**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**HE ZHANG, *Applicant***

**vs.**

**SAN FRANCISCO UNIFIED SCHOOL DISTRICT, permissibly self-insured, administered by ATHENS ADMINISTRATORS, *Defendant***

**Adjudication Number: ADJ12348581**
**Oakland District Office**

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

Applicant in pro per seeks reconsideration of the Findings, Award and Orders (F&O) issued on October 8, 2024, wherein the workers' compensation administrative law judge (WCJ) found that (1) while employed on March 13, 2019 as a safety aide/security guard, applicant sustained injury to his cervical spine and lumbar spine; (2) the employer was permissibly self-insured; (3) the employee's earnings were $984.82 per week, warranting weekly indemnity of $656.55 for temporary disability, and $290.00 for permanent disability, with temporary disability paid from December 14, 2020 through January 18, 2021, wage continuation of $4,079.93 paid through January 18, 2021, and adequate compensation paid for all periods of temporary disability claimed through March 28, 2023; (4) applicant's injury caused permanent disability of 28%, after apportionment; (5) applicant is entitled to further medical treatment to cure or relieve the effects of injury; (6) applicant's prior attorneys have performed services for applicant, and 15% of the permanent disability awarded herein is to be withheld to satisfy the attorneys' liens; (7) there is no good cause to exclude defendant's exhibits A, D, E, H, I, J and K from evidence; (8) defendant's claim of credit for overpayment of temporary disability benefits is denied; and (9) there is no basis to order replacement of Dr. Sciaroni as the Qualified Medical Evaluator (QME) in this matter.

The WCJ awarded applicant (1) permanent disability of 28%, with permanent disability benefits payable beginning on January 19, 2021 at a weekly rate of $290.00, less credit for benefits previously paid, and less 15% to be withheld to satisfy the attorneys' liens, with jurisdiction reserved; and (2) further medical treatment.

The WCJ ordered that exhibits A, D, E, H, I, J and K be admitted in evidence and that defendant's credit claim be denied.

Applicant contends that (1) QME Dr. Sciaroni's reporting that he has a pre-existing congenital condition of the spine is without support; (2) the WCJ failed to terminate QME Dr. Sciaroni and replace her with a new orthopedic QME; and (3) applicant's three prior attorneys and defendant's attorney colluded to settle his case without his consent. (Petition, pp. 4-6.)

We received an Answer from defendant.

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

We have reviewed the contents of the Petition, the Answer, and the Report. Based upon our review of the record, and for the reasons discussed below, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute new findings that defer the issues of permanent disability and attorneys' fees; and we will return the matter to the trial level for further proceedings consistent with this decision. Our decision to defer the issues of permanent disability and attorneys' fees is taken so that the medical record may be further developed on apportionment of permanent disability to the cervical spine and lumbar spine, and we make no other substantive changes to the F&O.

**FACTUAL BACKGROUND**

On July 18, 2024, the matter proceeded to trial of the following issue:

> 1. Parts of the body injured with applicant claiming injury to the psyche, bilateral hands, wrists, body system under code 800, sleep, internal systems and carpal tunnel.
> 2. Liens of applicant's prior attorneys . . .
> 3. Claimed overpayment of temporary disability from December 14, 2020 through January 18, 2021 in the amount of $4,376.54.
> 4. Permanent disability pursuant to QME Dr. Sciaroni regarding the cervical spine and lumbar spine.
> 5. Applicant requests that Dr. Sciaroni be replaced as a panel QME.
> (Minutes of Hearing and Summary of Evidence, July 18, 2024, pp. 2:42-3:9.)

The parties stipulated that while employed as a safety aide/security guard on March 13, 2019, applicant sustained injury arising out of and in the course of employment to his cervical spine and lumbar spine, and that QME Dr. Sciaroni issued a permanent and stationary report which defendant rates at 28 percent. (*Id*., p. 2:6-38.)

The WCJ admitted an exhibit entitled Supplemental QME Report by Dr. Sciaroni dated June 24, 2022, into evidence. (Ex. E, Supplemental QME Report of Dr. Sciaroni, June 24, 2022.) In it, Dr. Sciaroni states:

> When I first evaluated Mr. Zhang on 12/14/2020, he described 4-1/2 years of employment as a security guard for San Francisco Unified School District. He had concurrent employment at the Oakland Library as well as with American Eagle Protective Services, during which he worked as an armed guard. His mechanism of injury at San Francisco Unified School District was breaking up an altercation. He described being punched and falling down more than 10 stairs. He continued to work full duty at all 3 of his jobs until receiving work restrictions in June 2019. At that point, he was given work restrictions however continued to work unrestricted at his other 2 jobs wearing a duty belt and gun. . . . He ultimately underwent cervical spine surgery by Khondrashov 2/3/2020 and returned to unrestricted work at American Eagle in March 2020 and at the Oakland Library August 2020.
> . . .
> I determined him to be permanent and stationary with a cervical DRE category 4, 25% whole person impairment rating and I did not find a rating for carpal tunnel. I did not find a rating for the cervical spine. I apportion[ed] his cervical spine 90% pre-existing and 10% to the industrial injury.
>
> I then issued a supplemental report after reviewing documentation from Dr. Khondrashov stating that the fall 3/2019 likely resulted in herniation of right C5-6 and the need for surgery was related to combination of the hernia from the injury as well as pre-existing congenital stenosis. He opined that the employer was more than 50% responsible. I revisited the apportionment with regard to the cervical spine and apportioned 40% to pre-existing nonindustrial factors and 60% to the industrial injury of 3/13/2019.
>
> At the time of the supplemental report I was also provided with lumbar spine MRI findings. I considered these in addition to his non-verifiable radicular complaints and found that this was consistent with a lumbar DRE category 2. I apportioned 60% to pre-existing degenerative changes and prior history of lower back pain and 40% to the industrial injury of 3/13/2019.
> . . .
> I have been asked to revisit apportionment with regard to the specific event versus nonindustrial factors both preexisting congenital as well as other industrial exposure not related to SSEP USD including occupational history of wearing a duty belt. 11 questions are posed with respect to his cervical spine and 11 questions are posed with respect to his lumbar spine.
>
> Cervical spine:
> . . .
> 2. In your initial report, you reviewed 1044 pages of records including the 9/18/2019 cervical MRI and the 11/18/2019 report Khondrashov in forming your

opinions. In this initial report you found 10% of the applicant's permanent disability was caused by the specific event of 3/13/2019 and attributed the other 90% to pre-existing conditions including degeneration and congenital defects. Please cite any medical evidence relied upon to support this change in the initial opinion and ensure that the medical opinion is substantial medical evidence. Please consider the applicants complete work history in determining your final opinions. ANSWER*: I believe that my original apportionment was inaccurate. It failed to fully recognize the fact that although Mr. Zhang has some underlying degenerative and congenital factors related to his cervical spine, there was no impairment and no need for treatment prior to the traumatic injury of 3/13/2019. His pre-existing condition did not cause any impairment prior to the 3/13/2019 industrial injury. Although the pre-existing conditions may lower the threshold of trauma required to cause impairment, the traumatic injury of 3/13/2019 necessitated the need for surgery. Further, the mechanism of injury of a fall down stairs is sufficient to cause such an impairment even in someone with less pre-existing findings. This is the substantial medical evidence that warrants the change in apportionment. This information is not new, but was not adequately considered at the time of my first apportionment determination.*

3. The supplemental report references the 11/18/2019 one-page letter by Dr. Khondrashov supporting his decision to provide the cervical surgery. Please explain what your understanding of this one-page report is and why this report resulted in any change as to your opinions as to the apportionment of permanent disability. Please offer your opinion if he was seen this correspondence written to the nurse case manager is a medical legal opinion regarding apportionment or a justification to provide the surgery on an industrial basis as the PTP. ANSWER: *My understanding of this report was that Dr. Khondrashov was explaining the need for cervical spine surgery under the industrial claim. His opinion in this letter is not the basis of the change in my apportionment. Rather, when I was provided with this information and asked to issue a supplemental report, I reevaluated my entire report and found that the initial apportionment was inaccurate and needed to be corrected. A 10% apportionment for a traumatic industrial injury necessitating surgery, when there were no prior symptoms or need for treatment, is not supported by the evidence as discussed in the answer to #2 above.*

. . .

6. On page 2 of your supplemental report, you opined that "severe foraminal stenosis at several levels as caused by disc osteophyte complexes, uncovertebral arthropathy and facet arthropathy are degenerative findings" *is not caused by the specific injury.* Do continue to agree with this medical opinion? ANSWER: *Yes, it is true that the above degenerative findings are not caused by the specific injury. Nevertheless, they were rendered symptomatic by the industrial injury.*

7. Is it still your medical legal opinion that the MRI does not conclusively find a disc herniation at C 5–6? ANSWER: *I have reviewed the cervical MRI report and I do not find conclusive evidence of a disc herniation. A disc herniation is technically defined as an extrusion of disc material through the annulus. However,*

*orthopedic surgeons will frequently describe a disc as bulging or herniated interchangeably. From a practical standpoint, the issue is not the technicality of whether or not the disc material is extruded beyond the annulus but rather, whether or not the protrusion results in symptomatic nerve root compromise. In the case of Mr. Zhang, the industrial traumatic injury resulted in development of symptoms from his pre-existing and previously asymptomatic nerve root compression. I am unable to determine with medical probability whether or not further disc protrusion occurred specifically as a result of the fall, in the absence of a pre-injury MRI. I do not find this to be material, because as previously stated, he had no impairment or need for treatment for his cervical spine prior to the industrial injury.*

. . .

10. Please identify: a) the overall percentage of permanent disability caused by the industrial injury on 3/13/2019, and b) the percentage of permanent disability caused by all other factors. Please provide your opinion on the percentage of permanent disability caused by each factor and indicate the scientific basis supporting your conclusion of the percentage contribution of each factor of causation of permanent disability. ANSWER: *Disability is apportioned 40% to pre-existing non-industrial factors and 60% to the industrial injury of 3/13/2019 as set forth in my supplemental report of 11/1/2021. Typically for someone in Mr. Zhang's age group, I would apportion a 10% to 20% to pre-existing nonindustrial degenerative changes in the instance where no prior symptoms or need for treatment existed, the amount depending on the degree of degenerative change, and more if there was need for treatment prior to industrial injury. Apportionment to non-industrial factors is increased in the case of Mr. Zhang because of the degree of degenerative change greater than expected in the age group and combined with the existence of congenital stenosis. In the course of his work for SFUSD, Mr. Zhang had to break up altercations. This was the cause of his fall resulting in the industrial injury. In his other employment he did have to wear a gun belt, however as a security guard was not required to wear a vest such as a police officer would wear. The gun belt does not contribute to his cervical spine condition. Wearing a heavy belt would not cause a neck problem. If there is evidence that he did carry heavy weight on his shoulders during the course of those other jobs, I would reconsider the apportionment.*

Lumbar spine:

Regarding the lumbar spine, I have been provided with 2 lumbar MRI reports both of which I have seen before. One was taken 5 days before the other. I have reviewed both of these reports in my prior supplemental. I have been provided reports and not films. The reports describe substantially different findings, with the MRI from Castro Valley characterizing him as having severe spinal stenosis at L4-S5 whereas the MRI taken 5 days prior showed degenerative changes with minimal foraminal encroachment at that level and no evidence of spinal stenosis. The Castro Valley MRI was done on an open 1.5T scanner, and the RadNet MRI was done on a closed 3T scanner, higher resolution. I confirmed this information by calling both facilities. I would consider the findings on the RadNet scanner to be more accurate

due to the better resolution study. The findings are the result of age related degenerative changes and use of a gun belt, and are not the result of the 3/13/2019 industrial traumatic injury. However, the industrial traumatic injury resulted in the radicular complaints. Considering the findings reflected on the RadNet MRI on 3T scanner, Mr. Zhang is not a candidate for epidural injection or surgery for the lumbar spine.

Answers to Questions regarding lumbar spine:
5. Your supplemental report finds apportionment to disability as to the lumbar spine because 60% due to pre-existing nonindustrial conditions. Does this remain your opinion and does this consider the applicant's work history as an armed guard or is that separate? ANSWER: *The apportionment of 60% due to pre-existing nonindustrial conditions is inclusive of age related degenerative changes, and industrial exposure from his employment separate from SFUSD, in which he works wearing a gun belt.*

6. Does it remain your opinion that 40% of applicant's lumbar disability is industrially caused by applicant's work only at SFUSD as a safety officer or should applicant's work as an armed security guard be apportion to and considered within this "industrial causation"? ANSWER: *As stated in the answer to question #5 above, 60% is apportion to pre-existing nonindustrial conditions inclusive of age related degenerative change in combination with industrial exposure. The apportionment of 40% to the work at SFUSD*
*is attributed to the specific traumatic industrial injury of 3/13/2019.*
. . .
10. With respect to Labor Code 4663, please address permanent disability based on causation. That is, breakdown, by percentage, all factors of disability including the industrial injury and any pre-existing nondisabling factors. If you are aware of any previous or subsequent injuries please apportion to those events if warranted. Per the Court Of Appeals decision in *City of Jackson v Rice*, apportionment to pre-existing genetic factors is permissible. Please support your opinion regarding apportionment to genetics with relevant studies or medical literature to constitute substantial medical evidence. Please recall that, per the Court of Appeals decision in *Borman*, the absence of symptoms or return to baseline is not, in and of itself, sufficient to discount the application of nonindustrial apportionment. If pathology exists, you must consider it and formulate your opinion accordingly. ANSWER: *Specific apportionment percentages were provided above with regard to the traumatic industrial injury of 3/13/2019, and other pre-existing factors of both age-related degenerative changes and other industrial exposure. As stated above, the disability is apportioned 40% to the specific traumatic industrial injury of 3/13/2019. The remaining 60% would be attributed 40% to his previous work wearing a gun belt, and the remaining 20% to nonindustrial degenerative changes. I am unaware of any genetic factors with regard to his lumbar condition.*

11. Please identify: a) the overall percentage of permanent disability caused by the industrial injury, and b) the percentage of permanent disability caused by all other

factors. Please provide your opinion on the percentage of permanent disability caused by each factor and indicate the scientific basis supporting your conclusion on the percentage of contribution of each factor of causation of permanent disability. ANSWER: *See answer to question #10 above. 40% is apportioned to the specific 3/13/2019 as caused by the traumatic injury. This is based on the mechanism of injury falling down many stairs resulting in buttock contusion and later complaints of lumbar pain. Cervical injury severe enough to require surgery was distracting. The majority of the impairment with regard to the lumbar spine, 60% is apportioned nonindustrially, as the lumbar condition was not severe enough to require interventions such as epidural injection or surgery. Nevertheless, due to the ongoing radicular complaints, apportionment of 40% to the industrial injury is appropriate. The remaining apportionment not related to the 3/13/2019 industrial injury is apportioned 20% to nonindustrial degenerative changes and 40% to his previous work wearing a gun belt as discussed above.*
(Ex. E, Supplemental QME Report of Dr. Sciaroni, June 24, 2022, pp. 3-11.)

In the Opinion on Decision, the WCJ states:

Dr. Sciaroni's original report (Exh. G) of December 14, 2020 (served on January 13, 2021) found that applicant's condition was permanent and stationary with a 25% Whole Person Impairment (WPI) to the cervical spine. No impairment was provided for the lumbar spine or the right wrist. Dr. Sciaroni apportioned 90% of the permanent impairment to "pre-existing non-industrial" and 10% to the specific injury of March 13, 2019.

In her supplemental report of November 16, 2021 (Exh. F), Dr. Sciaroni reviewed prior MRI reports from 2021, and changed her opinion in two respects. First, she found that the need for cervical surgery following the March 13, 2019 injury was caused by both the work injury and the prior cervical spinal stenosis, and as a result changed the apportionment determination to 60% from the injury and 40% pre-existing and non-industrial. Second, Dr. Sciaroni assessed a 5% WPI for the lumbar spine, with an apportionment determination of 60% to non-industrial factors, based upon his prior lower extremity weakness and medical care for his lumbar spine.

Dr, Sciaroni provided her final report on June 24, 2022 (Exh. E), wherein she provided extensive answers to questions posed regarding impairment and apportionment. Dr. Sciaroni's opinion on impairment and apportionment remained unchanged, but she provided additional description of the basis for primarily the lumbar spine condition, based upon his use of a gun belt in his previous work.
(Opinion on Decision, pp. 2-3.)

In the Report, the WCJ states:

The background of this case is set forth at pp. 1- 2 of my Opinion on Decision as follows:

> This matter was submitted for decision, with testimony from applicant at trial that focused mainly on his dissatisfaction with his physicians and prior attorneys involved in this case.
> . . .
> Dr. Kondrashov misdiagnosed him with pre-existing congenital stenosis at around the time of his surgery. Twenty-five years ago, in the US Army, he could run five miles in 30 minutes and could do 50 push ups in two minutes and was very healthy with no pre-existing degenerative conditions.
>
> Applicant further testified that the defense used a false statement to the QME to conceal Dr. Hall's negligence. This involved the misdiagnosis, of which there is no proof. This is why he wants a new QME.
>
> The applicant is unhappy with all three of his prior attorneys.
> . . .
> Regarding the opinion of Dr. Sciaroni relied on in my decision and the records that I reviewed prior to issuing my decision, I noted that her opinion is substantial evidence because she reviewed an exhaustive amount of records and provided a detailed description of applicant's complaints and his prior history.
> . . .
> With respect to applicant's contentions regarding the attorneys involved in this case, I note that these are serious allegations made without any supporting evidence. (Report, pp. 2-4.)

**DISCUSSION**

**I.**

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

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (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 Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is

reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on November 7, 2024, and 60 days from the date of transmission is January 6, 2025. This decision is issued by or on January 6, 2025, so that we have timely acted on the petition as required by Labor Code section 5909(a).

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

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on November 7, 2024, and the case was transmitted to the Appeals Board on November 7, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on November 7, 2024.

**II.**

Labor Code section 4663 states in relevant 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.
(Lab. Code, § 4663(a), (b).)

Labor Code section 4663(a)'s statement that the apportionment of permanent disability shall be based on 'causation' refers to *the causation of the permanent disability, not causation of the injury*, and the analysis of the causal factors of permanent disability for purposes of

apportionment may be different from the analysis of the causal factors of the injury itself. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 607 (Appeals Bd. en banc) [Emphasis added].

In *Escobedo, supra,* the Appeals Board held that (1) Labor Code section 4663 requires the reporting physician to make an apportionment determination; (2) apportionment to other factors allows apportionment to causation, including pathology, prior conditions, and retroactive work restrictions; (3) applicant holds the initial burden to prove industrial injury and also has the added burden of establishing the approximate percentage of permanent disability directly related to the industrial injury; (4) defendant has the burden of establishing the approximate permanent disability caused by other factors; and (5) a medical report addressing apportionment may not be relied upon unless it constitutes substantial evidence. (*Escobedo*, *supra*, at p. 612.)

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. Furthermore, if a physician opines that a percentage of disability is caused by a degenerative disease, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Id*.)

We turn first to applicant's contention that QME Dr. Sciaroni's reporting that he has a pre-existing congenital condition of the spine is without support. In this regard, Dr. Sciaroni reported that applicant sustained injury to the cervical spine and lumbar spine, opining that 40% of the permanent disability resulting from the cervical spine injury should be apportioned to pre-existing and non-industrial causes, and that 60% of the permanent disability resulting from the lumbar spine injury should be apportioned to non-industrial factors. (Opinion on Decision, pp. 2-3.) Since Dr. Sciaroni found that applicant sustained the alleged injury but apportioned the injury to a pre-existing congenital spine condition and other non-industrial causes, it appears that applicant challenges Dr. Sciaroni's reporting on apportionment.

Here, Dr. Sciaroni's apportionment of permanent disability resulting from the cervical spine injury does not disclose how or why the pre-existing congenital spine condition and non-industrial factors caused the extent of the disability attributed to them. (Ex. E, Supplemental QME

Report of Dr. Sciaroni, June 24, 2022, pp. 3-11.) Specifically, Dr. Sciaroni reports that apportionment of the cervical spine went beyond the 10% to 20% that she would typically assign for a similar injury to a worker of applicant's age without explaining how or why applicant's pre-existing congenital stenosis and prior lack of symptomatology contributed to his permanent disability at the time of evaluation. (*Id*., pp. 6-7.)

Likewise, Dr. Sciaroni's apportionment of permanent disability resulting from the lumbar spine injury does not disclose how or why unspecified "nonindustrial degenerative changes" caused 20% of applicant's disability, or how or why applicant's previous work wearing a gun belt caused 40% of his disability. (*Id*., pp. 3-11.) Notably, Dr. Sciaroni refers to the specific injury of March 13, 2019 as the mechanism of injury behind applicant's lumbar condition without identifying what non-industrial degenerative changes occurred and how they contributed to applicant's permanent disability. (*Id*., p. 11.)

Because Dr. Sciaroni did not explain how or why she apportioned the percentages of permanent disability resulting from the injury to the cervical spine to pre-existing congenital stenosis and non-industrial causes, and because she did not explain how or why she apportioned the percentages of permanent disability resulting from injury to the lumbar spine to non-industrial degenerative changes and wearing a gun belt, we conclude that the record should be developed regarding the issue of apportionment of injury to the cervical and lumbar spine. (See *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261] (finding that the Appeals Board has the discretionary authority to develop the record when appropriate to fully adjudicate the issues); see also Lab. Code § 5313.) Accordingly, we will amend the F&O to defer the issue of permanent disability so that the record on the issue of apportionment may be further developed. We will also defer the issue of attorneys' fees pending further development of the record as to permanent disability.

We observe that the preferred procedure to develop the medical record is to allow supplementation by the physician who has already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc).) Hence the proper method to develop the record here is for the parties to return to QME Dr. Sciaroni; and, per *McDuffie*, if the need for development of the record still cannot be met, the parties should consider selection of an agreed medical evaluator (AME). If the parties cannot

agree to an AME, then the WCJ can appoint a physician to evaluate the issue of permanent disability/apportionment pursuant to Labor Code section 5701.

We turn next to applicant's argument that the WCJ failed to terminate QME Dr. Sciaroni and replace her with a new orthopedic QME.

Here, we concur with the WCJ that there is no evidence in the record to suggest that grounds exist to terminate QME Dr. Sciaroni and replace her with a new orthopedic QME. (Report, p. 4.)

In addition, under *McDuffie*, *supra*, we may not consider terminating Dr. Sciaroni and appointing a new QME to develop the record unless "the previously reporting physician[] . . . cannot cure the need for development of the medical record." (*McDuffie*, *supra*, at p. 142.)

Accordingly, we discern no merit to the argument that the WCJ failed to terminate QME Dr. Sciaroni and replace her with a new orthopedic QME.

Lastly, we address applicant's argument that his three prior attorneys and defendant's attorney colluded to settle his case without his consent.

Here, the issue of attorney misconduct was not raised for trial and was therefore waived. (Minutes of Hearing and Summary of Evidence, July 18, 2024, pp. 2:42-3:9; see *U.S. Auto Stores v. Workers' Comp. Appeals Bd*. (*Brenner*) (1971) 4 Cal.3d 469 [36 Cal.Comp.Cases 173]; *Los Angeles Unified Sch. Dist. v Workers' Comp. Appeals Bd*. (*Henry*) (2001) 66 Cal.Comp.Cases 1220 (writ den.); *Hollingsworth v. Workers' Comp. Appeals Bd*. (1996) 61 Cal.Comp.Cases 715 (writ den.).)

In addition, the pleadings record does not show that the case has been settled.

Accordingly, we discern no merit to the argument that applicant's three prior attorney's and defendant's attorney colluded to settle his case without his consent.

Accordingly, we will grant reconsideration and, as our Decision After Reconsideration, we will rescind the F&O and substitute new findings that defer the issues of permanent disability and attorneys' fees; and we will return the matter to the trial level for further proceedings consistent with this decision. Once again, we note that our decision to defer the issues of permanent disability and attorneys' fees is taken so that the medical record may be further developed on apportionment of permanent disability to the cervical spine and lumbar spine, and we make no other substantive changes to the F&O.

For the foregoing reasons,

**IT IS ORDERED** that the Petition for Reconsideration of the Findings, Award and Orders issued on October 8, 2024 is **GRANTED**.

**IT IS FURTHER ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Orders issued on October 8, 2024 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

## FINDINGS OF FACT

1. He Zhang, born _____, while employed on March 13, 2019 as a safety aide/security guard (see Occupational Group No. 213) at San Francisco, California by the San Francisco Unified School District, sustained injury arising out of and in the course of employment to his cervical spine and lumbar spine.

2. At the time of injury, the employer was permissibly self-insured and is currently administered by Athens Administrators.

3. At the time of injury, the employee's earnings were $984.82 per week, warranting an indemnity rate of $656.55 per week for temporary disability. Temporary disability benefits were paid from December 14, 2020 through January 18, 2021, with wage continuation of $4,079.93 also paid through January 18, 2021. Applicant has been adequately compensated for all periods of temporary disability claimed through March 28, 2023.

4. The issue of permanent disability is deferred.

5. Applicant is entitled to further medical treatment to cure or relieve from the effects of injury.

6. The issue of attorneys' fees is deferred.

7. There is no good cause shown to exclude defendant's exhibits A, D, E, H, I, J and K from evidence.

8. Defendant's claim for credit of overpayment of temporary disability benefits is denied.

9. There is no basis to order replacement of Dr. Sciaroni as the QME in this matter.

## AWARD

AWARD IS MADE in favor of He Zhang and against San Francisco Unified School District, permissibly self-insured and adjusted by Athens Administrators, of further medical treatment for his cervical spine and lumbar spine.

## ORDERS

It is ordered that exhibits A, D, E, H, I, J and K are admitted in evidence. It is further ordered that defendant's claim of credit against permanent disability for overpayment of temporary disability is denied.

**IT IS FURTHER ORDERED** that the matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**


**/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER**

**JOSÉ H. RAZO, COMMISSIONER**
**CONCURRING NOT SIGNING**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**JANUARY 3, 2025**

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

**HE ZHANG**
**LAUGHLIN, FALBO, LEVY & MORESI**

**SRO/*cs***

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