**WORKERS' COMPENSATION APPEALS BOARD**
**STATE OF CALIFORNIA**

**JAVIER HERNANDEZ, *Applicant***

**vs.**

**RICHMAR FARMS; ZENITH INSURANCE CO., *Defendants***

**Adjudication Numbers: ADJ10490434 (MF), ADJ10419398, ADJ10490429, ADJ10419507, ADJ8677936**
**Bakersfield District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the "Rulings & Orders Admitting Evidence Joint Findings of Fact & Joint Award Opinion on Decision" (F&A) issued on March 10, 2025, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that the applicant's multiple injuries resulted in a single joint and several award of 82% permanent partial disability because the permanent disability associated with applicant's hypertension was found to be inextricably intertwined across all of applicant's injuries.

Defendant contends that the WCJ erred in issuing a single joint and several award of permanent disability and should have instead issued an award of disability to hypertension, without apportionment, to only one date of injury, while excluding an award of hypertension to all other dates of injury.

We have received an answer from applicant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, we will deny the Petition for Reconsideration.

## FACTS

Per the WCJ's Report:

Defendant-Carrier Zenith Insurance Company seeks Reconsideration of the Joint Findings of Fact and Joint Award of March 10, 2025 to annul the denial of apportionment as between the five industrial injuries.

Applicant Javier Hernandez, 58 to 61 years of age at the relevant times, sustained injuries arising out of and in the course of employment to his neck, back, shoulders, knees and circulatory system but not the digestive system as claimed on March 7, 2021, December 8, 2014, February 21, 2015, April 5, 2015 and during the period from September 1, 2000 to August 30, 2015 while employed in Bakersfield, California, as a Cow Maternity Worker (Occupational Group 491) by Defendant-Employer Richmar Farms. At the time of these injuries, Defendant- Employer Richmar Farms was insured for California workers' compensation liability by Petitioner Zenith Insurance Company.

Following Trial, post-Trial argument and submission for decision, Joint Findings of Fact and Joint Award issued on March 10, 2025. Among other things, Applicant was found to have sustained 82% permanent partial disability as a result of the combined effect of the five industrial injuries. Apportionment between the injuries was denied in reliance on the expert opinion of Internal Medicine QME Dr. Benjamin Simon. Consistent with the findings, permanent partial disability indemnity and a Life Pension were awarded. *Joint Findings of Fact & Joint Award 3/10/2025 p. 4 (Finding of Fact #6), p. 5 (Joint Award), pp. 8-10 (Opinion on Decision).*

By timely, verified and properly served petition, Zenith Insurance Company seeks reconsideration. *Petition for Reconsideration 4/04/2025 p. 16 (verification), pp. 17-18 (Proof of Service).* Authorized grounds for reconsideration are alleged consistent with Lab.C. §5903 {a}, {c} and {e}. *Petition for Reconsideration 4/04/2025 p. 2 lines 1-4.*

Petitioner argues that 1) An undivided award of permanent disability is not supported by well-established principles of apportionment because "A) The *Benson* Decision and the "Cannot Parcel Out" Exception " (*Petition for Reconsideration 4/04/2025 p. 2 lines 6-13, p. 5 line 12 to p. 7 line 13)); "*B) Application of the Apportionment principles mandated by *Benson* does not support an undivided award of permanent disability" (*Petition for Reconsideration 4/04/2025 p. 2 line 14 to p. 3 line 5; p. 7 line 14 to p. 12 line 14).* Petitioner also argues that 2) "Public Policy Dictated that a different approach to *Benson* based on apportionment in multiple PQME cases needs to be considered." *Petition for Reconsideration 4/04/2015 p. 12 line 15 to p. 14 line 13.*

A timely, verified and properly served Answer has been filed on behalf of Applicant Javier Hernandez. *Applicant's Answer to Defendant's Petition for Reconsideration*

*(*hereafter *"Answer") 4/14/2025; Verification 4/14/2025; Proof of Service 4/14/2025.* Applicant argues that the expert opinions of QME Dr. Simon are substantial medical evidence, that the undersigned PWCJ correctly applied the statutes and precedents to this evidence, and Petitioner that had the burden of proof on apportionment. *Answer 4/14/2025 p. 1 line 27 to p. 2 line 26.* Applicant's Answer notes the prior discussion of these issues in his Trial brief and the undersigned PWCJ's Opinion on Decision. *Answer 4/14/2025 p. 2 lines 24-26; Applicant's Trial Brief (Points and Authorities on Apportionment Only) 6/17/2024; Joint Findings of Fact & Joint Award 3/10/2025 pp. 8-10 (Opinion on Decision).*

Denial of the pending petition is recommended. The Trial-level decision was well supported by the substantial and expert opinion of the Internal Medicine QME, followed published legal authority, held Petitioner to its burden of proof on apportionment and liberally construed the conditions of compensation in favor of the injured employee.

**II. Facts**: In or about 2009, Applicant Javier Hernandez sustained the first of several industrial injuries when he slipped and fell on the placenta of a cow. He injured his right shoulder, which was surgically repaired in 2009. *Applicant's Exhibit 05: Report of Benjamin Simon, M.D. 8/30/2018 p. 6.* This 2009 injury is not one of the five industrial injuries involved in the pending petition.

On March 7, 2012, Applicant sustained the first of the five injuries in the present case. He tripped and fell on a concrete step, hurting his left shoulder and neck. Applicant declined shoulder surgery and continued working. *Applicant's Exhibit 05: Report of Benjamin Simon, M.D. 8/30/2018 p. 6.* This case is being heard as case ADJ 8677936. Primary proceedings were initially resolved with a Stipulated Award at 3% permanent partial disability and a general award of further medical treatment. *Stipulations with Request for Award 12/18/2012; Award 12/20/2012.* A timely petition to reopen was filed. *Petition to Reopen 2/17/2017.*

On December 8, 2014, Applicant slipped and fell while taking a sick cow to the infirmary. He attempted to break his fall by grabbing a fence with his left arm. He experienced pain in his lower back and bilateral lower extremities down to his ankles. *Joint Exhibit A: QME report of Allen Fonseca, M.D. 6/03/2016 p. 3; Applicant's Exhibit 05: Report of Benjamin Simon, M.D. 8/30/2018 p. 6.* This specific injury claim is being heard as case ADJ 10419398.

On February 21, 2015, Applicant fell on a wheelbarrow while loading a baby calf estimated to weigh sixty pounds. He experienced lower back pain radiating to his left leg and foot. *Joint Exhibit A: QME report of Allen Fonseca, M.D. 6/03/2016 pp. 3-4.* This specific injury claim is being heard as ADJ 10490434.

On April 5, 2015, Applicant fractured his left ankle jumping out of a tractor while removing a dead cow. He continued working until August 2015 and came to ankle surgery in 2018. This injury claim is being heard as case ADJ 10490429.

Applicant also sustained a period of cumulative injury from September 1, 2000 to August 30, 2015. The CT claim is being heard as case ADJ 10419507.

Allen S. Fonseca, M.D., is serving as a Qualified Medical Evaluator in the field of Orthopedics. He initially evaluated Applicant and reported on June 3, 2016. He was provided with a history including only three of the five injuries: the December 8, 2014 specific injury (ADJ 10419398), the February 21, 2015 injury (ADJ 10490434) and the cumulative injury (ADJ 10419507). *Joint Exhibit A: QME report of Allen Fonseca, M.D. 6/03/2016 pp. 2-4, p. 29.*

Dr. Fonseca opined that Applicant sustained the February 21, 2015 specific injury and the cumulative injury. He opined that Applicant was permanent and stationary from their effects. *Joint Exhibit A: QME report of Allen Fonseca, M.D. 6/03/2016 pp. 2-4, p. 29.* He deferred assessment of the extent of impairment and apportionment pending further diagnostic testing. *Joint Exhibit A: QME report of Allen Fonseca, M.D. 6/03/2016 pp. 2-4, pp. 31-32.*

QME Dr. Fonseca provided a supplemental report on August 16, 2016. He reported his receipt and review of X-rays of Applicant's spine and lower extremities. He affirmed his prior opinion that Applicant was permanent and stationary. *Joint Exhibit B: Report of Allen Fonseca, M.D. 8/16/2016 p. 3.* Dr. Fonseca opined that Applicant sustained 24% Whole Person Impairment of the lumbar spine and 11% WPI of the lower extremities. *Joint Exhibit B: Report of Allen Fonseca, M.D. 8/16/2016 p. 9.*

Orthopedic QME Dr. Fonseca provided a further supplemental report dated June 27, 2017. He reported receipt of a letter from Petitioner's counsel noting the occurrence of the April 15, 2015 specific injury (ADJ 10490429) and March 7, 2012 specific injury (ADJ 8677936). He was informed that these claims had previously settled at 3% permanent partial disability. *Joint Exhibit C: Report of Allen Fonseca, M.D. 6/27/2017 pp. 2-4.* Dr. Fonseca also noted his review of additional medical information, including treatment reports from Dr. Irene Sanchez indicating on-going temporary disability. *Joint Exhibit C: Report of Allen Fonseca, M.D. 6/27/2017 pp. 5-7.* Dr. Fonseca opined that re-evaluation of Applicant was appropriate. *Joint Exhibit C: Report of Allen Fonseca, M.D. 6/27/2017 pp.7-8.*

On July 7, 2017, Applicant amended his application in the cumulative injury case (ADJ 10419398) to add non-orthopedic bodily systems including his psyche, digestive system, and circulatory system (primarily in the form of hypertension) as well as orthopedic injury to his right shoulder. *Amended Application for Adjudication of Claim 7/0 7/2017.*

Orthopedic QME Dr. Fonseca provided an additional supplemental report dated August 30, 2017. He reported his receipt and review of additional X-ray reports. He opined that they documented "severe spondylosis of the lumbar spine" which

was felt to confirm his previously expressed opinions. *Joint Exhibit D: Report of Allen Fonseca, M.D. 8/30/2017 p. 2.*

Orthopedic QME Dr. Fonseca provided a comprehensive re-evaluation of Applicant and reported on September 22, 2017. After review of extensive additional medical records and a re-examination, Dr. Fonseca changed his prior opinion that Applicant's orthopedic permanent impairment had remained permanent and stationary since the initial examination of June 3, 2015 and opined instead that Applicant had period of temporary partial disability from April 7, 2015 to September 29, 2016 and temporary total disability from September 30, 2016 to June 9, 2017 with no ability to return to his pre-injury regular work. *Joint Exhibit E: Report of Allen Fonseca, M.D. 9/22/2017 p. 44.* Dr. Fonseca opined that Applicant was again at maximum medical improvement with spinal impairment consistent with a Category I of 0% Whole Person Impairment for the cervical spine and Category V with 25% Whole Person Impairment for the lumbar spine. Lower extremity impairment for the knees, ankles, hindfoot and in the form of gait derangement was quantified at 16% Whole Person Impairment. *Joint Exhibit E: Report of Allen Fonseca, M.D. 9/22/2017 pp. 47-50.*

Dr. Fonseca apportioned 70% of the lumbar spinal impairment and 40% of the lower extremity impairment equally between the specific injury of February 2015 (ADJ 10490434) and the cumulative injury (ADJ 10419398). Remaining causation was attributed to other factors, which discussed pre-existing conditions and impairments seemingly including the other three specific industrial injuries as well as non-industrial factors. *Joint Exhibit E: Report of Allen Fonseca, M.D. 9/22/2017 p. 53.*

Orthopedic QME Dr. Fonseca provided a supplemental report dated January 19, 2018. He reported his receipt and review of an inquiry letter from Applicant's advocate including discussion of the additional specific injuries, Applicant's claim of impairment to his left shoulder and the claims of injury to non-orthopedic bodily systems. Dr. Fonseca affirmed his previously expressed opinions but noted that if new orthopedic injuries or a new orthopedic bodily system (i.e. the left shoulder) needed to be reviewed, further evaluation was appropriate. He also recommended that claims of non-orthopedic impairment should be directed to applicable specialists. *Joint Exhibit F: Report of Allen Fonseca, M.D. 1/19/2018 pp. 1-6.*

Benjamin Simon, M.D., is serving as a Qualified Medical Evaluator in the field of Internal Medicine. He initially evaluated Applicant and reported on August 30, 2018. *Applicant's Exhibit 05: Report of Benjamin Simon, M.D. 8/30/2018.* Dr. Simon was presented with an initial history including all five injuries in the present case and related medical reports. *Applicant's Exhibit 05: Report of Benjamin Simon, M.D. 8/30/2018 p. 1 (injury listing) pp. 13-53 (review of medical records)*

Dr. Simon noted that Applicant suffered from hypertension and hyperlipidemia of uncertain origin as well as arthritis and had a family history of both diabetes and

hypertension. *Applicant's Exhibit 05: Report of Benjamin Simon, M.D. 8/30/2018 p. 7.* He also noted that notwithstanding elevated blood pressure readings during Applicant's orthopedic treatment, a frank diagnosis of hypertension did not appear in the records until noted by a nurse practitioner as part of surgical clearance for Applicant's 2018 ankle surgery.

Given the uncertainty in the medical records, Dr. Simon opined that while a relationship between Applicant's hypertension and his work injuries was possible, "any clear association" would be "completely speculative." *Applicant's Exhibit 05: Report of Benjamin Simon, M.D. 8/30/2018 p. 55.* Assuming industrial causation, Dr. Simon opined that Applicant was permanent and stationary and would be in Hypertensive Cardiovascular Category II with 10% Whole Person Impairment with apportionment moot because of the "limited information provided." *Applicant's Exhibit 05: Report of Benjamin Simon, M.D. 8/30/2018 p. 56.*

Orthopedic QME Dr. Fonseca was deposed on January 25, 2019. Dr. Fonseca testified that notwithstanding the five litigated claims, he had been aware of only two claims (the August 2015 specific to Applicant's low back and leg and the 2011 to 2015 cumulative injury to Applicant's low back, neck and lower extremities) when he evaluated Applicant. *Joint Exhibit M: Transcript of Deposition of Allen S. Fonseca, M.D. 1/25/2019 p. 7 line 7 to p. 8 line 5.*

Dr. Fonseca defended his Category I (0% WPI) classification of Applicant's cervical spinal condition. He testified that notwithstanding pathology identified by MRI scanning, there was no indication of impairment in activities of daily living and, therefore, no ratable impairment despite pathology. *Joint Exhibit M: Transcript of Deposition of Allen S. Fonseca, M.D. 1/25/2019 p. 10 line 5 to p. 12 line 13.*

Dr. Fonseca testified that to expand his medical-legal analysis beyond the two injuries originally presented to him, re-examination would be needed. Reevaluation would need to include review of the pleadings including the applications and DWC-1 forms as well as the medical records for all the injuries. For example, he pointed out that Applicant's 2018 ankle fusion might or might not result in a significant period of post-surgical temporary disability and such a surgery "significantly changes your impairment rate." *Joint Exhibit M: Transcript of Deposition of Allen S. Fonseca, M.D. 1/25/2019 p. 15 line 5 to p. 17 line 18.*

Dr. Fonseca testified that without awareness of all the injuries, his prior discussion of apportionment "is not going to be relevant" because his assessment of impairment would change, and it seemed likely that "a significant portion of his impairment was not related to those two industrial injuries" originally presented for examination. *Joint Exhibit M: Transcript of Deposition of Allen S. Fonseca, M.D. 1/25/2019 p. 35 line 19 to p. 36 line 16.*

Consistent with his deposition testimony, Orthopedic QME Dr. Fonseca performed a comprehensive re-evaluation of Applicant and reported on April 25, 2019. It appears that all five injuries were presented for orthopedic evaluation. After an extensive examination and review of medical records, Dr. Fonseca deferred comment on impairment and apportionment pending receipt and review of additional diagnostic testing. *Joint Exhibit P: Report of Allen Fonseca, M.D. 4/25/2019 pp. 48-49.*

Internal Medicine QME Dr. Simon received and reviewed additional medical records. He provided a supplemental report on May 8, 2019. He indicated that:

> After review of these records, although many of them are complete, it does seem fairly clear that the applicant had the onset of hypertension during his course of employment and during the period of time he was dealing with injuries.
>
> As discussed in my initial report, it would be within reasonable medical probability that the injuries, treatment for the injuries, pain associated with the injury and possible additional weight gain may have contributed to hypertension and therefore there is an industrial causation for his hypertension. *Applicant's Exhibit 03: Report of Benjamin Simon M.D. 5/08/2019 p. 27*

Dr. Simon opined that had 10% Whole Person Impairment with 70% industrial apportionment.3 Dr. Simon also indicated that Applicant probably did not have GERD and "I do not find there is an industrial causation of GERD, if present." He also doubted whether Applicant had a hernia and recommended review by a general surgeon. He likewise deferred the possibility of psychiatric impairment for lack of "the credentials to evaluate him from the psychiatric perspective." *Applicant's Exhibit 03: Report of Benjamin Simon M.D. 5/08/2019 p. 27.*

Dr. Simon provided a further supplemental report. He defended his opinion of 30% non-industrial apportionment as a "determination based on reasonable medical probability and on my medical judgment," including consideration of Applicant's obesity. *Applicant's Exhibit 02: Report of Benjamin Simon, M.D. 7/22/2019 pp. 4-5.*

Regarding apportionment as between the five injuries, Dr. Simon reported "I would state that I feel that the causation of his hypertension is inextricably intertwined with his injuries and cannot be separated by date of injury. *Applicant's Exhibit 02: Report of Benjamin Simon, M.D. 7/22/2019 p. 5 emphasis added. Orthopedic QME Dr. Fonseca re-evaluated Applicant and provided a report on May 29, 2020. Dr. Fonseca opined that Applicant had remained permanent and stationary since his initial examination of June 3, 2016 except for a period of temporary total disability from September 30, 2016 to June 9, 2017 and temporary partial disability from*

*April 7, 2015 to September 29, 2016. Joint Exhibit N: Report of Allen Fonseca, M.D. 5/29/2020 pp.44-45.*

*Dr. Fonseca indicated total spinal impairment of 25% with 19% due to the cervical spine and 7% for the lumbar spine. Joint Exhibit H: Report of Allen Fonseca, M.D. 5/29/2020 p. 51. Upper extremity impairment was quantified at 15% WPI. Joint Exhibit H: Report of Allen Fonseca, M.D. 5/29/2020 p. 55. Lower extremity impairment was quantified at 25%. Joint Exhibit H: Report of Allen Fonseca, M.D. 5/29/2020 p. 57.*

*Dr. Fonseca was able to apportion between the injuries, with 75% of the spinal impairment attributed equally to the December 8, 2014 specific injury, the February 21, 2015 specific injury and the cumulative injury. 50% of the left shoulder impairment was attributed to the March 7, 2012 specific injury with 20% divided equally between the December 8, 2014 specific injury and the February 21, 2015 specific injury. 75% of the right shoulder impairment was divided equally between the December 8, 2014 specific injury, the February 21, 2015 specific injury and the cumulative injury. 50% of the impairment to bilateral knees was divided evenly between the December 8, 2014 specific injury and the February 21, 2015 specific injury. Impairment of the left ankle was entirely attributed to the April 5, 2015 specific injury. Joint Exhibit H: Report of Allen Fonseca, M.D. 5/29/2020 pp. 60-61.*

Dr. Fonseca was asked to consider a *Kite* analysis adding rather than combining impairments and to add gait derangement to his assessment of Applicant's lower extremity disability. He declined both invitations. *Joint Exhibit I: Report of Allen Fonseca, M.D. 9/07/2020. P. 4.* Dr. Fonseca was also invited to change his opinions regarding periods of temporary disability and the extent of lumbar disability but again declined. *Joint Exhibit J: Report of Allen Fonseca, M.D. 8/02/2021 p. 4.*

Internal Medicine QME Dr. Simon provided a supplemental report on December 8, 2022. He re-affirmed his prior opinion that the industrial causation of Applicant's hypertension could not be reasonably apportioned by date of injury. He explained that the medical records he received did not provide records prior to the orthopedic injuries or during the time of most of them, with the first indication of hypertension in a record dated September 30, 2014. Thus, Dr. Simon explained, he could not apportion between the injuries without speculation, guess or surmise. *Applicant's Exhibit 01: Report of Benjamin Simon, M.D. 12/08/2022 p. 6.*

Orthopedic QME Dr. Fonseca re-evaluated Applicant's back and reported on March 23, 2023. He reviewed updated medical reports. He opined that Applicant was permanent and stationary as of the new examination and added the periods from February 22, 2018 to March 12, 2018 and from August 5, 2020 to May 17, 2022 to the periods of temporary total disability. *Joint Exhibit K: Report of Allen Fonseca, M.D. 3/23/2023 pp. 29-30.* Dr. Fonseca's opinion regarding apportionment of lumbar spinal disability was unchanged from his prior reports.

*Joint Exhibit K: Report of Allen Fonseca, M.D. 3/23/2023 pp. 37-38.* Internal Medicine QME Dr. Simon was deposed on June 1, 2023. Dr. Simon testified that he had quantified 30% non-industrial apportionment based on analysis of Applicant's obesity. *Joint Exhibit N: Transcript of Deposition of Benjamin Simon, M.D. 6/1/2023 p. 10 line 13 to p. 12 line 23.*

Regarding apportionment between the injuries, Dr. Simon testified that it would be speculative to include the 2009 right shoulder injury or the 2012 specific injury because they pre-dated the diagnosis of hypertension in 2014. *Joint Exhibit N: Transcript of Deposition of Benjamin Simon, M.D. 6/1/2023 p. 15 lines 8-12.* Dr. Simon testified that it was still his opinion that the effects of the injuries were inextricably intertwined. *Joint Exhibit N: Transcript of Deposition of Benjamin Simon, M.D. 6/1/2023 p. 13 lines 17-23.* He rejected apportionment along the lines of the orthopedic apportionment suggested by Dr. Fonseca because the effects of pain and medications on blood pressure vary and the medical records made available to him were not sufficient for that purpose, particularly in light of the use of multiple medications for different parts of the body at overlapping times. *Joint Exhibit N: Transcript of Deposition of Benjamin Simon, M.D. 6/1/2023 p. 21 line 6 to p. 22 line 25.*

(WCJ's Report, pp. 1-14.)

## DISCUSSION

### I.

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

(§ 5909.)

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 April 24, 2025, and 60 days from the date of transmission is Monday, June 23, 2025. This decision is issued by or on June 23, 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.

According to the proof of service for the Report and Recommendation by the WCJ, the Report was served on April 24, 2025, and the case was transmitted to the Appeals Board on April 24, 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 24, 2025.

**II.**

As explained in the Appeals Board's en banc decision in *Nunes I*:

> The California worker's compensation system requires that, "[e]mployers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. 'Apportionment is the process employed by the Board to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.'" (*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1321 [57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 Cal.Comp.Cases 565], quoting *Ashley v. Workers' Comp. Appeals Bd*. (1995) 37 Cal.App.4th 320, 326 [43 Cal.Rptr. 2d 589, 60 Cal.Comp.Cases 683].)
>
> Section 4663(c) provides, in relevant part:

> (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.
>
> (Lab. Code, § 4663(c).)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*), we explained:

> Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting physician and the WCAB must make determinations of what percentage of the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.

(*Id*. at p. 607.)

Accordingly, section 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use. (Lab. Code, § 4663(c); *Escobedo*, *supra*, at pp. 607, 611–612.) Apportionment must account for "other factors both before and subsequent to the industrial injury," and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions. (*Ibid*.) In addition, when a physician considers all appropriate factors of apportionment but nevertheless determines that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability, the physician has made the apportionment determination required under section 4663(c). (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal. App. 4th 1535 [89 Cal. Rptr. 3d 166, 74 Cal.Comp.Cases 113, 133]; see also *James v. Pacific Bell Tel. Co*. (May 10, 2010, ADJ1357786) [2010 Cal. Wrk. Comp. P.D. LEXIS 188].)

(*Nunes v. State of California, Dept. of Motor Vehicles* (*Nunes I*), (2023) 88 Cal.Comp.Cases 741, 748-749 (Appeals Board en banc).)

In our en banc opinion in *Benson*, we explained that limited situations may exist where a joint and several award of permanent disability may issue across multiple dates of injury. (*Benson v. Permanente Med. Group*, (2007), 72 Cal. Comp. Cases 1620, 1634 (Appeals Board en banc), (emphasis added); aff'd *Benson v. Workers' Comp. Appeals Bd*. (2009) 170 Cal.App.4th 1535.) Where some aspects of the industrially caused permanent disability form two or more separate industrial injuries that cannot reasonably be parceled out, then a combined joint and several award of permanent disability must issue even though other aspects of the industrially caused permanent disability from those injuries can be parceled out with reasonable medical probability. (See, e.g. *Alea North American Insurance Co. v. Workers' Comp. Appeals Bd*. (*Herrera*) (2018) 84 Cal. Comp. Cases 17 [2018 Cal. Wrk. Comp. LEXIS 123] (writ den.); *Flowserve Corp. v. Workers' Comp. Appeals Bd*. (*Espinoza*) (2016) 81 Cal. Comp. Cases 812 [2016 Cal. Wrk. Comp. LEXIS 92] (writ den.); *Northrop Grumman Systems v. Workers' Comp. Appeals Bd*. (*Dileva*) 80 Cal. Comp. Cases 749 [2015 Cal. Wrk. Comp. LEXIS 78] (writ den.); *Christiansen v. Facey Med. Found*., 2024 Cal. Wrk. Comp. P.D. LEXIS 2, *12.) Accordingly, applicant is entitled to a combined award on all injuries and their respective body parts, even where other body parts are apportioned as between the injuries.

"It is the responsibility of each medical evaluator to determine apportionment for the body parts or body systems within his or her area of expertise." (*Mayorga v. Dexter Axle Chassis Group*, 2015 Cal. Wrk. Comp. P.D. LEXIS 359, *16.)

It has long been the law that separate disabilities arising out of a single injury are rated together, even if those disabilities do not become permanent and stationary at the same time. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93] [chef suffered specific back injury but, as a result of blood transfusions given during later back surgery, contracted hepatitis; employee's spinal disability and liver disability were rated together in one combined award, with consideration being given to duplicate or overlapping work limitations]; *Morgan v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 710 [43 Cal.Comp.Cases 1116] [police officer suffered a cumulative injury causing hypertension, peptic ulcer, hepatitis, gastrointestinal bleeding, and hernia; employee's separate disabilities were rated together in one

combined award, with consideration being given to duplicate or overlapping work limitations]; *Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 1 Cal.App.3d 720 [41 Cal.Comp.Cases 81] [employee's chest and left knee injuries rated together].)

Defendant argues that the en banc decision in *Benson*, which was affirmed by the Court of Appeal should not be followed because some parts of applicant's disability can be parceled out, while others cannot. Defendant further argues that the disability, which cannot be parceled out should simply be combined with applicant's highest disability rating and issued as part of that award. This argument is not convincing. As discussed above, binding case law by the Appeals Board and Court of Appeal has consistently held that where permanent disability cannot be parceled out, the disability is combined into a joint and several award. (*Benson*, *supra* 170 Cal. App. 4th at p. 1545.)

The Legislature is presumed to be aware of the law that exists. Had the Legislature disapproved of the approach adopted in *Benson*, it could have amended the statute in 2012 while conducting comprehensive workers' compensation reform. Without any change to the law, we continue to apply the sound principles in *Benson*.

Accordingly, we deny defendant's Petition for Reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that defendant's petition for reconsideration of the Rulings & Orders Admitting Evidence Joint Findings of Fact & Joint Award Opinion on Decision issued on March 10, 2025, by the WCJ is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**

**JOSÉ H. RAZO, COMMISSIONER**
**PARTICIPATING BUT NOT SIGNING**

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

**June 23, 2025**

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

**JAVIER HERNANDEZ**
**ANHALT LAW OFFICES**
**LAW OFFICES OF JON M. WOODS**
**CHERNOW, PINE AND WILLIAMS**

**EDL/mc**

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