forms of age-related degeneration to the spine." (Exhibit 1, p. 21.) He further explains that applicant had "been involved in at least two MVAs which resulted in injury to the cervical spine (per review of the medical records)." (*Ibid*.) Additionally, in a prior report dated February 21, 2023, Dr. Simpkins provides a preliminary assessment on apportionment. He notes review of multiple MRIs which reveal "spondylosis" and "moderate to severe foraminal narrowing at multiple levels" and opines that apportionment to age related degeneration is necessary. (Exhibit 2, p. 14.) He also provides a detailed summary of medical records reviewed, including a June 20, 2017 cervical x-ray evidencing "cervical spondylosis[,]" particularly at the "C4-5 and C5-6[,]" and "osseous neural foraminal narrowing at the C5-6." (*Id*. at p. 2.) Also reviewed were cervical MRIs dated July 5, 2017 and April 23, 2022 with evidence of mild to severe spinal stenosis and neural foraminal narrowing. (*Id*. at pp. 2-4.)

Based upon the foregoing, Dr. Simpkins's opinions on apportionment are well-reasoned, in accordance with *Escobedo* and *Gatten*.

Accordingly, I would have granted the Petition for Reconsideration to rescind and substitute the April 11, 2025 Findings, Award, and Orders to reflect that Dr. Simpkins's apportionment findings are substantial medical evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JUNE 30, 2025

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

EVYETTE GAINES
ABRAMSON LABOR GROUP
LAW OFFICES OF PARKER & IRWIN
EMPLOYMENT DEVELOPMENT DEPARTMENT

RL/*cs*

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