WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DARA BUTLER, ***Applicant***

vs.

STATE OF CALIFORNIA, DEPARTMENT OF TOXIC SUBSTANCES CONTROL; legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, ***Defendants***

Adjudication Numbers: ADJ6958667; ADJ6960238
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Joint Findings and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on June 2, 2026, wherein the WCJ found in relevant part that applicant, while employed by defendant on May 14, 2009 as an office technician (Case Number ADJ6960238), sustained injury arising out of and in the course of employment (AOE/COE) to the lumbar spine, psyche, vascular system (by way of headaches), cognitive (by way of memory), and sleep. The WCJ further found that applicant, while employed by defendant during the period of April 13, 2008 through April 13, 2009 (Case Number ADJ6958667) sustained injury AOE/COE to the psyche; that applicant is entitled to a joint award per *Benson,* and that applicant's injury caused permanent disability of 73%.

Defendant contends that the portion of the rating that included 51% permanent disability for the hypothalamic pituitary axis disorder class III is invalid and should be denied, and that the apportionment found by qualified medical evaluators (QME) Roger Bertoldi, M.D. and David Sones, M.D., for applicant's psych and cognitive impairment is valid.

We received an Answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition denied.

We have considered the allegations in defendant's Petition, the Answer, and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons set forth in the WCJ's report, which we adopt and incorporate, we will deny reconsideration.

I.

Up through July 1, 2024, petitions for reconsideration were subject to former Labor Code[1] section 5909, which 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.)

During the period from July 2, 2024 through June 30, 2026, petitions for reconsideration were subject to former section 5909, which stated 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.
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> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a) (in effect from July 2, 2024 through June 30, 2026), 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 July 15, 2026, and 60 days from the date of transmission is Sunday, September 13, 2026. The next business day that is 60 days from the date of transmission is Monday, September 14, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, September 14, 2026, so that

[1] All further references are to the Labor Code, unless otherwise noted.

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

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

we have timely acted on the petition as required by section 5909(a) (in effect from July 2, 2024 through June 30, 2026).

Section 5909(b)(1) (in effect from July 2, 2024 through June 30, 2026) 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) (in effect from July 2, 2024 through June 30, 2026) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on July 15, 2026, and the case was transmitted to the Appeals Board on July 15, 2026. 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) (in effect from July 2, 2024 through June 30, 2026), because service of the Report in compliance with section 5909(b)(2) (in effect from July 2, 2024 through June 30, 2026) provided them with actual notice as to the commencement of the 60-day period on July 15, 2026.

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 11, 2026

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

DARA BUTLER
LAW FIRM OF ROWEN, GURVEY & WIN
STATE COMPENSATION INSURANCE FUND

SL/abs

I certify that I affixed the official seal of the Workers' Compensation Appeals Board to this original decision on this date.
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REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I.
INTRODUCTION

1. **Applicant's occupation:** office technician
2. **Applicant's age at dates of injury:** 37 years old
3. **Dates of injury:** in ADJ6960238, 5/14/09; and in ADJ6958667, CT 4/13/08-4/13/09
4. **Parts of body injured:** in ADJ6960238, lumbar spine, psyche, vascular system (by way of headaches), cognitive (by way of memory), and sleep; and in ADJ6958667, psyche
5. **Identity of petitioner:** Defendant.
6. **Timeliness:** Yes.
7. **Verified:** Yes.
8. **Answer Filed:** No.
9. **Date of Action:** Findings & Award dated 6/2/26.
10. **The petitioner's contentions:** Petitioner has 3 contentions: (I) 10% non-industrial apportionment should be applied based on Escobedo; (2) the court should not have included the 51 % PD rating for Applicant's sleep claim per Almaraz/Guzman; and (3) attorneys' fees should be amended according to an updated final PD rating.

II.

FACTS

The matter came to trial on 3/11 /26 and was submitted on that date without testimony before the undersigned.

Applicant, Dara Wright-Butler, was employed by Department of Toxic Substances Control as an office technician when she sustained injury to her psyche, low back, cognitive (by way of memory), vascular headaches, and sleep on 5/14/09 and her psyche during the CT period 4/13/08-4/13/09. While two separate claims were alleged, a specific injury and CT injury, the court found the injuries were inextricably intertwined. Defendant did not challenge the joint rating but rather challenges the end result.

The following medical-legal evaluators were utilized in this case: AME Newton (Joint Exhibits Z5- Z1O, SOE, page 4 lines 14-25), AME Sones (Joint Exhibits Z15-Z29, SOE, page 5 line 11 through page 6 line 16), QME Bertoldi (Joint Exhibits Z1-Z4, SOE page 4 lines 5-13), and QME Silverman (Joint Exhibits Z1 l-Z14, SOE page 5 lines 1-9).

III.
DISCUSSION

A. Defendant failed to meet its burden of proving apportionment under Escobedo.

Pursuant to Labor Code Section 4663, Defendant bears the burden of proving apportionment with substantial evidence. Under *Escobedo v. Marshalls* (2005) 70 CCC 604 , such burden is met if apportionment is supported by substantial medical evidence that explains **how and why** nonindustrial factors caused a percentage of the applicant's permanent disability. A medical opinion based on materially inaccurate or unresolved historical facts is not substantial evidence. In *Pan Pacific Printing Press, Inc. v. WCAB* (*Whitt*) (2016) 81 CCC 744 (writ denied), the QME report could not be relied upon for conclusions dependent on the inaccurate history that applicant had no prior back symptoms. Specifically, in the case of *Whitt*, "the WCAB explained in its decision that Dr. Broderick's conclusion that Applicant suffered a specific injury on 1/4/2012 was not substantial evidence because it was based on an incorrect history of no prior back injury."

Here, Defendant contends that the court erred in declining to apply a 10% non-industrial apportionment based upon the opinions of Dr. Bertoldi and Dr. Sones, which opine that 10% of Applicant's permanent disability should be apportioned to non-industrial factors. However, the medical opinions on this point were predicated upon Applicant's reported past history. As noted by Dr. Silverman, the record contains material inconsistencies regarding the history Applicant reported to each doctor in terms of her past alcohol use. Because Applicant did not testify at trial, and no supplemental medical reporting was obtained to reconcile the differing histories provided to the evaluating physicians, the Court was unable to assess Applicant's credibility or determine which factual history, if any, was accurate.

Dr. Bertoldi finds non-industrial apportionment of 10% to Applicant's cognitive and sleep impairments based on Applicant's history of alcohol abuse. Specifically, in Dr. Bertoldi' s 12/10/14 report, he notes that:

> "Applicant's history includes over 20 years of ethyl alcohol (ETOH) abuse; however, she has been sober for 20 months as of 10/2/24." (Joint Exhibit Z3, page [2])

Further, in Dr. Bertoldi 's 4/6/25 report, he indicates that:

> "From a neurological standpoint, it is possible Ms. Wright-Butler's long-term alcohol usage affected her cognition. Ms. Wright-Butler's long-term memory loss and cognitive disorder mimic the expected decline of individuals with alcohol-induced Wernicke encephalopathy." (Joint Exhibit Z2, page 16)

For cognitive,

> "Ninety percent (90%) of Ms. Wright-Butler's cogrnt1ve impairment is apportioned to her 4/13/08 - 4/13/09 CT and 10% is apportioned to non-industrial alcohol usage" . . . and for sleep, "Ninety percent (90%) of Ms. Wright-Butler's OSA is apportioned her cumulative trauma (CT) 4/13/08- 4/13/09 CT work injury and 10% is apportioned to non-industrial factors." (Joint Exhibit Z2, pages 22 and 24)

Dr. Sones comments briefly on Applicant's alcohol history and non-industrial stressors in his finding of 10% non-industrial apportionment of Applicant's psychiatric disability, in his 7/16/21 report. Specifically, Dr. Sones states:

> "Since the applicant was last examined on April 12, 2023, she has attended Alcoholics Anonymous meetings on two to five occasions, the last time in approximately 2016. She has not attended any other twelve-step or self-help programs since she was last examined." (Joint Exhibit Z15, page 5)
>
> "The applicant identifies some non-industrial stressors. In June of July 2010 the home she had purchased in 2007 went into foreclosure. In 2006 her maternal grandmother died. In 2008 she was having serious conflicts with a friend that led to court appearances for restraining orders. In July 2012 her personal vehicle was stolen. In 2017 or 2018 the applicant separated from her husband and they have no plans to reconcile. A divorce has not been finalized. In 2019 or 202[0] a sister was diagnosed with sarcoidosis, and in March or April 2020 another sister-in-law sustained a stroke. In 2018 a close friend sustained a stroke. In 2019 or 2020 the applicant's stepmother was diagnosed with tongue cancer. In May 2020 one of her sisters dies and in April 2020 the father of her daughter died [...] The remaining 10% of the applicant's permanent psychiatric disability has been caused by the non-industrial stressors identified above." (Joint Exhibit Zl5, pages 20-21)

Dr. Silverman states in his 10/14/25 report that he was not aware of the alcohol abuse history referenced in Dr. Bertoldi's 12/10/24 and 4/6/25 reports; and accordingly, the parties need to confirm Applicant's past history in terms of apportionment. Specifically, Dr. Silverman states:

> "I had reviewed the QME report in psychiatry of Dr. Sones from July 2021 and prior reports, who had diagnosed her with major depressive disorder, a specific personality disorder from a psychiatric basis. The report of Dr. Bertoldi is new, who did a comprehensive neuropsychological evaluation report using a battery of 23

> neuropsychological tests. **He noted a most pertinent history, why I was not aware of, was a history of ethyl alcohol abuse of more than 20 years** [...] I would now add that the history of alcohol abuse raises the possibility that there should be an apportionment to the nonindustrial alcohol use of at least 20%, if confirmed. **It would be important to confirm her past history in terms of amount and duration of alcohol abuse in terms of apportionment of the cognitive problems noted by Dr. Bertoldi.** However, the fatigue and pain remain 100% industrial." (Joint Exhibit 11, page 4)

Given the inconsistent histories provided by the applicant, the court appropriately found that the apportionment opinions provided by Dr. Bertoldi and Dr. Sones were speculative and unsupported. Thus, Defendant did not meet its apportionment burden since the medical evidence Defendant relies upon is based on inconsistent applicant history that remains unresolved. Apportionment cannot be based on possibilities – it must be based on reasonable medical probability. Per *Kopping*, that is defendant's burden. [*Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal. App. 4th 1099, 1101.]

Notwithstanding the foregoing, even though the reports of Dr. Bertoldi and Dr. Sones were not substantial on the issue of apportionment, the court still found them substantial with respect to findings on causation and impairment. In *Republic Indemnity Co. of America v. WCAB* (*Winner*) (2007) 72 CCC 1175 , the WCJ properly relied on the valid portions of the medical reports even though neither physician's apportionment analysis was entirely convincing, demonstrating that a report may be unreliable on apportionment yet still substantial on other issues. Defendant failed to meet their burden of proof and as such the award was issued without apportionment.

B. Defendant contends Applicant is not entitled to 51 % PD for sleep because Dr. Bertoldi did not provide an *Almaraz/Guzman* analysis; however, Dr. Bertoldi found Applicant's sleep impairment was caused by a pituitary dysfunction. Thus, the 45% WPI utilizing Chapter 10 of the *AMA Guides* was Dr. Bertoldi's straight rating, and *Almaraz/Guzman* does not apply.

Any award, order, or decision of the Appeals Board must be supported by substantial evidence. (Lab. Code Section 5952(d); *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal. 3d 274, 281 [39 Cal. Comp. Cases 310]; *Garza v. Workmen's Compensation Appeals Board*, *Mcdonnell-Douglas Aircraft Company,* et. al., (1970) 3 Cal. 3d 312, 317 935 Cal. Comp. Cases 16].); *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal. 3d 627,635 [35 Cal. Comp. Cases 16].). In *Blackledge v. Bank of America* (2010) 75 CCC 613, the WCAB held that it is the physician's role to determine the injured worker's WPI under the *AMA Guides* and to support that

assessment with an explained medical report setting forth the facts and reasoning underlying the impairment opinion. Because *Blackledge* assigns the physician the task of selecting and explaining the applicable AMA Guides impairment rating, a properly supported straight rating does not require an *Almaraz/Guzman* analysis; an *Almaraz/Guzman* alternative rating is only necessary when the physician is departing from the standard applicable Guides framework to rebut the scheduled rating.

Here, the record reflects that Dr. Bertoldi did not rely upon an alternative impairment rating under *Almaraz/Guzman II*. Rather, Dr. Bertoldi expressly provided a strict impairment rating under the *AMA Guides* utilizing Table 10-1 based upon his opinion, stated within reasonable medical probability, that Applicant's obstructive sleep apnea was caused by a hypothalamic-pituitary axis disorder. As a physician specializing in sleep medicine, Dr. Bertoldi identified the underlying etiology of Applicant's condition was an endocrine disorder, and thus, assigned impairment under the chapter of the *AMA Guides* addressing that body system. Accordingly, *Almaraz/Guzman II* analysis is not triggered because Dr. Bertoldi did not deviate from the *AMA Guides* or employ an alternative method of rating impairment. Instead, he selected the *AMA Guides* chapter he concluded was medically applicable based upon Applicant's underlying pathology. Defendant has not identified any provision of the *AMA Guides* requiring Dr. Bertoldi to disregard his medical opinion regarding causation and instead rate Applicant's impairment under Table 13-4. Nor has Defendant explained why Table 13-4 would be the appropriate table where Dr. Bertoldi concluded, within reasonable medical probability, that Applicant's obstructive sleep apnea was caused by a hypothalamic-pituitary axis disorder.

Dr. Bertoldi found Applicant's sleep impairment was caused by a hypothalamic-pituitary axis endocrine dysfunction, as described in Table 10-1 of the *AMA Guides*. Specifically, in Dr. Bertoldi's 4/6/25 report, he found that:

> "For sleep impairment, the *AMA guides* refers to "The Respiratory System (Chapter 5) which also discusses impairment as it relates to obstructive sleep apnea (OSA) (p.317) with controlling Section 5.6 of The Respiratory System (Chapter 5) stating: grading obstructive sleep apnea severity depends on the number of apnea/hypopnea episodes observed in polysomnography and the severity of hypoxia caused by these episodes. There are no standard, well- documented criteria for determining the level of impairment based on the results of polysomnography. For purposes of impairment rating as discussed in this chapter, refer to the judgment of a sleep specialist (p. 105). Also, Ms. Wright-Butler's elevated REM AHI of 53 is associated with serious medical consequences which markedly increases her risk of stroke, myocardial infarction, hypertension, diabetes mellitus, and reproductive

health and fertility, if untreated. **All of these medical conditions are caused by OSA-induced hormonal dysfunction from hypothalamic-pituitary axis endocrine dysfunctions as described in Table 10-1 of the Endocrine System which includes alterations in prolactic secretion, altering sleep pattern, with increased secretion during sleep and subsequent lower levels during waking periods [...] For sleep impairment, Section 5.6 "refers to the judgment of a sleep specialist." Therefore, as a sleep specialist, Ms. Wright-Butler's resulting sleep impairment is best measured by severe OSA's resulting hormonal dysfunction by the use of Table 10-1 Criteria for Rating Permanent Impairment Due to Hypothalamic-Pituitary Axis Disorders**, on p. 215 [...] Ms. Wright-Butler's diagnosed severe REM Obstructive Sleep Apnea (OSA) hormonal dysfunction severely affecting her ability to perform activities of daily living (ADL) warrants, according to the AMA Guidelines 5th Edition Table 10-1 Criteria for Rating Permanent Impairment Due to Hypothalamic-Pituitary Axis Disorders, on p. 215, of the Endocrine System, a Class III rating 45% WPI." (Joint Exhibit Z2, pages 23-24)

Because Dr.-Bertoldi provided a strict *AMA Guides* rating under the chapter he determined was applicable based upon Applicant's diagnosed condition and its underlying cause, Defendant's reliance on *Almaraz/Guzman II* is misplaced as *Almaraz/Guzman* was not triggered on these facts. Per *Blackledge*, the undersigned's rating was supported by substantial medical evidence.

C. There are no changes to the court's PD rating, which would warrant a change in the awarded attorney's fees.

Because the Court's permanent disability rating remains unchanged, there is no basis to modify the attorney's fee awarded in the Findings and Award. Accordingly, no adjustment to the attorney's fee is warranted. Thus, the issue is rendered moot.

RECOMMENDATION

It is respectfully recommended that the petition for reconsideration be denied. This report has been transmitted on EAMS on 7/15/26.

Dated: 7 /15/26

This Report and Recommendation was transmitted to the Recon Unit on 7/15/2026.

Cheryl Simbulan Beach
Workers' Compensation Judge