WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

LUIS PANTOJA, ***Applicant***

vs.

DRILLTECH DRILLING & SHORING; ZURICH NORTH AMERICAN INSURANCE, ***Defendants***

Adjudication Numbers: ADJ11987597
Sacramento District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant filed a Petition for Reconsideration (Petition) in response to the workers' compensation administrative law judge's (WCJ) Findings and Award (F&A) issued on February 6, 2026. In the F&A, the WCJ found in the relevant part that applicant, while employed on November 16, 2018, as a construction worker, by defendant, sustained injury arising out of and in the course of employment to multiple body parts; that there is no need for future medical treatment for the bilateral wrists and bilateral hands on an industrial basis in this case; and that applicant's injury caused 66% permanent partial disability after apportionment.

Applicant contends that the agreed medical examiner (AME)'s opinions on apportionment are not substantial medical evidence and, therefore, apportionment in the F&A which relies on the AME's opinions is not based on substantial medical evidence.

Defendant filed an Answer.

The WCJ's Report and Recommendation (Report) recommends reconsideration be denied.

After our review of the record and for the reasons discussed below, we will grant the Petition for Reconsideration, amend the award to find 72% permanent disability without apportionment, remove the finding as to medical care for the bilateral wrists and hands, award attorney's fees from the life pension, commute the attorney's fees, and otherwise affirm the award.

I.

Former Labor Code section 5909[1] 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. (Former 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.
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> (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.

(Lab. Code, § 5909.)

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events the case was transmitted to the Appeals Board on February 27, 2026, and 60 days from the date of transmission is Tuesday, April 28, 2026. This decision issued by or on April 28, 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.

According to the proof of service, the Report was served on February 27, 2026, and the case was transmitted to the Appeals Board on February 27, 2026. Service of the Report and

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

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 February 27, 2026.

II.

As found by the WCJ in the Findings and Award, while employed on November 16, 2018, as a construction worker, applicant sustained injury arising out of and in the course of employment to his neck, lumbar spine, left shoulder, right shoulder, thoracic spine, left lower limb, radicular pain, and teeth, but did not sustain injury to the bilateral wrists and hands.[2]

In finding 66% permanent disability, the WCJ applied apportionment as described by AME Michael Sommer, M.D. (F&A, p. 2, Opinion on Decision, p. 4.) Applicant contends that AME Dr. Sommer's opinions on apportionment are not substantial evidence, and that applicant should be awarded un-apportioned disability of 72%. (Petition, p. 9, lns 1-3.)

On November 5, 2020, AME Dr. Sommer evaluated applicant and issued a report. With respect to apportionment, he states:

> I have considered apportionment and specifically apportionment of permanent disability (shall be) based on causation. I have had the opportunity to review both the *Escobedo* and *Yeager* decisions with respect to their instruction as to apportionment. In both cases, it is plain that permissible apportionment has been expanded, provided the clinician offering an apportionment opinion adheres to the concept of substantial medical evidence. I have done so here, and have avoided guess, speculation or surmise in reaching my conclusions, all of which are constructed to a reasonable degree of medical probability.
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> Apportionment considerations include a significant history of nicotine abuse, as well as a very minor component of prior symptoms that develop in the gentleman's shoulder after the injury of 2011, but which, from the records were not much of a significant ongoing problem. I conclude it a reasonable medical probability that approximately 15% of Mr. Pantoja ultimate disability preexisted, thus, approximately 85% of his disability was caused by the instant 11/16/18 injury.

[2] At trial, the parties stipulated to multiple injured body parts which the WCJ adopted as findings of fact. (F&A, p. 1.) Injury to the bilateral wrists and hands was disputed with the WCJ finding those body parts non-industrial. (F&A, p. 2.) In the Petition, "[a]pplicant seeks reconsideration of *the sole issue the application of apportionment* to the permanent disability rating." (Petition, p. 3, lns 1-2, emphasis added.) A petitioner is "deemed to have finally waived all objections, irregularities, and illegalities concerning the matter upon which the reconsideration is sought other than those set forth in the petition for reconsideration." (Lab. Code § 5904.) We therefore do not further consider injury.

(Exhibit AA, AME Michael Sommer, M.D., November 5, 2020, p. 33.) The AME's introductory paragraph on apportionment is provided verbatim in two subsequent reports discussing apportionment but is not restated here in the interest of brevity. (See Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, p. 5, and Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 35.)

On January 13, 2021, Dr. Sommer issued a supplemental report after reviewing test results. "Now after review of the above reports, it's reasonable medically probable that there is contribution to Mr[.] Pantoja's upper limb symptoms from cervical spine pathology." (Exhibit BB, AME Michael Sommer, M.D., January 13, 2021, p. 4.) Attached to the report are a December 8, 2020 nerve conduction/EMG study (Exhibit 5), a December 7, 2020 cervical MRI, and a December 7, 2020 cervical x-ray.

On May 5, 2021, Dr. Sommer issued a supplemental report after reviewing additional records. He concluded that: "I've no reason to change my opinion from the present information: he remains P&S." (Exhibit CC, AME Michael Sommer, M.D., May 5, 2021, p. 4.)

Next, on July 23, 2021, Dr. Sommer issued another supplemental report. He stated that: "I will request x-ray and thoracic spine MRI; unless they show pathology other than (the expected) degenerative disc changes, there's no reason for orthopedic consultation." (Exhibit DD, AME Michael Sommer, M.D., July 23, 2021, p. 5.)

On November 17, 2021, Dr. Sommer re-evaluated applicant and noted that: "I think it most appropriate to create a permanent and stationary document again for Mr. Pantoja but will defer doing that until the pending lumbar diagnostics have been returned." (Exhibit EE, AME Michael Sommer, M.D., November 17, 2021, p. 12.)

Thereafter, on January 26, 2022, Dr. Sommer issued a supplemental report after reviewing additional records. With respect to apportionment, he states:

> Apportionment considerations include a significant history of nicotine abuse, as well as a very minor component of prior symptoms that develop in the gentleman's shoulder after the injury of 2011, but which, from the records were not much of a significant ongoing problem. I conclude it a reasonable medical probability that approximately 15% of Mr. Pantoja ultimate shoulder disability preexisted, thus, approximately 85% of that disability was caused by the instant 11/16/18 injury. Disability/ impairment in the spine is approximately 10% non-industrial: nicotine abuse (which is well known to be deleterious to musculoskeletal and neural tissues) and degenerative changes are the cause of this, while approximately 90% is from the fall at work on 11/16/18.

(Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, pp. 5-6.) Attached to the report are a January 14, 2022 lumbar MRI, February 2, 2022 lumbar spine x-rays, and a January 10, 2022, neuro-diagnostic evaluation by Alan Kimelman, M.D.

On May 21, 2024, Dr. Sommer once again evaluated applicant, and stated under discussion:

> Thus, I do conclude that subsequent diagnoses of thoracic sprain and lumbar pathology and condition now manifest were in fact to some extent a consequence of the instant 11/16/18 injury and, regarding the right shoulder, while details on that are sparse (which is because the treatment has been given at Kaiser and there are no Kaiser records provided to me) it is likely that the right shoulder is a compensable consequence of what had happened to the left, i.e., the gentleman was protecting the injured left from the original injury and subsequent surgery and sustained an overuse injury on the right.
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> Apportionment considerations are as I earlier described as to the shoulders, which is approximately 15% nonindustrial and approximately 85% a consequence of the injury under discussion. That would be true as well in the thoracic spine. However, in the lumbar spine, he has an anatomic peculiarity which makes him vulnerable and that is why there are these leg radicular symptoms in spite of the absence of any findings on exam (conjoined nerve root at L5-S1 which makes him vulnerable to foraminal stenosis at that site). Thus, in that regard, low back and left lower limb apportionment is approximately 25% nonindustrial and approximately 80% a consequence of the instant injury. In the neck, it remains as discussed in the 1/26/22 report, approximately 10% non-industrial and approximately 90% the instant injury.

(Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, pp. 34, 35.)

Finally on August 26, 2024, Dr. Sommer issued a supplemental report after reviewing additional records. "This information buttresses and does not indicate need for any change in my previous conclusions in this matter." (Exhibit HH, AME Michael Sommer, M.D., August 26, 2024, p. 3.)

In his reporting, AME Dr. Sommer reviewed and digested treating records which were admitted into evidence as Exhibits 1-7, covering September 16, 2019, through March 14, 2024. In addition, but not reviewed by AME Dr. Sommer, progress reports from Robert Rovner, M.D., for April 10, 2024, through November 25, 2024 were admitted as Exhibits 8-12.

On January 26, 2026, the parties proceeded to trial. Applicant testified through an interpreter that he worked for defendant four to five years as a laborer. (Minutes of Hearing and

Summary of Evidence (MOH), p. 6, lns 10-11.) On November 16, 2018, he was injured while they were drilling holes for a pipe eight inches in diameter. He was carrying the pipe on his right shoulder and walking and holding the pipe with his other arm. The pipe was eight feet long and weighed more than 300 pounds. There were two of them holding the pipe at the time of the injury. (MOH, p. 6, lns 21-24.) He got injured because his co-worker behind him fell. The pipe fell while he was still holding his end of the pipe. At that moment, everything hurt because everything was heavy. (MOH, p. 7, lns 1-5.) On cross examination applicant testified he started smoking at age 15. He stopped several years ago and then would pick it back up. He last smoked several months ago. When he was actively smoking cigarettes he smoked about 15 per day, then later on just a couple. (MOH, p. 8, lns 11-14.)

The WCJ issued the F&A of February 6, 2026, finding in part applicant was entitled to permanent disability of 66% after apportionment. (F&A, p. 2.) The WCJ found valid apportionment of the cervical, thoracic, lumbar, and bilateral shoulder disability based on AME Dr. Sommer's opinions. (F&A, Opinion on Decision, p. 4; Report, p. 2.)

Applicant seeks reconsideration from the February 6, 2026 F&A.

III.

A.

The burden of proving apportionment of permanent disability falls on the employer because it is the employer that benefits from apportionment. (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).)

In *Escobedo* the Appeals Board held: (1) section 4663 requires the reporting physician to make an apportionment determination; (2) apportionment to other factors allows apportionment to causation, including pathology, prior conditions, and retroactive work restrictions; (3) applicant holds the initial burden to prove industrial injury and also has the added burden of establishing the approximate percentage of permanent disability directly related to the industrial injury; (4) defendant has the burden of establishing the approximate permanent disability caused by other factors; and (5) a medical report addressing apportionment may not be relied upon unless it constitutes substantial evidence. (*Escobedo*, *supra*, at p. 607.)

Here, as set forth in holdings 4 and 5 in *Escobedo*, petitioner contends that defendant has not met the burden to establish apportionment, and that the medical reporting by Dr. Sommer addressing apportionment is not substantial evidence and should not be relied on. In *Escobedo*, we explained the defendant's burden to provide substantial medical evidence on the issue of apportionment as follows:

> [T]he mere fact that a report "addresses" the issue of causation of the permanent disability and makes an "apportionment determination" by finding the approximate relative percentages of industrial and non-industrial causation does not necessarily render the report one upon which the WCAB may rely. This is because it is well established that any decision of the WCAB must be supported by substantial evidence. (Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [520 P.2d 978, 113 Cal. Rptr. 162] [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [475 P.2d 451, 90 Cal. Rptr. 355] [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [463 P.2d 432, 83 Cal. Rptr. 208] [35 Cal.Comp.Cases 16].)
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> In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. (*McAllister v. Workmen's Comp. Appeals Bd*. (1968) 69 Cal.2d 408, 413, 416–417, 419 [445 P.2d 313, 71 Cal. Rptr. 697] [33 Cal.Comp.Cases 660]; *Travelers Ins. Co. v. Industrial Acc. Com.* (*Odello*) (1949) 33 Cal.2d 685, 687–688 [203 P.2d 747] [14 Cal.Comp.Cases 54]; *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1700–1702, 1705 [20 Cal. Rptr. 2d 778] [58 Cal.Comp.Cases 313].) Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [480 P.2d 967, 93 Cal. Rptr. 15] [36 Cal.Comp.Cases 93]; *Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378–379 [475 P.2d 656, 90 Cal. Rptr. 424] [35 Cal.Comp.Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at p. 798.) Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Granado v. Workers' Comp. Appeals Bd.* (1970) 69 Cal.2d 399, 407 [445 P.2d 294, 71 Cal. Rptr. 678] (a mere legal conclusion does not furnish a basis for a finding); *Zemke v. Workmen's Comp. Appeals Bd.*, *supra*, 68 Cal.2d at pp. 799, 800–801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence); see also *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 [443 P.2d 777, 70 Cal. Rptr. 193] (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)

(*Escobedo*, *supra*, at pp. 620-21.)

We also explained that if a physician opines that a percentage of disability is caused by a degenerative disease, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Escobedo*, *supra*, at p. 621.)

Here, the medical expert apportionment opinions are provided by AME Dr. Sommer. We ordinarily follow the opinion of an AME because it is presumed the AME was chosen by the parties because of their expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) To determine if defendant has met its burden on apportionment, however, we must review AME Dr. Sommer's opinions.

Although necessarily repetitive, it appears the most appropriate way to consider and fully credit AME Dr. Sommer's evolving opinions on apportionment is to chronologically restate them as to each body part with our resulting analysis. We acknowledge that it was proper for AME Dr. Sommer's opinions to evolve as he received additional medical records, evaluations, and updated histories. In considering AME Dr. Sommer's opinions it is also important to note that after the claimed injury applicant underwent arthroscopic repair of the left shoulder on October 9, 2019, C6-7 anterior discectomy and fusion on March 23, 2023, and arthroscopic repair of the right shoulder on December 6, 2023. (Petition, p. 2, lns 22-24; Exhibit AA, AME Michael Sommer, M.D., November 5, 2020, p. 20; Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, pp. 4-5.)

B.

1.

It appears the following opinions are general in nature and provide background for AME Dr. Sommer's final apportionment findings.

> Apportionment considerations include a significant history of nicotine abuse, as well as a very minor component of prior symptoms that develop in the gentleman's shoulder after the injury of 2011, but which, from the records were not much of a significant ongoing problem. I conclude it a reasonable medical probability that approximately 15% of Mr. Pantoja ultimate disability preexisted, thus, approximately 85% of his disability was caused by the instant 11/16/18 injury.

(Exhibit AA, AME Michael Sommer, M.D., November 5, 2020, p. 33.) These opinions were mirrored and summarized in a later 2022 supplemental report. (Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, p. 5.)

In essence, with respect to apportionment it appears clear that AME Dr. Sommer found relevant the significant history of nicotine abuse, as well as that symptoms developed in the shoulder after a prior 2011 injury. We have considered these statements in our analysis below.

Although the following language does not on its own provide substantial medical reasoning, we also consider the provided boiler plate language that AME Dr. Sommer has "avoided guess, speculation or surmise in reaching [his] conclusions, all of which are constructed to a reasonable degree of medical probability." (Exhibit AA, AME Michael Sommer, M.D., November 5, 2020, p. 33; Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, p. 5; and Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 35.)

2.

For the cervical spine, AME Dr. Sommer found the "[d]isability/impairment in the spine is approximately 10% non-industrial: nicotine abuse (which is well known to be deleterious to musculoskeletal and neural tissues) and degenerative changes are the cause of this, while approximately 90% is from the fall at work on 11/16/18." (Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, p. 6; restated in Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 35.)

AME Dr. Sommer provides non-industrial apportionment to two causes of applicant's disability: nicotine abuse and degenerative changes. The doctor adds to nicotine abuse by stating it "is well known to be deleterious to musculoskeletal and neural tissues."

Here, the doctor does not set forth the required reasoning behind his opinion, merely his conclusions (apportioning approximately 10% non-industrial). Failure to set forth the required reasoning behind his opinion renders AME Dr. Sommer's not substantial. (*Granado*, 69 Cal.2d at p. 407.) We are unable to identify "the reasoning by which [the AME] progresses from the material to the conclusion." (*People v. Bassett*, 69 Cal.2d at p. 141.) Although nicotine abuse "is well known to be deleterious to musculoskeletal and neural tissues," AME Dr. Sommer does not explain how this existing factor leads to apportionment of cervical disability. Thus, defendant has failed to meet the burden of proving apportionment of the cervical spine disability to nicotine abuse.

For the same reasons discussed above that defendant failed to meet the burden to establish apportionment to nicotine abuse, defendant failed to establish apportionment of cervical spine disability to "degenerative changes." Further, AME Dr. Sommer did not explain the nature of the degenerative changes nor how and why they are causing disability at the time of his evaluation.

(*Escobedo*, supra, at p. 621.) Thus, defendant has failed to meet the burden of proving apportionment of the cervical spine disability to degenerative changes.

3.

For the thoracic spine, AME Dr. Sommer apparently again relies on the statement "[d]isability/ impairment in the spine is approximately 10% non-industrial: nicotine abuse (which is well known to be deleterious to musculoskeletal and neural tissues) and degenerative changes are the cause of this, while approximately 90% is from the fall at work on 11/16/18." (Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, p. 6.) But then goes on to state: "Apportionment considerations are as I earlier described as to the shoulders, which is approximately 15% nonindustrial and approximately 85% a consequence of the injury under discussion. That would be true as well in the thoracic spine." (Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 35.)[3]

Here again, the doctor does not set forth the required reasoning behind his opinion, merely his conclusions (approximately 15% nonindustrial). The thoracic spine is subject to the same analysis as the cervical spine above, and thus, the failure to set forth the required reasoning behind his opinion renders AME Dr. Sommer's not substantial. (*Granado*, 69 Cal.2d at p. 407.)

4.

AME Dr. Sommer next addresses the lumbar spine. ""However, in the lumbar spine, he has an anatomic peculiarity which makes him vulnerable and that is why there are these leg radicular symptoms in spite of the absence of any findings on exam (conjoined nerve root at L5-S1 which makes him vulnerable to foraminal stenosis at that site). Thus, in that regard, low back and left lower limb apportionment is approximately 25% nonindustrial and approximately 80% a consequence of the instant injury." (Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 35.) Here, AME Dr. Sommer only provides as the factor for apportionment that applicant has a conjoined nerve root at 15-S1 which makes him vulnerable to foraminal stenosis.

Unfortunately, without the reasoning behind his opinion, we are unable to bridge the gap in AME Dr. Sommer's opinion that the factor of a *vulnerability* to foraminal stenosis *causes*

[3] As AME Dr. Sommer's opinions on apportionment are not substantial for failing to set forth the required reasoning behind his opinions, we need not address AME Dr. Sommer's further failure to explain how his opinions moved from the original generalized 10% apportionment to 15% apportionment. Nor do we address AME Dr. Sommer's failure to explain how and why the apparently systemic conditions of nicotine abuse and degenerative changes would provide for different apportionment percentages of the cervical spine and other body parts, such as the thoracic spine.

lumbar disability. “Expert testimony is necessary where the truth is occult and can be found only by resorting to the sciences.” (*Peter Kiewit Sons v. I.A.C.* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].) A vulnerability to foraminal stenosis may well cause lumbar disability in this applicant, but on this record, we have nothing more than mere conjecture to support such a hypothesis.

Further, there is no explanation why AME Dr. Sommer’s provided apportionment of “approximately 25% nonindustrial and approximately 80%” industrial. It is unclear if these percentages, which add up to 105%, are intentional or a typographical error.

Thus, the failure to set forth the required reasoning behind his opinions renders AME Dr. Sommer’s opinion on lumbar apportionment not substantial. (*Granado*, 69 Cal.2d at p. 407.)

5.

For the left shoulder, AME Dr. Sommer stated “[o]verall, the picture is that of a gentleman who had a fairly straightforward problem in his shoulder, had a fairly straightforward surgery and is now worse because of the surgery (at least in his own view).” (Exhibit EE, AME Michael Sommer, M.D., November 17, 2021, p. 12.) It appears this statement by AME Dr. Sommer is in reference to the arthroscopic repair of the left shoulder on October 9, 2019, as the report quoted was issued after the 2019 surgery but before the 2023 right shoulder surgery.

AME Dr. Sommer again refers back to the statement: “Apportionment considerations include a significant history of nicotine abuse, as well as a very minor component of prior symptoms that develop in the gentleman's shoulder after the injury of 2011, but which, from the records were not much of a significant ongoing problem.” (Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, p. 5.) AME Dr. Sommer then states, “I conclude it a reasonable medical probability that approximately 15% of Mr. Pantoja ultimate shoulder disability preexisted, thus, approximately 85% of that disability was caused by the instant 11/16/18 injury.” (Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, pp. 5-6; restated in Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 35.)

The statement *apportionment considerations* include a significant history of nicotine abuse, as well as a very minor component of prior symptoms that develop after the injury of 2011, does not logically lead to, nor support, the conclusion that apportionment is approximately 15% nonindustrial and approximately 85% industrial. Identifying “apportionment considerations” is not same as providing medical reasoning of causation. In addition, AME Dr. Sommer refers to the

shoulder disability in general without providing any discrete analysis for the *left shoulder* being considered.

Defendant has failed to meet the burden of establishing apportionment because the medical opinion is again conclusory and does not set forth the required reasoning behind it. (*Granado*, *supra*, at p. 407.)

6.

Finally, AME Dr. Sommer also provides opinions on apportionment for the right shoulder by again stating: "I conclude it a reasonable medical probability that approximately 15% of Mr. Pantoja ultimate shoulder disability preexisted, thus, approximately 85% of that disability was caused by the instant 11/16/18 injury." (Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, pp. 5-6; restated in Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 35.) The doctor does expand the discussion on the right shoulder:

> [R]egarding the right shoulder, while details on that are sparse (which is because the treatment has been given at Kaiser and there are no Kaiser records provided to me) it is likely that the right shoulder is a compensable consequence of what had happened to the left, i.e., the gentleman was protecting the injured left from the original injury and subsequent surgery and sustained an overuse injury on the right.

(Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 34.)

Again, the generalized statement *apportionment considerations* include a significant history of nicotine abuse, as well as a very minor component of prior symptoms that develop after the injury of 2011, does not logically lead to, nor support, the conclusion that apportionment of the right shoulder is approximately 15% nonindustrial and approximately 85% industrial. AME Dr. Sommer does explain "the right shoulder is a compensable consequence of what had happened to the left" but provides no reasoning linking this to apportionment. Identifying that the right shoulder is a compensable consequence of what happened to the left is only the beginning of reasoned medical opinion that is otherwise left hanging without support.

It is clear defendant has failed to meet the burden of establishing apportionment of the right shoulder because the medical opinion is conclusory and does not set forth the required reasoning behind it. (*Granado*, *supra*, at p. 407.)

C.

Here, we are unable to follow the apportionment opinions of AME Dr. Sommer. Although AME Dr. Sommer discusses many contributing factors he believes have a bearing on the cause of

applicant's claimed injuries to provide percentages of causation, AME Dr. Sommer does not provide linking reasoning connecting the factors to the injury. This defect is not cured by the parties' selection of Dr. Sommer as an agreed medical evaluator because AME Dr. Sommer's opinions on apportionment are not substantial evidence. (*Hegglin*, *supra*, pp. 169-170.)

Applicant is entitled to an award of disability without apportionment. In the F&A, Opinion on Decision at page 4, the WCJ provided the relevant rating strings which, without apportionment, are as follows:

Cervical spine	15.01.01.00 - 28 [1.4] 39 - 480I - 48 - 52
Right shoulder	16.02.01.00 - 2 [1.4] 3 - 480H - 5 - 6
Left shoulder	16.02.01.00 - 2 [1.4] 3 - 480H - 5 - 6
Thoracic spine	15.02.01.00 - 5 [1.4] 7 - 480I - 11 - 13
Lumbar spine	15.03.01.00 - 10 [1.4] 14 - 480I - 20 – 23

These percentages are then combined to find the overall disability.

Combined Values 52 c 23 c 13 c 6 c 6 = 72%

We therefore will amend the F&A to provide an award of 72% disability.

IV.

The WCJ found and awarded reasonable attorney's fees of 15% to be paid from applicant's permanent disability. It is customary for such fees to be commuted from the far end of the award to avoid interruption of benefits to the applicant. We will amend the F&A to provide that payment of the attorney's fees from permanent disability be commuted from the far end of the award. In addition, we will award reasonable attorney's fees of 15% from the resulting life pension to be commuted by the uniform reduction method.

Finally, we note the F&A includes finding number 2 that "[a]pplicant did not sustain an injury to the bilateral hands and bilateral wrists arising out of and in the course of employment on November 16, 2018," and as finding number 5 that "t]here is no need for future medical treatment for the bilateral wrists and bilateral hands on an industrial basis in this case." (F&A, p. 2.) As the finding of no injury to bilateral hands/wrists renders subsequent bilateral hands/wrists issues moot, there is no need for the additional finding concerning future bilateral wrist/hand treatment, and we will amend the F&A to remove finding 5. We also observe that if a need for treatment to those body parts arose as a compensable consequence of the industrially injured body parts, the request

for medical treatment would then be evaluated by the physicians at the time of the request. (See Lab. Code, § 4600 et seq.)

V.

Following our independent review of the record, and for the reasons stated above, we grant applicant's February 23, 2026 Petition for Reconsideration, amend the February 6, 2026 Findings and Award to find 72% disability less 15% of the permanent disability to be commuted from the far end for reasonable attorney's fees, a life pension less 15% attorney's fees to be commuted by the uniform reduction method, to remove finding number 5 as moot, and to otherwise affirm the findings and award.

For the foregoing reasons,

IT IS ORDERED that applicant's February 23, 2026 Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the February 6, 2026 Findings and Award is **AFFIRMED**, except that it is **AMENDED** as follows:

FINDINGS OF FACT

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3.Applicant is entitled to permanent disability without apportionment of 72%.
4. Applicant's occupation group number is 480.
5. A reasonable attorney fee is 15% of the permanent disability and of the life pension.
6. The liens for California Certified Interpreters and Fremont Surgery Centers were deferred.

AWARD

AWARD IS MADE in favor of LUIS PANTOJA against ZURICH NORTH AMERICAN INSURANCE of:

1. Permanent disability of 72%, payable at $290.00 per week equal to $134,922.50, less credit for payments previously made, and less 15% of the permanent disability to be commuted from the far end of the award as reasonable attorney's fees, thereafter a life pension of $92.77 per week subject to adjustment per Labor Code section 4659(c) and less 15% of the life pension as reasonable attorney's fees to be commuted by the uniform reduction method.

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WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I DISSENT (*See Dissenting Opinion*),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 28, 2026

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

LUIS PANTOJA
HODSON & MULLIN
LAW OFFICE OF DOUGLAS G. MACKAY

PS/oo

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

DISSENTING OPINION OF COMMISSIONER JOSÉ H. RAZO

I respectfully dissent. I am of the opinion the record is clear that defendant has met the burden to establish apportionment.

In 2004, the Legislature exercised its legislative power by enacting an omnibus reform of the workers' compensation statutes. (*Brodie v. Workers' Comp. Appeals Bd.*, (2007) 40 Cal. 4th 1313, 1323 [72 Cal.Comp.Cases 565].) Senate Bill No. 899 was "an urgency measure designed to alleviate a perceived crisis in skyrocketing workers' compensation costs." (*Id*, at 1329.) One of the significant changes to the Labor Code was how the framework for apportionment of disability was applied.

"The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, § 4664(a).) Further:

> 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), emphasis added.)

The word *approximate* is used twice in section 4663(c) as the correct and unambiguous standard for use by medical evaluators. To address the perceived crisis in skyrocketing workers' compensation costs, apportionment by *approximate* percentage should not be a difficult burden for a defendant to establish.

Further, it is clear that "the plain language of the new statutory scheme *requires apportionment* to each cause of a permanent disability, including each distinct industrial injury." (*Benson v. Workers' Comp. Appeals Bd.*, (2009) 170 Cal. App. 4th 1535, 1549 [74 Cal. Comp. Cases 113], emphasis added.)

As noted by my colleagues, the burden of proving apportionment of permanent disability falls on the employer because it is the employer that benefits from apportionment. (*Id.* at p. 1560.) Section 4663, however, requires no more than that a "doctor made a determination based on his medical expertise of the *approximate* percentage of permanent disability caused by [a]

degenerative condition." (*E. L. Yeager Constr. v. Workers' Comp. Appeals Bd.* (2006) (*Gatten*) 145 Cal. App. 4th 922, 930 [71 Cal.Comp.Cases 1687], emphasis added.)

Even where the percentages "provided are *approximations* that are not precise and require some intuition and medical judgment. This does not mean [the] conclusions are speculative." (*Andersen v. Workers' Comp. Appeals Bd.*, (2007) 149 Cal. App. 4th 1369, 1382 [72 Cal.Comp.Cases 389], emphasis added.) "[T]he fact that a doctor *approximates* the percentage of PD caused by non-industrial factors does not make the opinion speculative, since an *approximate* percentage is exactly what is required under Labor Code § 4663." (*Paredes v. Workers' Compensation Appeals Bd.*, (2007) (writ denied) 72 Cal.Comp.Cases 690, 694, emphasis added.)

In the case before us, the AME identified apportionable factors consisting of a significant history of nicotine abuse, a 2011 shoulder injury (Exhibit AA, AME Michael Sommer, M.D., November 5, 2020, p. 33), degenerative changes (Exhibit FF, AME Michael Sommer, M.D., January 26, 2022, p. 6), and conjoined nerve root at L5-S1 (Exhibit GG, AME Michael Sommer, M.D., May 21, 2024, p. 35). The AME then used his medical expertise to provide apportionment by *approximate* percentages. Nothing further is required. To require more would ignore the legislature's passage of "an urgency measure designed to alleviate a perceived crisis in skyrocketing workers' compensation costs." (*Brodie*, 40 Cal. 4th at 1323.)

"[T]he relevant and considered opinion of one physician, though inconsistent with other medical opinions, may constitute substantial evidence. [citation]." (*Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378 [35 Cal.Comp.Cases 525].) Here, the parties used AME Dr. Sommer. It is presumed the AME was chosen by the parties because of their expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) There is no reason not to credit the considered opinion of a fully informed medical expert, especially when that expert is the parties' AME and has met the requirement to provide apportionment by the *approximate* percentages.

Here, one cannot escape the conclusion that defendant has met its burden on apportionment by providing expert medical opinion on the approximate percentages of apportionment.

I would deny reconsideration, and would not disturb the February 6, 2026 Findings and Award wherein the WCJ found that defendant met its burden on apportionment.

For the foregoing reasons, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

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LUIS PANTOJA
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PS/oo

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