WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

RAUL SERVIN, *Applicant*

vs.

UPS FREIGHT; LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

Adjudication Numbers: ADJ14680333
Pomona District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant filed a Petition for Reconsideration (Petition) on March 23, 2026, of our Opinion and Order Granting Reconsideration and Decision After Reconsideration (Decision) issued on March 16, 2026. In our Decision, we affirmed the workers' compensation administrative law judge (WCJ)'s December 17, 2025 Findings & Award (F&A), except that we amended the F&A to find disability of 59% without apportionment.

Defendant contends that apportionment of disability is supported by substantial medical evidence or, alternatively, that the record on apportionment should be developed. Defendant attached multiple documents to the Petition.

Applicant filed an Answer.

The WCJ did not file a Report and Recommendation (Report).

After our review of the record and for the reasons stated in our Decision, and for the reasons discussed below, we will deny the Petition for Reconsideration.

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:

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

(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.

(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 March 30, 2026, and 60 days from the date of transmission is Friday, May 29, 2026. This decision issued by or on May 29, 2026, so that we have timely acted on the Petition as required by section 5909(a).

Section 5909(b)(1) requires that "[w]hen 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." Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here the case was transmitted to the Appeals Board on March 30, 2026, however, no notice was provided to the parties by the district office. Thus, we conclude that the parties were not provided with the notice of transmission required by section 5909(b)(1). While this failure to provide notice does not alter the time for the Appeals Board to act on the petition, we note that as a result the parties did not have notice of the commencement of the 60-day period on March 30, 2026.

II.

As found by the WCJ in the December 16, 2025, Findings and Award, applicant, while employed on February 19, 2021, by defendants as a truck driver, sustained injury to his bilateral knees.

As relevant here, the record contains reporting from Panel Qualified Medical Evaluator (PQME) Stephan Sweet, M.D., who evaluated the applicant three times and issued a total of six reports. (Exhibits 2-7, Stephan Sweet, M.D.)

In his November 2, 2023, evaluative report, Dr. Sweet concluded that applicant sustained injury to his bilateral knees and that each knee provided a 20% whole person impairment (WPI). (Exhibit 4, Stephan Sweet, M.D., November 2, 2023, pp. 21-22.) Dr. Sweet reviewed treatment records and applicant's history, as well as medical publications, before concluding that apportionment of impairment was "40% to pre-existing, nonindustrial degenerative changes, and the prior surgeries with the remaining 60% to the subject claim." (*Id*. at 22-25.)

In a March 28, 2025, supplemental report Dr. Sweet reviewed additional records and did not change his opinions from the November 2, 2023, report. (Exhibit 2, Stephan Sweet, M.D., March 28, 2025, p. 4.)

In his final report, also a supplemental, Dr. Sweet notes there is a *likely* typographical error in the November 2, 2023, report and changes apportionment to "60% to pre-existing, nonindustrial degenerative changes, and the prior surgeries with the remaining 40% to the subject claim that caused aggravation of his longstanding preexisting bilateral knee issues." (Exhibit 3, Stephan Sweet, M.D., July 31, 2025, p 3.)

The record also includes reports from treating physician Kenneth Jahng, M.D., who issued an October 23, 2023, maximum medical improvement (MMI) report in which applicant was assigned a total 28% WPI for the bilateral knees and apportionment was stated as "30% related to the industrial injury and 70% to non-industrial factors, including pre-existing degenerative changes and normal wear and tear. ???" (Exhibit 1, Kenneth Jahng, M.D., October 23, 2023, p. 5.)

In his November 24, 2025, supplemental report, Dr. Jahng changed impairment to 20% WPI for the left knee with a 2% WPI add on for pain, and a 15% WPI for the right knee. For apportionment the doctor states:

> The patient was noted to have a pre-existing injury to his knees. He had surgery in both knees prior to his February 19, 2021 injury. A left knee MRI dated March 8, 2021 described areas of full-thickness cartilage loss. Subsequent radiographs also showed advanced osteoarthritis.

> It appeared that his February 19, 2021 injury was an aggravating injury of a pre-existing condition thus 30% industrial apportionment was given. I believe this to be medically reasonable considering the above.

(Exhibit A, Kenneth Jahng, M.D., November 24, 2024, pp. 4-5.)

On December 10, 2025, the parties proceeded to trial, and applicant testified primarily as to the facts surrounding the claim of serious and willful misconduct.

The WCJ issued the F&A on December 16, 2025, finding in relevant part that applicant's injury was not caused by the serious and willful misconduct of the employer and finding permanent disability of 26% after apportionment.

Applicant filed a Petition for Reconsideration of the F&A, challenging the findings that the injury was not caused by serious and willful misconduct and that apportionment applied.

We issued our Decision on January 20, 2026, in which we affirmed the finding that applicant's injury was not caused by the serious and willful misconduct of the employer, however we found that apportionment was not based on substantial medical evidence and amended the award to 59% disability without apportionment.

It is from our Decision that defendant, newly aggrieved, now seeks reconsideration. Defendant seeks reconsideration only as to the finding of apportionment, contending that apportionment of applicant's permanent disability was supported by substantial medical evidence.

III.

We note that defendant's Petition for Reconsideration has numerous documents attached, in violation of WCAB Rule 10945(c), which (1) prohibits attaching documents that have been received in evidence or made part of the adjudication file, and (2) prohibits the attachment of documents that are not part of the adjudication file, unless a ground for the petition for reconsideration is newly discovered evidence. (Cal. Code Regs., tit. 8, § 10945(c)(1) and (2).) Defendant raises no issue of newly discovered evidence.

Here, documents were attached to the Petition in violation of WCAB Rule 10945, and these documents have not been considered. (Cal. Code Regs., tit. 8, § 10945(c)(1).)

Defendant's attorneys Sean Taliaferro and Acumen Law, LLP, are admonished to follow the WCAB's Rules in all future matters and reminded that offending parties may be subject to sanctions. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421.)

IV.

Under the constitutional mandate for the workers' compensation system the Legislature is "expressly vested with plenary power" . . . "to create and enforce a liability on the part of any or all persons *to compensate any or all of their workers for injury or disability*" and to "accomplish substantial justice in all cases *expeditiously, inexpensively, and without incumbrance of any character*". (Cal Const, Art. XIV § 4, emphasis added.)

Using this plenary power, the Legislature sets the foundation for establishing disability as the Permanent Disability Ratings Schedule (PDRS), which is prima facie evidence of applicant's level of permanent disability. (Lab. Code, §§ 4660(c), 4660.1(d).) Further, the Legislature has incorporated the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides) into the PDRS for evaluating physical injury or disfigurement. Section 4660.1 states in the relevant part:

> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.
>
> (b) For purposes of this section, the *"nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides* to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.

(Lab. Code, § 4660.1(a) and (b), emphasis added.)

The use and incorporation of the AMA Guides is acknowledged in the PDRS itself. (PDRS, p. 1-2.) The PDRS direct that psychiatric impairment, however, is to be evaluated using the Global Assessment of Function (GAF) scale. (PDRS, p. 1-12.)

The AMA Guides provides that "[a]n impairment evaluation is a medical evaluation performed by a physician, using a standard method as outlined in the Guides to determine permanent impairment associated with a medical condition. An impairment evaluation may include a numerical impairment percentage or rating, as defined in the Guides." (AMA Guides, p. 18, sect. 2.1.) When determining whole person impairment, "the physician should begin with an estimate of the individual's most significant (primary) impairment and evaluate other impairments in relation to it. It may be necessary for the physician to refer to the criteria and estimates in several

chapters if the impairing condition involves several organ conditions." (AMA Guides, p. 19, sect. 2.5b.)

The use of the AMA Guides, however, is rebuttable. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) Because the AMA Guides incorporation into the PDRS is rebuttable, the first step in the assessment of disability (and thereafter any apportionment), is to determine the impairment for the injured body part(s) under the AMA Guides in order to determine if rebuttal is necessary. If the physician finds the strict AMA Guides impairment to be lacking:

> [t]he physician should be free to acknowledge his or her reliance on standard texts or recent research data as a basis for his or her medical conclusions, and the WCJ should be permitted to hear that evidence. If the explanation fails to convince the WCJ or WCAB that departure from strict application of the applicable tables and measurements in the Guides is warranted in the current situation, the physician's opinion will properly be rejected.

(*Id*. at 829.)

An employer is only liable for that percentage of disability that is actually caused by the industrial injury. This liability is established through the process of apportionment. In 2004 the Legislature enacted current sections 4663 and 4664. Section 4663 provides in part:

> (a) Apportionment of permanent disability shall be based on causation.
>
> (b) A physician who prepares a report addressing the issue of permanent disability due to a claimed industrial injury shall address in that report the issue of causation of the permanent disability.
>
> (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. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.

(Lab. Code § 4663.)

Section 4664 now provides as relevant here:

> (a) 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.
>
> (b) If the applicant has received a prior award of permanent disability, it shall be conclusively presumed that the prior permanent disability exists at the time of any subsequent industrial injury. This presumption is a presumption affecting the burden of proof.

(Lab. Code § 4664.)

The Legislature intended new sections 4663, 4664, requiring apportionment of permanent disability based on causation, to apply to pending cases prospectively from the date of enactment, regardless of the date of an employee's injury. (*Kleemann v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 285 [70 Cal.Comp.Cases 133].)

It has long been established the burden of proving apportionment of permanent disability falls on the employer because it is the employer that benefits from apportionment. (*Id*. at 1560; *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, 613 (Appeals Board en banc).)

To 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. Furthermore, 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 pp. 620-621.)

The phrase "how and why" from *Escobedo* has come to be used as a shorthand statement to summarize apportionment in the workers' compensation community. Unfortunately, this conflation has led to confusion as physicians and participants struggle to explain both the "how" and the "why" of apportionment, often leading to circular reasoning.

The word "why" is commonly defined as "for what cause, reason, or purpose" or "for what reason," while "how" is defined as "in what manner or way" or "in what way, or by what methods."[2]

The "why" of apportionment should not be mysterious as it is the result of the legislative mandate. Apportionment is a result of statutory direction. In most cases, by referencing and discussing sections 4663 and 4664 a medical expert not only provides the "why" for apportionment, but the medical expert also discloses familiarity with the concept of apportionment. This discussion provides the foundational "why" of apportionment and supports later conclusions. This first step of acknowledging the legislative mandate should be relatively easy for a medical expert with any familiarity with the workers' compensation benefit system.

The difficult part for most medical experts is in providing the "how." Specifically, how a non-industrial factor results in disability, and by what approximate percentage. Through explaining the "how" the medical expert allows the trier of fact to determine if the apportionment opinion is substantial evidence. Through explaining the "how" the applicant receives appropriate compensation for the industrial disability and defendant is protected from paying for non-industrial disability. In this way, an applicant is provided with the approximate percentage of industrial disability, no more and no less, as provided by the workers' compensation system set up by the Legislature through use of its plenary power.

Therefore, a medical opinion concerning apportionment must explain the facts relied on and the reasoning resulting in its conclusions. This is important because it allows the lay trier of fact to evaluate the substantial nature of medical evidence.

> Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess.

(*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].

As discussed above, once the applicant has established an industrial link to disability by approximate percentages, defendant must then establish apportionment. In meeting the burden on

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[2] See: https://dictionary.cambridge.org/dictionary/english/how; https://www.merriam-webster.com/dictionary/how; and see https://dictionary.cambridge.org/dictionary/english/why; https://www.merriam-webster.com/dictionary/why.

apportionment defendant must produce substantial expert medical opinion in support of that apportionment. This is because:

> Where an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence. [citations] Expert testimony is necessary "where the truth is occult and can be found only by resorting to the sciences." [citation].

(*Peter Kiewit Sons v. I.A.C.* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].)

Further, a defendant is charged with the ongoing duty of developing such evidence as part of adjusting a claim. The "duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due." (Cal. Code Reg., tit. 8, § 10109(c).) Defendant's duty to investigate is based in the constitutional mandate that the employer provide benefits and to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal Const, Art. XIV § 4, emphasis added.) If a defendant has concerns about benefits due it must conduct timely investigation. Such investigation not only assures timely provision of benefits when due, it protects defendant from providing benefits that are not due.

In preparing and presenting substantial evidence of apportionment it is paramount that a defendant keeps in mind the constitutional mandate that the workers compensation system provide benefits expeditiously and without encumbrance. This is because a defendant is in the best position to explore and develop evidence of disability and its causes. Although SB 899 vastly expanded the universe of apportionable factors, such expansion cannot be at the cost of delay in the provision of benefits to an injured worker.

Defendants are expected to have fully prepared and presented substantial evidence supporting apportionment at time of trial. Failure to do so violates the constitutional requirement to provide benefits expeditiously. Instead of allowing delay for further investigation, disability is provided to the injured worker without apportionment.

Because apportionment is usually based on impairment described in the AMA Guides, it is the described AMA Guide impairment that is the proper focus of apportionment. After full consideration of the AMA Guides, there may be instances where the disability described by a medical expert is not found in the AMA Guides. Correspondingly, in such cases, the medical expert

should provide reasoning as to "how" apportionment of the actual disability described is medically reasonable.

In summation, for a medical opinion to be substantial evidence, a physician must identify the impairment or disability and describe how the approximate percentage of that specific impairment or disability is caused by other factors. This focus of the medical opinion on apportionment to the actual impairment or disability under consideration allows the lay trier of fact to meaningfully evaluate the opinion. Unfortunately, medical opinions on apportionment often speak in terms of the overall cause of an injury, a diagnoses, condition, or other entity, which does not provide the necessary connecting reasoning for the trier of fact to assess the substantiality of apportionment.

With these principles in mind, we now turn to the record before us.

First, we must identify the applicant's impairment under the AMA Guides. Here, PQME Dr. Sweet found industrial impairment, and hence disability, for the right and left knee in his November 2, 2023, evaluative report as follows:

> For the bilateral knees, per the Guides pages 546-549, tables 17-33 and 17-35, *rating is based upon points provided for pain, range of motion and stability* with deductions for any lack of extension or alignment. For both knees there is what would be considered as frequent, moderate pain that provides 15 points; for range of motion, given 120°, 22 points is provided; for stability, given no instability demonstrated, 25 points for a total of 62 points. There is no extension lag or flexion contracture and no malalignment.
>
> Total for each knee is 62 points which equates to a fair result and 20% WPI for each knee.

(Exhibit 4, Stephan Sweet, M.D., November 2, 2023, pp. 21-22, emphasis added.)

Therefore, applicant's impairment is founded on the assessment of three medical findings: pain; range of motion; and stability.

Dr. Sweet's apportionment discussion appropriately acknowledges the "why" of apportionment by stating that sections 4663 and 4664 require it. For the "how" the doctor begins by stating:

> I have now been provided with medical records that pertain to the pre-existing bilateral knee pain that began with the right knee in 2008 and the left knee on October 4, 2010.

> Surgeries were undergone consisting of a medial meniscectomy on the left and on the right, given operative reports have not been provided, based upon the June 27, 2008, MRI findings, medial and lateral meniscectomies appear likely.
>
> There is also the issue of obesity with a BMI of 30-31.

(Exhibit 4, Stephan Sweet, M.D., November 2, 2023, p. 23.) The doctor then reviewed medical literature on obesity, arthritis, and the long-term results of meniscectomy before concluding:

> Based upon the above, the bilateral knees are apportioned as 40% to pre-existing, nonindustrial degenerative changes, and the prior surgeries with the remaining 60% to the subject claim.

(Exhibit 4, Stephan Sweet, M.D., November 2, 2023, pp. 23-25.)

Instead of providing medical reasoning as to how any factors caused pain, range of motion or affected stability, the doctor states "the bilateral knees are apportioned as 40% to pre-existing, nonindustrial degenerative changes, and the prior surgeries." (Exhibit 4, Stephan Sweet, M.D., November 2, 2023, p. 25.) There is simply no discussion of how a factor such as obesity affects applicant's knee pain, range of motion, or stability.

It seems entirely plausible that pre-existing, nonindustrial degenerative changes, and the prior surgeries could lead to pain, and affect the range of motion and stability in this applicant. We may not however, as lay reviewers, provide that causal connection. This is because "[w]here an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence." (*Peter Kiewit Sons*, *supra*, at p. 838.) It is clear that the issue of apportionment is "occult and can be found only by resorting to the sciences." (*Id*.)

In subsequent reporting, Dr. Sweet changes apportionment from 40% to "60% to pre-existing, nonindustrial degenerative changes, and the prior surgeries" but again provides no further discussion of his reasoning. (Exhibit 3, Stephan Sweet, M.D., July 31, 2025, p 3.)

All that we know from Dr. Sweet's reporting is that *the bilateral knees* are apportioned to pre-existing, non-industrial degenerative changes, and the prior surgeries. Such conclusory reasoning, without any connective tissue, does not raise to the level of substantial medical evidence sufficient to meet defendant's burden.

To support apportionment a medical opinion must provide the reasoning connecting the impairment to "other factors," not just the injury in vague and general terms. Here there is no

discussion of how any listed factor causes the approximate percentage of applicant's knee pain, range of motion, or stability. It is clear the Legislature greatly benefited employers by vastly expanding the universe of apportionable factors. When defendants do not take advantage of that expansion by developing medical evidence linking factors to applicant's impairment or disability, it is incumbent under the constitutional mandate to allow no further delays in the provision of benefits to the injured work.

We again note that treating physician Dr. Jahng also found impairment per the AMA Guides at pages 546-549, tables 17-33 and 17-35, based upon Diagnosis-Based Estimate, although he arrived at slightly different impairment percentages. (Exhibit A, Kenneth Jahng, M.D., November 24, 2024, p. 4.) For apportionment, he states:

> The patient was noted to have a pre-existing injury to his knees. He had surgery in both knees prior to his February 19, 2021 injury. A left knee MRI dated March 8, 2021 described areas of full-thickness cartilage loss. Subsequent radiographs also showed advanced osteoarthritis.
>
> It appeared that his February 19, 2021 injury was an aggravating injury of a pre-existing condition thus 30% industrial apportionment was given. I believe this to be medically reasonable considering the above.

(Exhibit A, Kenneth Jahng, M.D., November 24, 2024, pp. 4-5.)

As above, such conclusory reasoning does not raise to the level of substantial medical evidence sufficient to meet defendant's burden. To support apportionment a medical opinion must provide the reasoning connecting the specific AMA Guide impairment sustained by the applicant to "other factors," not just the injury in vague and general terms, as provided here. Dr. Jahng's opinions are not substantial evidence on the issue of apportionment.

Based on the record before us, we discern no reason to disturb our prior Decision and will therefore deny defendant's Petition.

V.

Following our independent review of the record, and for the reasons stated in our Decision and for the reasons stated above, we deny defendants' March 23, 2026, Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that the Defendant's March 23, 2026, Petition for Reconsideration of the Opinion and Order Granting Reconsideration and Decision After Reconsideration issued by the Workers' Compensation Appeals Board on March 16, 2026, is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR IN PART AND DISSENT IN PART (*See Dissenting Opinion*),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 29, 2026

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

RAUL SERVIN
SILBERMAN & LAM
ACUMEN LAW

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. While I concur with my colleagues that defendant improperly attached exhibits to the Petition, I am again unable to join in Part IV of the decision. I remain of the opinion that the record is sufficient to return this matter to the trial level for further development on the issue of apportionment.

It is clear the defendant has the burden of proof to establish apportionment. It is also clear the Appeals Board has broad powers to make further inquiry when warranted.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id*. at 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).)

It is also clear that:

> [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.)

In the seminal WCAB apportionment case "*Escobedo,*" the WCAB used the word "approximate" or "approximately" no less than twenty-four times. (*Escobedo v. WCAB* (2005) 70 Cal.Comp.Cases 604, 607, 609-613, 616, 620-622.) It is indisputable that apportionment is an "approximate" business. When opining on apportionment, a doctor is charged with using expertise and experience to arrive at approximate percentages, nothing more.

The Supreme Court has explained that since the April 19, 2004, adoption of Senate Bill 899, "the new approach to apportionment 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].) Moreover, the law on apportionment does not require medical certainty. The Court of Appeal underscored this point in *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687], when it concluded that the apportionment opinions of a physician cannot be disregarded as speculative when they are based on the physician's "expertise in evaluating the significance of these facts," and that insofar as the issue involves a matter of scientific medical knowledge, the Appeals Board may not substitute its judgment for that of the medical expert. (*Id*. at 930.)

Apportionment is clearly not an exact science nor are medical opinions concerning apportionment held to a higher standard than other medical opinions. Quite the opposite.

Keep in mind that applicant's injury occurred on February 19, 2021. The following summarized medical history of applicant's knees starts *twelve years before injury*. This history of applicant's knees grouped by year is illuminating:

April 15, 2008, right knee pain two weeks, referred to ortho.
April 17, 2008, normal right knee x-ray.
June 19, 2008, right knee pain, prescribed medication, keep ortho appointment.
June 23, 2008, assessment right knee medial meniscal tear. Refer for MRI.
June 27, 2008, MRI right knee mild chondromalacia with meniscus tears.
July 17, 2008, right knee meniscal tear. Plan, scope, debridement v. repair.
August 6, 2008, status post right knee arthroscopy.
August 28, 2008, status post right knee arthroscopy.

October 4, 2010, left knee pain, requested x-ray.
October 4, 2010, x-ray impression mild degenerative changes of the knee.

November 2, 2018, use left knee brace as needed.
November 13, 2018, left knee pain.
November 26, 2018, left knee x-ray showing no significant abnormality.
November 29, 2018, right knee pain and left knee tenderness on exam.
December 17, 2018, left knee MRI medial meniscal tear with osteoarthritis.

January 8, 2019, assessment left knee medial meniscal repair.
April 9, 2019, left knee medial meniscal repair.
April 25, 2019, left knee post partial medial meniscectomy.
May 7, 2019, left knee physical therapy initial evaluation.
May 23, 2019, left knee physical therapy discharge.
May 24, 2019, left knee mild effusion.
June 26, 2019, left knee tenderness over the medial joint line.

July 22, 2019, follow up left knee.

(Exhibit 4, Stephan Sweet, M.D., November 2, 2023, pp. 7-10.) It is clear that applicant has an extensive history of bilateral knee pain and surgeries.

After applicant's injury on February 19, 2021, applicant underwent an MRI of the left knee which revealed:

> Impression: 1. 1.5 cm full thickness chondral defect involving the posterior weight bearing aspect of the medial femoral condyle with underlying subcortical cysts and edema. 2. Bakers cyst. 3. Complex tear involving the body and posterior horn of the medial meniscus. 4. Partial tear of the anterior cruciate ligament. 5. Linear increased signal in the anterior horn and posterior horn of the lateral meniscus which approached and possibly extended to the inferior articular surface. This might reflect a tear vs internal degeneration. Correlation with MR arthrogram using high resolution MRI was recommended for further evaluation. 6. Subcutaneous edema anterior to patella.

(Exhibit 7, Stephan Sweet, M.D., September 2, 2021, p. 8.)

PQME Dr. Sweet reviewed the history of applicant's knees, including the post-injury MRI, and properly noted "pre-existing, non- industrial degenerative changes, and the prior surgeries" and "diagnostic testing showing significant preexisting pathology along with her [*sic*] history of obesity" before apportioning applicant's disability "60% to pre-existing, nonindustrial degenerative changes, and the prior surgeries." (Exhibit 3, Stephan Sweet, M.D., July 31, 2025, p. 3.)

PQME Dr. Sweet had previously explained his reasoning for apportionment as follows:

> [T]he apportionment noted above was formulated by considering numerous factors including discussing in detail with the patient the mechanism of injury, the type of temporal onset of symptoms, the response to various treatments, the physical examination findings, radiographic/diagnostic findings and other pertinent information including my experience, knowledge and training.

(Exhibit 3, Stephan Sweet, M.D., July 31, 2025, p. 3.)

Although the percentages the doctor "provided are approximations that are not precise and require some intuition and medical judgment. This does not mean his conclusions are speculative." (*Andersen v. Workers' Compensation Appeals Bd.* (2007) 149 Cal.App.4th 1369, 1382 [72 Cal.Comp.Cases 389].) In this case, by contrast, PQME Dr. Sweet unambiguously apportioned 60% of the disability to non-industrial factors.

> According to the WCAB, the 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. In addition, the WCAB opined that the Legislature's call for an approximation recognizes the difficulty of determining precisely the relative weight of the various causes of an employee's disability.

(*Paredes v. Workers' Compensation Appeals Bd.* (2007) 72 Cal.Comp.Cases 690, 694.)[3]

The correct standard for substantial medical evidence is reasonable probability. This was made clear by our Supreme Court:

> …We have held "reasonable or "probable" causal connection will suffice; it is to be distinguished from the merely "possible." (Travelers Ins. Co. v. Industrial Acc. Com. (1949) 33 Cal.2d 685, 687 [203 P.2d 747].) As we stated in Travelers Ins. Co., intellectual candor may at times require expert testimony in terms of mere probability. (See also Bethlehem Steel Co. v. Industrial Acc. Com., supra, 21 Cal.2d 742, 747; Pacific Emp. Ins. Co. v. Industrial Acc. Com., supra, 19 Cal.2d 622, 627, 629.) For that reason alone we cannot demand that experts be more certain, particularly when industrial causation itself need not be certain, but only "reasonably probable." […]

(*McAllister v. Workmen's Comp. App. Bd.* (1968) 69 Cal.2d 408, 416-417 [33 Cal.Comp.Cases 660].)

PQME Dr. Sweet's apportionment of "60% to pre-existing, nonindustrial degenerative changes, and the prior surgeries," is not unexpected on this record. (Exhibit 3, Stephan Sweet, M.D., July 31, 2025, p. 3.) Further, although the majority states they applied the requirements of substantial evidence laid out in *Escobedo*, *supra*, I believe the majority applies an even more exacting standard, requiring the doctor to be medically certain about his apportionment findings. As explained by the Court of Appeal, section 4663(c) requires no more than that the reporting physician make an apportionment determination based on their medical expertise of the approximate percentage of permanent disability caused by the non-industrial condition. (*Gatten*, *supra*, p. 930.)

Although the doctors may not have adequately explained the "how and why" of apportionment in this case, it is clear based on the medical evidence that there are obvious facts supporting apportionment. This is not a case cloaked in the mystery of vague medical opinion.

[3] *Paredes* is a panel decision cited for its persuasive reasoning. (see *Griffith v. WCAB* (1989) 209 Cal.App.3d 1260, 1264, fn 2, [54 Cal.Comp.Cases 1450].) WCAB panel decisions, however, are not binding precedent. (*Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6, [67 Cal.Comp.Cases 236].)

Whether that apportionment is 40%, 60% or some other percent, we should not ignore facts that clearly invoke the spirit of the 2004 legislative changes to the workers' compensation system when the legislature enacted section 4663 as part of SB 899. Where, as here, there are significant and substantial facts that could reasonably lead to apportionment, it is out constitutional duty to "accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character" by creating a substantial record. (Cal Const, Art. XIV § 4.) Substantial justice should be afforded to all parties, including defendants.

Again, I would return this matter to the trial level to further develop the record on apportionment through supplementation of the medical record by the physicians who have already reported in the case regarding apportionment. (*McDuffie*, *supra*, p. 139.)

For the foregoing reasons, I dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 29, 2026

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

RAUL SERVIN
SILBERMAN & LAM
ACUMEN LAW

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