**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**JOSEPH RYAN, *Applicant***

**vs.**

**CALIFORNIA DEPARTMENT OF CORRECTIONS, Legally Uninsured, Adjusted by STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Numbers: ADJ10256108 (MF), ADJ10255968, ADJ10256212, ADJ10256223, ADJ10489875**

**Van Nuys District Office**

**OPINION AND ORDER**
**DENYING PETITON**
**FOR RECONSIDERATION**

Defendant seeks reconsideration of the Joint Amended Findings and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on May 7, 2025, wherein the WCJ found in pertinent part: that as to the issue of apportionment pursuant to Labor Code section 4663, agreed medical evaluator (AME) Dr. Hasday's opinion does not constitute substantial evidence; that applicant is entitled to an un-apportioned combined award; and that in accordance with the September 23, 2022 opinion of the Appeals Board[1] and the previous September 8, 2021 Findings and Awards of WCJ Devine, applicant is 100% permanently totally disabled on an industrial basis, without apportionment.

Defendant contends that AME Dr. Hasday's apportionment analysis is substantial evidence and the WCJ's conclusion that Dr. Hasday is discussing apportionment to causation of applicant's injury and not apportionment to applicant's disability is incorrect; that AME Dr. Hasday was aware of the difference between the apportionment of impairment and disability based on his causation and apportionment analysis in his February 4, 2020 report; and that the WCJ incorrectly merged three claims to issue one award when three different awards need to be issued based on Dr. Hasday's apportionment analysis.

[1] Deputy Commissioner Schmitz, who was on the panel that issued the September 23, 2022 decision, is unable to participate in this decision, and another panelist was appointed in her place.

We received an Answer from applicant.

We received a Report and Recommendation from the WCJ, which recommends that we deny the Petition for Reconsideration.

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

## BACKGROUND

On September 23, 2022, we issued our Decision After Reconsideration.

As set forth in our September 23, 2022 decision:

> Turning to defendant's contention that "applicant's claims do not reach 100% PD" under *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], we find defendant's reliance on *Fitzpatrick* to be misplaced. Therein the Court of Appeal held that Labor Code section 4662(b) does not provide an independent basis to find permanent and total disability "in accordance with the fact," where the medical record justifies a scheduled rating of less than 100% and the scheduled rating is not rebutted. However, *Fitzpatrick* is distinguishable because it involved a 2012 injury to which Labor Code section 4660 applied, whereas here the WCJ awarded permanent disability resulting from two injuries in 2015, making Labor Code section 4660.1 applicable. As the *Fitzpatrick* court itself pointed out, section 4660.1(g) provides, "[n]othing in this section shall preclude a finding of permanent total disability in accordance with Section 4662." Section 4662(b) in turn specifically provides that permanent disability in all cases which do not involve a presumptive total and permanent disability injury "shall be determined in accordance with the fact." Accordingly, the WCAB may rely on a totality of substantial evidence in post-2012 cases to justify a finding of permanent and total disability. (See *Manvelian v. Edris Plastics Mfg.* (2021) 2021 Cal. Wrk. Comp. P.D. LEXIS 298.)
>
> We further note that unlike *Fitzpatrick*, in this case applicant secured the opinion of a vocational expert, Mr. Diaz, with whom AME Hasday agreed in finding applicant permanently and totally disabled, thus rebutting the strict impairment ratings for body parts individually evaluated by Dr. Hasday himself. (See *County of Alameda v. Workers' Comp. Appeals Bd.* (*Williams*) (2020) 85 Cal.Comp.Cases 792 (writ den.) [scheduled rating may be rebutted by establishing that the rating fails to account for the impact of an injured worker's ability to participate in

vocational rehabilitation, pursuant to *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 (48 Cal.Comp.Cases 587)].)[2]

***In this case, we agree with the WCJ that the medical opinion of AME Hasday, taken in conjunction with the vocational opinion of Mr. Diaz, justifies the WCJ's finding that the injuries to applicant's cervical, thoracic and lumbar spine in ADJ10256108 (May 29, 2015 specific) and ADJ10255968 (July 12, 2011-December 11, 2015 CT) resulted in permanent and total disability.***[3] (See Report and Recommendation of the WCJ, footnotes 9 through 11; Exhibit MM, Hasday report dated February 4, 2020, pp. 126-140.) In affirming the WCJ's finding of permanent and total disability based on Dr. Hasday's medical opinion, we follow the well-established doctrine that the AME's opinion ordinarily is followed because the AME has been chosen by the parties for the doctor's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114]; see also, *Brower v. David Jones Constr.* (2014) 79 Cal.Comp.Cases 550, 553-556 (Appeals Board in banc) [evaluating physician qualified to opine that an injured employee is so disabled by the industrial injury that he is incapable of working in the open labor market].)

Turning next to defendant's contention that the WCJ erred in not issuing separate permanent disability awards for each injury, we acknowledge that in *Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113], the Court of Appeal concluded that pursuant to Senate Bill 899 enacted in 2004, the law of apportionment mandates that multiple injuries ordinarily require separate permanent disability awards. However, the Court also stated that "there may be limited circumstances…when the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability. In such limited circumstances, when the employer has failed to meet its burden of proof, a combined award of permanent disability may still be justified." [*Id.* at p. 1560.]

In the instant matter, the WCJ issued a combined award of permanent and total disability relating to ADJ10256108 (specific injury May 29, 2015) and ADJ10255968 (cumulative trauma July 12, 2011-December 11, 2015). We note that Dr. Hasday opined that the permanent disability relating to applicant's thoracic and lumbar injuries should be apportioned 40 percent to the May 29, 2015 specific injury and 40% to the cumulative trauma injury from July 12, 2011 through

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[2] Our Supreme Court stated in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587], "[j]ust as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete. Accordingly, that factor should be considered in any determination of a permanent disability rating."

[3] As discussed in Section II of the WCJ's Report, applicant's injuries in ADJ10256212 (on July 11, 2011, to his lumbar spine including back muscles, spine and spinal cord, cervical spine and sleep disorder) and in ADJ10256223 (on November 12, 2012, to his bilateral knees (patella) and hernia) were not the basis for the WCJ's finding that the injuries in ADJ10256108 and ADJ10255968 resulted in permanent and total disability.

December 11, 2015. (Exhibit MM, p. 129.) However, we find this aspect of Dr. Hasday's opinion to be speculative because the doctor did not provide an explanation for his conclusion. In fact, Dr. Hasday's conclusion is undermined by the following discussion at page 126 of his report:

> The applicant then sustained a third compensable industrial injury to his low back on May 29, 2015, his second documented episode of lumbar instability, *from which he never fully recovered*; hence, there is element of industrial causation attributed to this specific injury. The applicant's fifth industrial claim is the CT injury (CT 07/2/2011 - 12/11/2015), which was filed for his back but appears to involve both his thoracic and cervical spine as well. (I note *the specific injury of May 29, 2015 apparently involved his lower thoracic spine as well,* as he soon developed early urinary and sexual dysfunction symptomatology following this injury. *This was then worsened over the course of time as part of the CT claim*.)
>
> (Italics added.)

Based on the above discussion by Dr. Hasday, the only reasonable interpretation is that although the doctor *concluded* that applicant's spinal disability should be apportioned 40 percent to the May 29, 2015 specific injury and 40% to the cumulative trauma injury from July 12, 2011 through December 11, 2015, the doctor *explained* that he could not really parcel out, with *reasonable medical probability*, the percentages to which each of those injuries causally contributed to applicant's overall permanent disability. As Dr. Hasday explained in the part of his report excerpted above, applicant never recovered from the specific injury of May 29, 2015, which resulted in urinary and sexual dysfunction; the specific injury, like the cumulative trauma injury, involved applicant's lower thoracic spine, followed by worsening of the specific injury symptoms within the continuing cumulative trauma. ***Therefore, we conclude that the Benson exception of "intertwined injuries" is applicable, and that the WCJ correctly issued a combined award.***

Finally, we address defendant's contention that the WCJ erred in not following Dr. Hasday's apportionment of permanent disability under Labor Code section 4663. On this issue, we agree (1) the WCJ erred in applying *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] based on the incorrect premise that all of applicant's permanent disability resulted from his spinal surgeries; and ***(2) the WCJ must revisit the issue of apportionment under section 4663 in light of Dr. Hasday's findings of preexisting spinal disease.***

* * *

In this case, Dr. Hasday did not conclude that the industrial medical treatment (spinal surgeries) endured by applicant was the sole cause of his permanent disability. Rather, the doctor gave reasons why he concluded that a part of applicant's disability is related to preexisting spinal disease:

In regards to the applicant's low back and lower thoracic spine, the applicant's second documented episode of instability occurred at the time of his May 29, 2015 injury, after which the applicant remained symptomatic. The specific injury involved the applicant's thoracic and lumbar spine. His second continuous trauma claim from July 12, 2011 to December 11, 2015 now adds the applicant's cervical spine with further aggravation of his thoracic and lumbar spine symptomatology. *It is clear that the applicant's grade I isthmic spondylolisthesis at L5-S1 predated his employment and would be considered an apportionable preexisting condition. The applicant's first set of thoracolumbar X-rays on May 31, 2006 showed evidence of mild degenerative disc disease at T12-L1 with Schmorl nodes and endplate changes from L1 to L3.* This would have predated the applicant's ATV non-industrial injury of May 20, 2006, where he sustained a transverse process fracture of T11.

Based on these assumptions *in regards to the applicant's cervical spine, I would apportion 10% due to preexisting degenerative disc disease* and 90% to continuous trauma AOE/COE his employment in the pled period July 12, 2011 to December 11, 2015, noting that the applicant's cervical spine symptomatology appears first in the medical records of Dr. Bakshian on February 8, 2016.

*In regards to the applicant's thoracic spine, I would apportion 20% due to preexisting degenerative disc disease,* 40% to the applicant's specific injury of May 29, 2015, and 40% to continuous trauma AOE/COE his employment in the period July 12, 2011 to December 11, 2015.

*In regards to the applicant's lumbar spine, I would apportion 20% due to preexisting grade I isthmic spondylolisthesis at L5-S1,* 40% to the applicant's specific injury of May 29, 2015, and 40% to continuous trauma AOE/COE his employment in the period July 12, 2011 to December 11, 2015.

(Exhibit MM, p. 129, italics added.)

Thus, in connection with applicant's permanent and total disability, Dr. Hasday apportions 10 percent of the cervical spine disability to preexisting degenerative disc disease, 20 percent of the thoracic spine disability to preexisting degenerative disc disease, and 20 percent of the lumbar spine disability to preexisting grade I isthmic spondylolisthesis at L5-S1. Dr. Hasday also provided medical reasoning and evidence in support of these conclusions. Other than stating that it was applicant's three spinal surgeries in 2016 that caused all his permanent disability, which is contrary to Dr. Hasday's opinion, the WCJ's Report does not address defendant's contention regarding apportionment under Labor Code section 4663. (See, e.g., *E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 930 (71 Cal.Comp.Cases 1687) [Section 4663(c)

satisfied where evaluating physician makes determination, based on medical expertise, of the approximate percentage of permanent disability caused by degenerative condition of injured employee's back].)

We note that "the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further [inquiry or] evidence." (*Telles Transport, Inc. v. Workers' Comp. Appeals Bd.* (2001) 92 Cal.App.4th 1159, 1164 [66 Cal.Comp.Cases 1290].) ***Based on Dr. Hasday's opinion and the unresolved issues relating to apportionment under section 4663 in this matter, we conclude that the WCJ must revisit and resolve the issue in further proceedings at the trial level. The WCJ may further develop the record as she deems necessary or appropriate, consistent with McDuffie v. Los Angeles County Metropolitan Transit Authority (2002) 67 Cal.Comp.Cases 138 [Appeals Board en banc]. This may include the procurement of supplemental opinions from Dr. Hasday and the vocational experts.***

In sum, we affirm the WCJ's findings that applicant's overall disability is permanent and total as a result of the injuries in ADJ10256108 and ADJ10255968, without apportionment between those injuries, but we amend the Findings and Awards to defer the extent of legal apportionment of the disability, if any, under Labor Code section 4663.

(Opinion and Decision After Reconsideration, September 23, 2022, pp. 3-6, 7-8, emphasis added.)

## DISCUSSION

### I.

Former Labor Code section 5909[4] 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.

[4] Unless otherwise stated, all further statutory references are to the Labor Code.

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 June 17, 2025, and 60 days from the date of transmission is Sunday, August 17, 2025. The next business day that is 60 days from the date of transmission is Monday, August 18, 2025. (See Cal. Code Regs., tit. 8, § 10600(b).)[5] This decision is issued by or on Monday, August 18, 2025, so that we have timely acted on the petition as required by section 5909(a).

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

Here, according to the proof of service for the Report by the WCJ, the Report was served on June 17, 2025, and the case was transmitted to the Appeals Board on June 17, 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 June 17, 2025.

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

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

**II.**

As highlighted in bold and italics in the original decision quoted above, we summarize three significant conclusions from our September 23, 2022 decision:

> The medical opinion of AME Hasday, taken in conjunction with the vocational opinion of Mr. Diaz, justifies the WCJ's finding that the injuries to applicant's cervical, thoracic and lumbar spine in ADJ10256108 (May 29, 2015 specific) and ADJ10255968 (July 12, 2011-December 11, 2015 CT) resulted in permanent and total disability.
>
> The *Benson* exception of "intertwined injuries" is applicable, and that the WCJ correctly issued a combined award.
>
> The WCJ must revisit the issue of apportionment under section 4663 in light of Dr. Hasday's findings of preexisting spinal disease. The WCJ may further develop the record as she deems necessary or appropriate, including the procurement of supplemental opinions from Dr. Hasday and the vocational experts.

In sum, we concluded that applicant was 100% totally and permanently disabled and that the *Benson* exception applied so that a combined award was appropriate. The only issue left undecided was whether there should be apportionment of disability for one combined award of 100% under section 4663.

In its Petition, defendant contends that AME Dr. Hasday's apportionment analysis is substantial evidence as the WCJ's conclusion that Dr. Hasday is discussing apportionment to causation of applicant's injury and not apportionment to applicant's disability is incorrect; that it is clear that AME Dr. Hasday was aware of the difference between the apportionment of impairment and disability based on his causation and apportionment analysis in his February 4, 2020 report; and that the WCJ incorrectly merged three claims to issue one award when three different awards need to be issued based on Dr. Hasday's apportionment analysis.

As to defendant's first two contentions with respect to Dr. Hasday's analysis of apportionment under section 4663, we agree with the WCJ's conclusions as set forth in his Report. We highlight the following:

Our Supreme Court has 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." (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1328 [72 Cal.Comp.Cases 565].)

In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Bd. en banc) (*Escobedo*).)

However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely. Rather, the report 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 that factors other than the industrial injury at issue caused permanent disability. (*Id.* at p. 621.) Our decision in *Escobedo* summed up the minimum requirements for an apportionment analysis as follows:

> [T]o 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.
>
> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, *how* and *why* it is causing permanent disability at the time of the evaluation, and *how* and *why* it is responsible for approximately 50% of the disability.

(*Ibid.*, italics added.)

Thus, a physician's apportionment determination requires that the physician *first identify the factors causing permanent disability* both before and after the industrial injury. Once the physician has identified each of the factors that are contributing to the employee's overall present permanent disability, the physician must then *make a finding of the approximate percentage* of the permanent disability was caused by each factor.

Accordingly, apportionment under section 4663 involves two separate but related analyses: (1) the identification of the factors causing permanent disability, and (2) a determination of the extent to which each of those factors contributed to present permanent disability, expressed as an approximate percentage.

We also observe that apportionment under section 4663 requires an analysis of causation of permanent disability, rather than causation of the injury. In *Escobedo, supra*, 70 Cal.Comp.Cases 604, we stated:

> Section 4663(a) states that "[a]pportionment of permanent disability shall be based on causation." The plain reading of "causation" in this context is causation of the permanent disability. This reading is consistent with other provisions of section 4663 and 4664. That is: (1) section 4663(b) provides that a physician's report on permanent disability shall address "the issue of causation of the permanent disability;" (2) section 4663(c) provides that a physician's report shall find "what approximate percentage of the permanent disability was caused by the direct result of injury . . . and what approximate percentage of the permanent disability was caused by other factors;" and (3) section 4664(a) provides that an employer "shall only be liable for the percentage of permanent disability directly caused by the injury. . . . " (Emphases added.) The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 (Significant Panel Decision).) **Thus, the percentage to which an applicant's injury is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different.**

(*Id.* at pp. 16-17, emphasis added.)

Here, based on our review of the record, and as explained by the WCJ, Dr. Hasday has not adequately explained how the identified factors of apportionment relate to the causation of applicant's residual *permanent disability*, rather than causation of applicant's *injury*.

Turning to the third contention with respect to the application of *Benson*, *supra*, we also agree with the WCJ's conclusion. We highlight the following:

Issue preclusion, also known as collateral estoppel, applies to bar a party from relitigating an issue already decided if the following requirements are met: (1) "the issue sought to be precluded from re-litigation must be identical to that decided in a former proceeding"; (2) "this issue must have been actually litigated in the former proceeding"; (3) "it must have been necessarily decided in the former proceeding"; (4) "the decision in the former proceeding must be final and on the merits"; and (5) "the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding." (*Branson v. Sun-Diamond Growers of California* (1994) 24 Cal.App.4th 327, quoting *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341, cert. denied, 500 U.S. 920 (1991).)

> The WCAB is bound by the basic rules of law and procedure. (Citation.) These basic rules of procedure require the board to give res judicata effect to its final decisions. (Citations.) The fact that the WCAB "is not bound by common law or statutory rules of evidence and procedure, may receive hearsay evidence, may proceed informally, and may adopt less stringent rules and regulations than those applicable in court does not alter the applicability of the doctrine of res judicata to its findings." (Citation.)

(*Dow Chemical Co. v. Workers' Comp. Appeals Bd.* (1967) 67 Cal.2d. 483, 491 (citations omitted).)

In our September 23, 2022 decision, we found in pertinent part that:

> ADJ10255968
>
> Finding of Fact 4: "The injury in this case, in conjunction with the injury in ADJ10256108, resulted in permanent and total disability, subject to apportionment under Labor Code section 4663, if any, as set forth in Finding 5 herein."
>
> Finding of Fact 5 "The issue of apportionment under Labor Code section 4663, if any, is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved."
>
> ADJ10256108
>
> Finding of Fact 4. "The issue of apportionment under Labor Code section 4663, if any, is deferred pending further proceedings and new determination by the WCJ, jurisdiction reserved."
>
> Finding of Fact 5. "The injury in this case, in conjunction with the injury in ADJ10255968, resulted in permanent and total disability, subject to apportionment under Labor Code section 4663, if any, as set forth in Finding 4 herein."

Finding of Fact 4. "Permanent disability is encompassed within the award in ADJ10255968."

When a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Following our September 23, 2022 decision, defendant did not petition for reconsideration and did not seek appellate review under section 5950 of the finding that applicant was entitled to one combined award. Accordingly, the law of this case is that ADJ10255968, ADJ10256108, and ADJ10256212 must be combined, and applicant is 100% permanently and totally disabled. The only issue that we left undetermined was whether section 4663 apportionment applied to the finding of 100%.

Thus, following our decision and the return of the matter to the trial level, there were two possible outcomes:

(1) defendant could fail to meet its burden on apportionment of pre-existing disability, resulting in one combined award of 100% permanent and total disability; or

(2) defendant could meet its burden on apportionment as to apportionment of pre-existing disability, resulting in one combined award of less than 100% permanent and total disability.

Defendant challenges the holding as to a combined award, but we ***cannot*** decide defendant's challenge as the matter was previously decided, and defendant failed to appeal. Except as to the issue of section 4663 apportionment with respect to one combined award, the 2022 Findings are final and binding upon the parties. That is, we are precluded from considering any arguments as to whether applicant was entitled to three separate awards, as the Findings are final. To the extent that defendant improperly seeks to relitigate those issues decided in 2022, defendant is admonished that such tactics could be construed as either frivolous and/or in bad faith.

Accordingly, we deny defendant's Petition for Reconsideration.

**IT IS ORDERED** that defendant's Petition for Reconsideration of the Joint Amended Findings and Award issued by the WCJ on May 7, 2025 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**I CONCUR,**

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

***I DISSENT (See Dissenting Opinion),***

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**August 18, 2025**

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

**JOSEPH RYAN**
**METZINGER & ASSOCIATES**
**STATE COMPENSATION INSURANCE FUND, LEGAL**

**AS/mc**

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

## DISSENTING OPINION OF COMMISSIONER RAZO

I respectfully dissent with respect to the majority's conclusion that Dr. Hasday's apportionment opinion does not constitute substantial medical evidence.

Instead, I believe that the "causation" that Dr. Hasday discusses in his apportionment analysis comports to the requirements under section 4663. Dr. Hasday specifically states that:

> My AME report of February 4, 2020 was over 130 typed pages and included review of 8,346 pages of medical records. The report includes an extremely detailed and annotated discussion of causation from pages 120-127 of this report in which I outlined in great detail exactly what would be consistent with the preexisting pathological conditions which would come into play in discussing 4663 apportionment and attributing a certain percentage of acceleration of degenerative disc and degenerative spine disease to his period of employment of 1999 through his last day of work in 2016.

(Joint Exhibit PP, Chester Hasday, M.D., January 19, 2023, p. 3).

Dr. Hasday then states that:

> Applicant had well documented specific injuries, as noted, which accelerated the need for medical treatment based on this progressive degenerative disc disease; hence, the specific injuries that were apportioned to in my causation analysis permanently changed the natural history of his underlying condition and either accelerated or precipitated his need for subsequent medical care.

(*Id.* p. 3).

Therefore, Dr. Hasday analyzed apportionment as required by section 4663, and consistent with the relevant decisional law interpreting the application of non-industrial apportionment.

Further, as noted by defendant, AME Dr. Hasday's initial report of February 4, 2020 (Exhibit MM) included a separate causation section in the report. In the causation section, Dr. Hasday specifically discusses each of the dates of injury and each of the industrially injured body parts. I agree with defendant's proposition that Dr. Hasday clearly understood the difference between causation of the injury and apportionment of disability given that he provided separate sections for both with a thorough explanation based on the medical evidence.

As explained in *Escobedo, supra,* the legislature intended that apportionment be assigned to a pre-existing condition if it was a causal factor in the disability, even if asymptomatic at the time of the injury, regardless of whether the asymptomatic condition would have developed absent the injury. If the preexisting asymptomatic condition was a causal factor in the disability, then

apportionment is valid. (*Escobedo, supra,* 70 Cal. Comp. Cases 604, 617.) Multiple Court of Appeal cases have affirmed the principle that the cause of injury and the cause of disability can be both the causation of injury and the cause of disability, even if the cause is of different percentages. (*Brodie*, *supra*, 40 Cal.4th at p. 1327; *Gatten*, *supra*, (2006) 145 Cal.App.4th at pp. 926–927; *City of Petaluma v. Workers Comp. Appeals Bd.* (*Lindh*) (2018) 29 Cal.App.5th 1175, 1191 [83 Cal.Comp.Cases 1869].) Thus, Dr. Hasday's apportionment determinations should be deemed substantial medical evidence.

I would amend the Joint Amended Findings of Fact and Award of May 7, 2025 to apply nonindustrial apportionment to applicant's permanent disability of 100%.

Therefore, I respectfully dissent.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**August 18, 2025**

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

**JOSEPH RYAN**
**METZINGER & ASSOCIATES**
**STATE COMPENSATION INSURANCE FUND, LEGAL**

**AS/mc**

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

## REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

## I
## INTRODUCTION

| | |
|---|---|
| 1. Finding & Award | 05/07/2025 |
| 2. Identity of Petitioner | Defendant |
| 3. Verification | Yes |
| 4. Timeliness | Petition is timely |
| 5. Petition for Reconsideration Filed | 08-26-2024 |

6. Petitioner's Contentions:

1. By the order, decision or award made and filed by the Workers' Compensation Administrative Law Judge the Division of Workers' Compensation acted without or in excess of its powers;
2. The evidence does not justify the Findings of Fact.
3. The Findings of Fact do not support the Order, decision, or Award.

These consolidated matters concern the validity of Labor Code §4463 apportionment and the benefits owed to applicant as the result of his ensuing joint Award. Following remand from the WCAB, the undersigned was directed to adjudicate the issue of the validity of that apportionment, with applicant claiming 100% permanent and total disability on an industrial basis. The Court concluded that AME Dr. Hasday's opinion on apportionment did not constitute substantial evidence and issued a combined Award for 100% permanent total disability. Central to the Court's decision as its distinction between the concepts of "impairment" and "disability" as defined in the AMA Guides 5th Edition, and the Cou1i's opinion that Dr. Hasday improperly apportioned the applicant's "impairment" rather than his "disability". The Court opined that this is akin to a discussion of causation of injury rather than disability, and that this is not what is contemplated by the plain language of Labor Code §4663.

Defendant has filed a timely verified petition for reconsideration of the Findings and Award. On Reconsideration, Petitioner argues that the Court was in error in finding that Dr. Hasday's reporting was not substantial on the issue of apportionment, and that the Court improperly merged three of applicant's claims.

## II

## FACTS

This matter has had a very unusual procedural history, with multiple appeals regarding various issues. For purposes of the instant Petition, the following summary is in order. On September 8, 2021, WCJ Devine issued multiple F&As with a joint opinion on decision. She made specific findings regarding parts of body injured as the result of each case, as well as findings regarding applicant's earnings. She found that in accordance with the AME opinion of Dr. Chester Hasday and applicant's vocational expert Frank Diaz, applicant was permanently totally disabled based on the multi-lumbar instability with neurologic involvement, as well as Dr. Hasday's opinion that applicant is unemployable, even in a sedentary capacity, because he has significant weakness of his core muscles and limited tolerance for standing and sitting.

The WCAB affirmed [1] WCJ Devine's original 9/8/2021 Findings and Awards in all respects other than as to Labor Code §4663 apportionment and the resulting fees; this is why the undersigned issued a combined joint Award. As to the §4663 apportionment however, the WCAB noted that WCJ Devine had intimated that applicant's permanent disability resulted strictly from his three spinal surgeries, and that therefore, apportionment was forbidden per the Board's decision in *Hikida v WCAB,* (2017) 12 Cal. App. 5th 1249; 82 Cal. Comp. Cases 679.

In truth, this was not the opinion expressed by Dr. Hasday; as per his then report[2] of 2/4/20, and as later affirmed thereafter in his report[3] of 1/19/23, Dr. Hasday did apportion to pre-existing degenerative disc disease, and preexisting grade Isthmic spondylolisthesis at LS-S1. Hence, without reaching the merits of whether or not such apportionment is legally valid, the WCAB noted that the WCJ's decision applied an erroneous legal standard to invalidate Dr. Hasday's apportionment, and instead remanded the case in order to allow the WCJ to determine "the extent of legal apportionment of the disability, **if any,** under Labor Code section 4663."[4] **(emphasis** added).

Although there were additional proceedings thereafter, the same are less relevant to the consideration of the instant Petition. Following a second series of Petitions for Reconsideration and Removal, the case was ultimately remanded and re-assigned to the undersigned. The

[1] 9/23/22 Decision of the WCAB, at pg. 9
[2] Exhibit MM
[3] Exhibit PP
[4] 9/23//22 Decision of the WCAB, at pg. 8

undersigned issued his decision awarding 100% permanent total disability, and the instant petition followed.

## III.

## DISCUSSION

**The Court stands by its determination that Dr. Hasdav's opinion on apportionment does not constitute substantial evidence.**

In its Petition, defendant primarily argues that the Court's conclusion as to the substantiality of Dr. Hasday's opinion is incorrect. Defendant essentially reiterates Dr. Hasday's own 01/19/2023 response[5] to the questioning of his apportionment analysis - in that report, in responding to applicant's counsel's interrogatory regarding apportionment, Dr. Hasday referred back to his 02/04/2020 report[6] and expressed his opinion that he had already provided "an extremely detailed and annotated discussion of causation... in which [he] outlined in great detail exactly what would be consistent with the preexisting pathological conditions..."[7].

It is true that applicant has a very complicated medical history, with multiple injuries and substantial interventional measures taken over many years. In the undersigned's opinion, Dr. Hasday admirably and deftly sorted through thousands of pages of medical records to reconstruct that history, and in so doing, he provided[8] a very complex, detailed, and substantial opinion regarding applicant's causation of injuries. However, when Dr. Hasday pivoted to the discussion of apportionment of disability, he did not actually speak to applicant's "disability" and how or why any part of it was attributable to pre-existing conditions or individual industrial injuries. Instead, as he later explained himself in his subsequent 01/19/2023 report, Dr. Hasday attempted to look at the presently deranged state of applicant's spine and knees and parcel out what events or degenerative changes had contributed to that derangement. In his own words[9], "I concluded that he was I00% Totally Disabled from the open labor market and provided the parties a detailed discussion of Section 4663 apportionment, eventually concluding that regarding

[5] Exhibit PP
[6] Exhibit MM
[7] Exhibit PP at pg. 3
[8] Exhibit MM at pgs. 120-127
[9] Exhibit PP at pg 1

the applicant's cervical spine, 0% of his cervical spine *impairment* was due to preexisting degenerative disc disease and 90% to continuous trauma..." [10] (*emphasis* added)

But, as the Court explained in detail in its opinion, "impairment" is not "disability". These two terms are defined differently in the AMA Guides, and the Court cited extensively to the text of the Guides in its explanation as to why the parceling out of "impairment" is actually a discussion of the causation of injury, i.e. why it is that a body part or system ended up in its present state; that discussion is *not* equivalent to legal apportionment of "disability". To recap, on page 2, the Guides defines the term "impairment" as "a loss, loss of use, or derangement of any body part, organ system, or organ function." The Guides continues:

> A medical impairment can develop from an illness or injury...The term *impairment* in the *Guides* refers to permanent impairment, which is the focus of the *Guides.*
> An impairment can be manifested objectively, for example, by a fracture, and/or subjectively, through fatigue and pain.... According to the *Guides,* determining whether an injury or illness results in a permanent impairment requires a medical assessment performed by a physician. An impairment ***may*** lead to functional limitations or the inability to perform activities of daily living. ***(emphasis*** added)...
> **Impairment percentages** or **ratings** developed by medical specialists are consensus-derived estimates that reflect the severity of the medical condition and the degree to which the impairment decreases an individual's ability to perform common activities of daily living (ADL), *excluding* work. Impairment ratings were designed to ***reflect functional limitations and not disability.*** The whole person impairment percentages listed in the *Guides* estimate the impact of the impairment on the individual's overall ability to perform activities of daily living, *excluding ,work,* as listed in Table 1-2. **(bold** and *italics* in original, ***bolded underlined italicized*** phrase emphasis added).
> The medical judgment used to determine the original impairment percentages could not account for the diversity or complexity of work but could account for daily activities common to most people. Work is not included in the clinical judgment for impairment percentages for several reasons: (I) work involves many simple and complex activities; (2) work is highly individualized, making generalizations inaccurate; (3) impairment percentages are unchanged for stable conditions, but work and occupations change; and (4) **impairment interact with such other factors as the worker's age, education, and prior work experience to determine the extent of work disability. (emphasis** added).
> For example, an individual who receives a 30% whole person impairment due to pericardia] heart disease is considered from a clinical standpoint to have a 30% reduction in general functioning as represented by a decrease in the ability

[10] [Note: No footnote on original]

> to perform activities of daily living. For individuals who work in sedentary jobs, there may be no decline in their work ability although their overall functioning is decreased. Thus, **a 30% impairment rating does not correspond to a 30% reduction in work capability.** Similarly, a manual laborer with this 30% impairment rating due to pericardia] disease may be completely unable to do his or her regular job and, thus, may have a 100% work disability. **(emphasis** added).
>
> As a result, impairment ratings are not intended for use as direct determinants of work disability. **When a physician is asked to evaluate work-related disability, it is appropriate for a physician knowledgeable about the work activities of the patient to discuss the specific activities the worker can and cannot do, *given the permanent impairment."*** (all emphasis added

In other words, "impairment" is equivalent to derangement, the altered state of a body part or system. Such derangement may lead to functional limitations, or conversely, it may not.

The Guides separately defines "disability" on page 8:

> The *Guides* continues to define disability as an alteration of an individual's capacity to meet personal, social, or occupational demands or statutory or regulatory requirements because of an impairment. Physicians have the education and training to evaluate a person's health status and determine the presence or absence of an impairment. If the physician has the expertise and is well acquainted with the individual's activities and needs, the physician may also express an opinion about the presence or absence of a specific disability...
> The impairment evaluation, however, is only one aspect of disability determination. A disability determination also includes information about the individual's skills, education, job history, adaptability, age, and environment requirements and modifications.

This is in keeping with the instructions given in the 2005 Permanent Disability Rating Schedule (PDRS), which require that physician-provided impairment ratings be adjusted for Diminished Future Earning Capacity (DFEC), age, and occupation.

The text of the AMA Guides continues on page 9:

> As discussed in this chapter and illustrated in Figure 1-1, medical impairments are not related to disability in a linear fashion. An individual with a medical impairment can have no disability for some occupations, yet be very disabled for others...
> The *Guides* is not intended to be used for direct estimates of work disability. Impairment percentages derived according to the *Guides* criteria do not measure work disability.

> Therefore, it is inappropriate to use the *Guides'* criteria or ratings to make direct estimates of work disability.

Stated in summary, the authors of the Guides explain that impairment is not disability. While disability may flow from an impairment, the two are separate concepts, defined differently,' and the fact that someone has an impairment pursuant to the Guides does not mean that the impairment necessarily results in *disability*.

The reason why this is critically important is that while Labor Code §4663 actually uses both terms in subsection (d), subsection (c) only provides for apportionment of permanent disability, not impairment. In fact, the statute itself distinguishes between the two terms in subsection (d), stating, "an employee who claims an industrial injury shall, upon request, disclose all previous permanent disabilities **or** physical impairments." (**emphasis** added). As petitioner ably points out in its citation to all of the authority in support of the principle, we must assume that the legislature made a deliberate choice to draft the statute in the manner written. By using the word "or" in separation of the words "permanent disabilities" and "physical impairments", the legislature recognized that these words had different meanings and should therefore be separately listed as items requiring disclosure upon request. Similarly, and especially in light of the fact that the term *is* used in subsection (d), we must also assume that while the legislature could have used the word "impairment" in subsections (a) - (c), its choice to not do so was deliberate rather than inadvertent.

And this is both a logical and reasonable reading of the statute in light of its purpose. If a pre-existing condition or prior injury contributes to the applicant's alteration of his capacity to meet occupational demands, the statute removes that contribution f om the disability portion that can be allocated as the employer's responsibility. But the Guides themselves recognize within the very first pages of the text [11] that impairment does not automatically cause disability, and it can be similarly stated that the pre-existence of degenerative changes does not automatically contribute to a person's disability following an injury. In those instances where a medical evaluator believes that non-industrial factors have indeed caused a portion of applicant's permanent disability, the evaluator must explain [12] how and why those factors are causing disability in the specific portions approximated by the doctor. If the doctor does not do this, the apportionment is invalid.

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[11] *See* AMA Guides 5th Edition at pgs. 2-9, including Table 1-1, pg. 3
[12] *See* e.g. Tatum v. Long Beach Transit, 2020 Cal. Wrk. Comp. P.D. LEXIS 306

Dr. Hasday did not do this. Instead, Dr. Hasday gave an opinion that purported to describe 13 [of] the contributing sources of applicant's impairment at the time of evaluation. Impairment is not disability. Dr. Hasday's opinion on apportionment is an analysis of causation of injury, not disability. It is not valid apportionment pursuant to Labor Code §4663, and accordingly, the Court properly disregarded it and awarded applicant an unapportioned I00% Award.

**The Court issued a combined Award because this was previously determined by the WCAB and is law of the case**

Finally, petitioner argues that the undersigned improperly merged 3 claims and should not have issued a combined Award. As a final brief point, the Cou1t refers petitioner to the 09/23/22 decision of the WCAB after Reconsideration, specifically at pages 6 and 8. On page 8, the WCAB decided to "affirm the WCJ's findings that applicant's overall disability is permanent and total as a result of the injuries in ADJ10256108 and ADJl0255968, without apportionment between those injuries, but [] amend[ed] the Findings and Awards to defer the extent of legal apportionment of the disability, if any, under Labor Code section 4663."

Labor Code §4663 apportionment is separate and distinct from *Benson* apportionment. The WCAB already decided "that the *Benson* exception of' intertwined injuries' is applicable, and that the WCJ correctly issued a combined award." This is law of the case and cannot be re-litigated. The Court's Amended Award rests upon the foundation previously laid by WCJ Devine and the WCAB.

## IV
## RECOMMENDATION

For the reasons stated above, it is respectfully recommended that defendant's Petition for Reconsideration be DENIED.

DATE: 6/16/2025

**Adam D. Graff**
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

TRANSMITTED TO RECON: 6/17/2025