WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

GREG O'BRIEN, *Applicant*

vs.

COVENANT LIVING AT THE SAMARKAND; NUTMEG INSURANCE COMPANY, administered by THE HARTFORD, *Defendants*

Adjudication Number: ADJ19939689
Goleta District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Amended Findings and Award (F&A), issued by the presiding workers' compensation administrative law judge (PWCJ) on May 5, 2026, wherein the PWCJ found in relevant part that applicant, while employed during the period of August 9, 2020, through September 17, 2024, as a transportation supervisor, Occupational group No. 460, by defendant, sustained injury arising out of and within the course of employment to his left knee; applicant's occupational group number is 460; applicant is entitled to 173 weeks of permanent disability indemnity, commencing January 4, 2024, and less attorney fees; and that there is no legal basis for apportionment.

Defendant contends that applicant's occupational group number is 250 and there is a legal basis for apportionment, which results in 13.5% permanent disability.

We received an Answer from applicant. The PWCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the allegations in the Petition, the Answer, and the contents of the Report with respect thereto.

Based on our review of the record, and as discussed below, we will grant defendant's Petition for Reconsideration to include the finding that applicant's injury caused 36% permanent disability, without apportionment, and otherwise affirm the F&A. (Finding of Fact 7.)

BACKGROUND

We will briefly review the relevant facts.

Applicant sustained injury to his left knee while employed by defendant as a transportation supervisor during the period from August 9, 2020 through September 17, 2024.

On June 9, 2021, applicant underwent a left total knee arthroplasty. (Exhibit 1, at p. 6.)

On November 20, 2023, applicant underwent a revision total knee arthroplasty, left knee. (*Id*. at p. 11.)

David Feingold, M.D., served as the panel qualified medical evaluator (QME) and on April 7, 2025, he evaluated applicant and diagnosed him with left knee arthritis, status post total knee arthroplasty. (Exhibit 2, at p. 8.) Dr. Feingold determined causation as follows:

> Regarding his diagnosis of left knee arthritis, status post total knee arthroplasty, it is within reasonable medical probability that the repetitive activities of his employment as a Supervisor-Transportation Services has caused an aggravation to a pre-existing condition of left knee arthritis. Arthritis of the knee is most often the result of many factors, including genetics, previous injury, and daily activity over many years. The repetitive kneeling, lifting and twisting required of [applicant's] job has caused an aggravation to the pre-existing, although asymptomatic at the time, left knee arthritis.

(Exhibit 2, at p. 9.)

Dr. Feingold assigned applicant 15% whole person impairment (WPI) and he addressed apportionment as follows:

> Regarding his diagnosis of left knee arthritis, status post total knee arthroplasty, it is my opinion that 20% of his current impairment is the result of a cumulative trauma that occurred from the repetitive activities of his employment with Covenant Living-Samarkand, and 80% of his current impairment is the result of a pre-existing, and naturally progressive condition of left knee arthritis. The period of cumulative trauma would be during the 9 years and 6 months that he has been employed with Covenant Living-Samarkand.

(*Id*. at pp. 9-10.)

On December 30, 2025, after reviewing medical treatment records, Dr. Feingold issued a supplemental report and updated his prior determination on apportionment only:

> Regarding his diagnosis of left knee arthritis, status post total knee arthroplasty, it is my opinion that 50% of his current impairment is the result of a cumulative trauma that occurred from the repetitive activities of his employment with Covenant Living-Samarkand, and 50% of his current impairment is the result of a pre-existing, and naturally progressive condition of left knee arthritis. The period of cumulative trauma would be during the 9 years and 6 months that he has been

> employed with Covenant Living-Samarkand. I have changed this apportionment upon review of the above records. There are no records available to suggest that the applicant was having any complaints of knee pain prior to his employment, but the MRI findings noted on the MRI from 4/02/2021 are consistent with degenerative arthritis all three compartments of the knee. These findings would have been present prior to his employment with Covenant Living-Samarkand, as absent any history of significant trauma to the knee (such as a fracture), it takes many years to show signs full articular cartilage loss as noted on this MRI. It is within reasonable medical probability that the repetitive activities of his employment have resulted in an aggravation to a pre-existing condition of [left] knee arthritis.

(Exhibit 1, at p. 20.)

On April 8, 2026, the matter proceeded to trial, in relevant part, on the issues of 1) Earnings, with the applicant claiming $2,464.17 per week based on earning capacity, and the defendant claiming $920.00 per week based on a wage statement; 2) Temporary disability, with the applicant claiming August 10, 2021, to November 20, 2021, and November 21, 2023, to January 3, 2024; 3) Permanent disability; 4) Apportionment; 5) Occupational group number claimed by applicant, 351. Occupational group number claimed by defendant, 250; 6) Need for further medical treatment; 7) Liens; 8) Attorney fees, with penalties deferred.

It is from the corresponding Amended Findings and Award that defendant seeks reconsideration.

DISCUSSION

I.

Former Labor Code section[1] 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.

[1] All statutory references are to the Labor Code unless otherwise stated.

> (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), 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 19, 2026, and 60 days from the date of transmission is Saturday, July 18, 2026. The next business day that is 60 days from the date of transmission is Monday, July 20, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision is issued by or on Monday, July 20, 2026, 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 shall be notice of transmission.

Here, according to the proof of service for the Report by the PWCJ, the Report was served on May 19, 2026, and the case was transmitted to the Appeals Board on May 19, 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) 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 May 19, 2026.

[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.

II.

Turning to the merits, we first address the issue of apportionment. 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].)
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> 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:
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> 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).)

Therefore, defendant carries the burden of proof on apportionment. (Lab. Code, § 5705.) Apportionment of permanent disability must address causation of disability and must constitute substantial evidence. (*Escobedo*, *supra* at pp. 611, 620-621.) To constitute substantial evidence "…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." (*Id*. at 621.) Causation of disability is not to be confused with causation of injury. (*Id*. at 611.)

Dr. Feingold's apportionment opinions do not constitute substantial evidence because he does not address the causation of applicant's *disability*, instead Dr. Feingold apportioned the applicant's "impairment." Evaluating physicians determine the extent of an applicant's impairment using the AMA Guides, this is a medical determination. Then, the assigned impairment is rated or adjusted for the applicant's diminished future earning capacity, occupation and age at the time of injury resulting in a level of permanent disability, this is a non-medical determination to account for an applicant's inability to compete in the open labor market. (Lab. Code, § 4660.) Hence, in workers' compensation, impairment is not subject to apportionment, but disability is. As Dr. Feingold mistakenly apportioned "impairment" twice over the course of more than eight months, it is not a simple error that can be excused.

Even assuming arguendo that Dr. Feingold meant to apportion causation of disability and not causation of impairment, causation of disability requires an appropriate analysis. Here, Dr. Feingold diagnosed applicant with left knee arthritis, status post total knee arthroplasty. The cause of injury is "repetitive kneeling, lifting and twisting required of [his] job has caused an aggravation to the pre-existing, although asymptomatic at the time, left knee arthritis." (Exhibit 2, at p. 9.) Dr. Feingold assigned left knee impairment per AMA Guides, Table 17-33 *Impairment Estimates for Certain Lower Extremity Impairment*, total knee replacement, good result of 37% in consideration

of pain, range of motion and stability per Table 17-35. This knee replacement impairment of 37% converts to 15% WPI. Here, applicant's disability is caused by impairment from total knee replacement with pain, range of motion limitation and stability measured by maximum movement in any direction, not arthritis. Dr. Feingold failed to explain how and why applicant's arthritis caused or contributed to his disability. Applicant's pre-existing arthritis may have put applicant at an increased risk of sustaining injury or damages from injury, but apportionment is improper without arthritis being assigned causation of disability.

In order for Dr. Feingold's reporting to have been substantial medical evidence for apportionment purposes, he would have to explain how and why the non-industrial arthritis caused applicant's current left knee permanent *disability* and he has failed to do so.

III.

Next, an employee's occupation is one of the component parts for rating permanent disability. The reason for this is that it serves to "aid in determining the relative effects of disability to various parts of the body taking into account the *physical requirements* of various occupations." (*Holt v. Workers' Comp. Appeals Bd.* (1986) 187 Cal.App.3d 1257, 1261 [51 Cal.Comp.Cases 576].) For injuries occurring on or after January 1, 2013, rating is completed through use of the 2005 Permanent Disability Rating Schedule (PDRS) which contains 45 occupational group numbers (Lab. Code, § 4660.1; 2005 PDRS, pp. 1-8.) Which occupational group number is to be applied in each case is a question of fact to be determined by the trier of fact. (*Dalen v. Workmen's Comp. Appeals Bd.* (1972) 26 Cal.App.3d 497, 503 [37 Cal.Comp.Cases 393].) It is also well established that an "employee is entitled to be rated for the occupation which carries the highest factor in the computation of disability." (*Id.* at pp. 505-506.) However, there must be evidence that the employee in fact performed the duties required of the more arduous occupation. (*Holt, supra* at 1262.) An employee may also be entitled to a higher occupational group number if the activity (or activities) which generates the higher occupational group is an integral part of the occupation. (*National Kinney v. Workers' Comp. Appeals Bd.* (Casillas) (1980) 113 Cal.App.3d 203, 215-216 [45 Cal.Comp.Cases 1266].)

At trial, applicant claimed occupational group number 351 and defendant claimed occupational group number 250. Applicant offered the following testimony about his regular duties:

> He is a transportation supervisor. At the time of the injury, he was the only person working in the entire department. This kept him constantly running, driving, loading people in wheelchairs, doing a lot of bending, twisting, and physical exertion. He even had to lift persons into dental chairs.
>
> He drove a 20-passenger bus with people and had to load and unload them and their walkers, wheelchairs, and other assist[ive] devices as well.
>
> He lifted every day. The heaviest thing he lifted would have been a person weighing approximately 250 pounds.

(Minutes of Hearing, April 8, 2026, at p. 4:7-14.)

The PWCJ determined that applicant's testimony about his work duties was credible. (Opinion on Decision, April 29, 2026, at p. 5.) Further, as noted by the PWCJ, the applicant's testimony about his work duties was unrefuted by any documentary evidence or witness testimony from defendant. (Report, at p. 2.) Based on the applicant's credible and unrefuted testimony, the PWCJ determined that applicant's occupational group number is 460 which contemplates the duties of material handlers, machine loaders and unloaders. (*Id*.) We give the PWCJ's credibility determinations great weight because the PWCJ had the opportunity to observe the demeanor of the witnesses. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500, 504-505].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the PWCJ's credibility determinations. (*Id*.)

The PWCJ considered the various occupational groups in light of the facts of this matter as follows:

> In the 2005 PDRS rating book, Applicant's occupational group number 351 refers to a "Heavy Equipment Operator". Typical occupations include crane operator, forklift operator, and snowplow operator.
>
> Defendant's occupational group number 250 refers to Public Transportation Drivers & Light Delivery Drivers. The typical occupations include parking enforcement officers, subway car operators, and taxi drivers.
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> Applicant testified at trial and his testimony was neither rebutted nor contested. He was the transportation supervisor. However, at the time of the injury he was the only person in the transportation department. He was driving a twenty (20) passenger bus and was constantly running, driving, and loading people in wheelchairs and other assistance devices. His job required a lot of bending, twisting, and physical exertion. He lifted every day and the heaviest item lifted weighed approximately 250 pounds.

> The WCJ found occupational group number 460 to be the most reasonable and accurate group number to apply. Occupation group 460 applies to material handlers, machine loaders and unloaders; and typical occupations include baggage handler, chain-off bearer, and laborer.
>
> Based upon the everyday loading and unloading of people, machines (wheelchairs and assisted walking devices), and the weight involved, occupational group 460 more accurately reflects Applicant's job duties.

(Report, at pp. 2-3.)

We also observe that occupations in group 460 have "strenuous demands on spine & legs for lifting and carrying heavy objects." (2005 PDRS, at p. 3-35.) Occupational group 250 contemplates a worker operating "light automotive equipment over public throughfares." (*Id*. at p. 3-31.) Occupational group 351 contemplates a worker operating "heavy construction equipment at work sites." (*Id*. at p. 3-34.) As applicant was driving a 20 person passenger bus, and he was lifting/assisting various disabled passengers weighing up to 250 pounds to sit, clearly occupational group numbers 250 and 351 are not accurate reflections of his duties. Based on the applicant's credible testimony about his regular duties assisting disabled patients weighing up to 250 pounds into the 20 person passenger vehicle or into dental chairs then driving the vehicle, we agree with the PWCJ's determination that occupational group number 460 most accurately reflects the arduous nature of applicant's work for defendant employer.

As there is no legal basis for apportionment and applicant's occupational code is 460, the PWCJ determinations regarding permanent disability and corresponding attorney fees are correct. However, as stated in the PWCJ's Opinion on Decision:

> The factors of permanent disability are based upon the credible testimony of Applicant with due regard for his demeanor as a witness, together with the medical reporting of David Feingold, M.D., reporting in the capacity of a PQME, and rates as follows:
>
> 17.25.06.00 – 15[1.4] – 21 – 460H – 28 – 36
>
> Applicant is entitled to a permanent disability award of 36%, equivalent to 173.00 weeks of indemnity payable at the rate of $290.00 per week, in the total sum of $50,170.00, payable commencing January 4, 2024.

Accordingly, we grant defendant's Petition for Reconsideration to add that applicant's injury caused 36% permanent disability, with no apportionment. We otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the May 5, 2026 Amended Findings & Award is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Amended Findings and Award of May 5, 2026, is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

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7. It is found applicant's injury caused 36% permanent disability, with no apportionment.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 20, 2026

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

GREG O'BRIEN
GHITTERMAN, GHITTERMAN &FELD
WAI, CONNOR & HAMIDZADEH

SL/abs

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