WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JORGE ALVARADO, ***Applicant***

vs.

BMW OF MURIETTA,
HENDRICK AUTOMOTIVE GROUP,
THE HARTFORD ACCIDENT AND INDEMNITY
administered by SEDGWICK CMS,
Defendants

Adjudication Number: ADJ9081819
Los Angeles District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) in this matter on April 14, 2025. In that decision, the WCJ found in relevant part that applicant sustained injury arising out of and in the course of employment (AOE/COE) to the lumbar spine, thoracic spine and right hip, but not to the left hip or psyche; that her injury caused 38% permanent disability with no apportionment; and that defendant did not meet its burden of proof as to apportionment.

Petitioner contends that the WCJ erred in finding that defendant failed in its burden of proving apportionment and that there is substantial evidence of apportionment due to non-industrial factors.

Applicant filed an Answer.

The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending denial of the Petition.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the Report and Recommendation (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.

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 May 20, 2025 and 60 days from the date of transmission is Saturday, July 19, 2025. The next business day that is 60 days from the date of transmission is Monday, July 21, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[1] This decision is issued by or on Monday, July 21, 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.

---

[1] 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.

According to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on May 20, 2025, and the case was transmitted to the Appeals Board on May 20, 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 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 May 20, 2025.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 21, 2025

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

JORGE ALVARADO
DOMINGUEZ FIRM
MURPHY BEANE LAW

LN/md

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: Auto Detailer.

2. Applicant's age at injury: 49

3. Date(s) of injury: July 3, 2013.

4. Part(s) of body injured: Lumbar spine, thoracic spine, right hip.

5. Identity of Petitioner(s): Defendant BMW of Murietta and Hendrick Automotive Group insured by The Hartford Accident and Indemnity administered by Sedgwick CMS.

6. Timeliness: The Petition is timely, filed May 8, 2025.

7. Verified: Yes, integrated into the body of the Petition at the end.

8. Date of Action that is the Subject of Reconsideration: April 14, 2025 Findings and Award after trial.

9. Answer Filed: None as of this date.

10. The Petitioner's contentions:
Petitioner contends that the evidence does not justify the Findings of Fact, and the Findings of Fact do not support the Order, Decision or Award regarding the WCJ's determination of apportionment.

II. FACTS

1. Following trial, the undersigned found injury to the lumbar spine, thoracic spine and right hip. No permanent disability was found to the right hip or thoracic spine. The Findings and Award included a final rating of 38% permanent disability to the lumbar spine with no apportionment.
2. The undersigned found the Orthopedic QME Dr. Ralph Steiger more credible and persuasive. Dr. Steiger found impairment due specifically to the interbody cage fusion at L5-S1 surgery post injury, which he determined merited Lumbar Spine DRE Category IV with 22 whole person impairment.

3. Category IV states in pertinent part "…may have complete or near complete loss of motion of a motion segment due to developmental fusion, or successful or unsuccessful attempt at surgical arthrodesis". AMA Guides, Table 15-3, page 384.

4. Dr. Michael Schiffman was the designated primary treating physician as well as the surgeon for the interbody cage fusion at L5-S1 post-injury, which occurred on 10-23-2017. The surgery was authorized by defendants. Dr. Schiffman also found permanent disability based on DRE Category IV: "He meets the criteria for this category based on loss of motion segment integrity following surgical fusion." Exhibit 43, Schiffman Report 4-23-24 P.4-5.

5. PQME Dr. Steiger ultimately found apportionment of 10% to degenerative changes, 45% to the current injury and 45% to a 2011 injury. The Doctor based his opinion on an MRI following the 2011 injury showing 2-disc bulges at 2.2 mm, while the current MRI showed a 2 mm bulge at L4-5 and a 3 mm bulge at L5-S1, prior to the fusion surgery, Exhibit J, Steiger Report 8-13-19, P.4.

6. At cross-examination, Dr. Steiger flatly stated that he considered the surgery unnecessary and had recommended against it in a report prior to the surgery because the applicant had only a 3 mm disc bulge, supra at P.11, Exhibit AA Cross-examination of Dr. Steiger, 10-31-2018. He also stated that the applicant's condition was made worse by the industrial surgery, Exhibit AA Cross-Examination of Dr. Steiger, 10-31-2018 P.12-13.

7. The applicant settled a prior specific injury of 3-3-2011 and a continuous trauma from 3-2-2011 to 7-5-2011 with a different employer by Compromise and Release on 10-24-12 for $50,000.00. Those two cases both alleged injury to the "back, hips, upper extremities, legs, psyche, internal systems, sleep, headaches and sexual dysfunction",ADJ8015212. The Compromise and
Release which includes both dates of injury states: "This case is being settled pursuant to the Orthopedic AME report of Dr. David Kim, which the parties agree rates at 19%. This settlement resolves all issues. Defendants dispute injury AOE/COE, per AME. Issue of causation deferred to trier of fact. In spirit of compromise, the parties have agreed to a lump sum Release." Exhibit Y, Records of Care West, P.4-20.

III. DISCUSSION

1. The Petition is Properly Viewed as a Petition For Reconsideration

A Petition for Reconsideration may only be taken from a final order, decision or award, Labor Code Sections 5900(a), 5902 and 5903. A final order is one that "determines any substantive right or liability of those involved in the case", *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 45 Cal.Comp.Cases 410; *Hansen v. Workers' Comp. Appeals Bd.*(1988) 53 Cal.Comp.Cases 193 (Writ Den.): *Jablonski v. Workers' Comp. Appeals*

Bd. (1987) 52 Cal.Comp.Cases 399 (Writ Den.) In the instant case, the Petition seeks reconsideration of a Findings and Award which is a final determination of apportionment of permanent disability. Since the subject of the petition is the final disposition of a key substantive right, the Petition for Reconsideration is the appropriate vehicle.

2. The Determination Regarding Apportionment of Permanent Disability Is Correctly Based on the Cause of Disability.

Apportionment must be based on the cause of disability, not the cause of injury. *Hikida v. WCAB,* (2017) 12 Cal.App.5th 1249. An employee is entitled to compensation for a new or aggravated injury which results from the medical or surgical treatment of an industrial injury. *Fitzpatrick v. Fidelity & Casualty Co.* (1936) 7 Cal.2d 230. The Court of Appeals stated:

> "Nothing in the 2004 legislation had any impact on the reasoning that has long supported the employer's responsibility to compensate for medical treatment and the consequences of medical treatment without apportionment." *Hikida, supra* at 1263 .
>
> "A new compensable consequence injury that is entirely the result of medical treatment which then led entirely to the injured worker's disability should not be apportioned, *County of Santa Clara v. Workers' Comp. Appeals Bd.* (Justice) (2020) 49 Cal.App.5th 605.
>
> Finally, the Hikida Court found:
> "The issue presented is whether an employer is responsible for both the medical treatment and any disability arising directly from unsuccessful medical intervention, without apportionment. For the reasons discussed below, we conclude it is." *Hikida, supra* at 1260.

The instant case is essentially on all fours with *Hikida*. Both the PQME and the primary treating physician agreed that the anterior lumbar interbody cage fusion surgery is the sole cause for the complete loss of motion in the spinal segment. There is no medical evidence the small disc bulges present in 2011 or 2013 contributed in any way to the poor result of the fusion surgery.

PQME Dr. Steiger reviewed the recommendation by the treating physician for an anterior lumbar decompression and fusion in his office with the applicant prior to the surgery, as Dr. Steiger explained in his report of 6-5-2017:

> "The magnetic resonance imaging (MRI) scan of the lumbar spine is reviewed today and shows two-disc bulges, one 2-3 millimeters and one 3 millimeters. We don't normally operate on disc bulges less than 5 to 6 millimeters in size and in that case, as the first operation, the indicated operation for 5-to-6-millimeter disc protrusion is simple laminectomy and partial discectomy. A lumbar fusion would make the patient worse than he is and not better and there is a higher probability

> of impotence with an anterior lumbar fusion. All of this was explained to the patient with a recommendation that he does not proceed with lumbar fusion. It is always amazing to me that some surgeons would propose an anterior spinal fusion for a 3-millimeter disc bulge." Exhibit D, Steiger Report 6-5-2017 P.6.

At cross-examination, the PQME again flatly stated that he considered the surgery unnecessary due to the minimal sizes of the two-disc bulges. Exhibit AA, Cross Examination of Dr. Steiger 10-31-2018 P. 13. The PQME did not consider the current 2.2- and 3-millimeter bulges merited surgery, so the even smaller bulges present after the 2011 injuries certainly did not cause the need for the fusion surgery that occurred. Thus the 2011 injury did not contribute to the need for the surgery that occurred and cannot be considered a cause or compensable consequence of the current disability. Although unnecessary, the surgery was authorized by defendants to cure and relieve the instant injury, and the applicant submitted to the medical treatment.

The applicant did not have the fused spine and its effects prior to the surgery, instead the industrial medical treatment resulted in a new injury that was the compensable consequence of the medical treatment itself. Thus, the surgery was the entire cause of the current disability. Both the surgeon/primary treating physician and the PQME agreed that it was solely the loss of motion in the spinal segment as a result of the surgery that merited the DRE Category IV. Therefore, no apportionment is merited. While Dr. Steiger rendered an opinion as a matter of medicine regarding apportionment, that opinion did not comply with current law.
Defendant fails in their burden of proof of apportionment.

It is noteworthy that Petitioner refers to the testimony of Dr. Steiger in his cross-examination as stating the worsening of the applicant's condition is due in part to the surgery. This omits an important part of the Doctor's opinion. In the very next question, he is asked what else contributed to his back condition. The doctor answers: "The fact is that not enough time has elapsed to decide whether he'll get further recovery and be enabled to do any kind of work which I somewhat doubt." Joint Exhibit AA Cross-Examination 10-31-2018 P.13, Lines 13 to 22. The questioner then changes the subject. The doctor never actually describes anything else that contributed to the worsening, so the defendant fails in their burden of proof that the surgery was not the sole cause of the disability.

IV. RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

DATE: May 20, 2025

Jerilyn Cohen
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE