WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SAMSON TESFAMARIAM, *Applicant*

vs.

UNITED CONTINENTAL HOLDINGS, INC.,
doing business as UNITED AIRLINES,
permissibly self-insured, administered by
SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ19551252
San Francisco District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on December 23, 2025. The WCJ found, in relevant part, that the applicant sustained injury arising out of and in the course of employment to his low back and is entitled to future medical treatment. The WCJ also found, that defendant paid temporary disability from June 15, 2024 to July 25, 2025 at the rate of $671.74 per week in addition to permanent disability advances from June 27, 2025 through the present at the rate of $290.00 per week and that defendant was not entitled to a credit for overpayment of temporary disability. The WCJ did not find that defendant met its burden of proof as to Labor Code section 4663[1] non-industrial apportionment.

Defendant contends the WCJ erred by finding that 1) applicant is entitled to future medical treatment for the left shoulder and not the low back, 2) defendant has not met its burden of proof as to section 4663 non-industrial apportionment, and 3) defendant is not entitled to credit for overpayment from June 27, 2025 through July 25, 2025.

We have not received an Answer from applicant.

[1] All section references are to the Labor Code, unless otherwise indicated.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report), recommending that we deny reconsideration.

We have considered the allegations of defendant's Petition for Reconsideration (Petition) and the contents of the Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, and for the reasons discussed below, we will deny reconsideration.

DISCUSSION

I.

Former section 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.
>
> (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 January 13, 2026, and 60 days from the date of transmission is March 14, 2026, which is a Saturday. The next business day that is 60 days from the date of transmission is Monday, March

16, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[2] This decision was issued by or on March 16, 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 and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on January 13, 2026, and the case was transmitted to the Appeals Board on January 13, 2026. Service of the Report and transmission of the cases 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 January 13, 2026.

II.

In addition to the analysis set forth in the WCJ's Report, we observe the following.

Defendant seeks credit for a claimed temporary disability overpayment for payments made from June 27, 2025 through July 25, 2025. (Petition, at p. 10, lines 1-2.)

Section 4909 provides:

> Any payment, allowance, or benefit received by the injured employee during the period of his incapacity ... which by the terms of this division was not then due and payable ... shall not, in the absence of any agreement, be an admission of liability for compensation on the part of the employer, but any such payment, allowance, or benefit *may* be taken into account by the appeals board in fixing the amount of the compensation to be paid.

(Lab. Code, § 4909 [italics added].)

[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.

Because section 4909 uses the term "may," which is not mandatory language, the Appeals Board has the discretion whether to grant or deny credit for overpayments thereunder. (Lab. Code, § 15; *City and County of San Francisco v. Workmen's Comp. Appeals Bd.* (*Quinn*) (1970) 2 Cal.3d 1001, 1016 [35 Cal.Comp.Cases 390]; *Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258 [34 Cal.Comp.Cases 382].) As we said in *Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429 (Appeals Bd. panel), "Whether a credit is to be allowed is a matter directed to the discretionary authority of the [WCAB] to be weighed in the light of the circumstances of the particular case and should not be subjected to a harsh dictate that avoids the equities presented."

The burden of proof is on the defendant to establish its entitlement to credit. (*Ott v. Workers' Comp. Appeals Bd.* (1981) 118 Cal.App.3d. 912, 922 [46 Cal.Comp.Cases 545]; *Quintana v. Contra Costa County* (1982) 47 Cal.Comp.Cases 512 (Appeals Board En Banc).)

Here, we do not find that the WCJ abused her discretion in finding that defendant is not entitled to a credit for temporary disability indemnity paid from June 27, 2025 through July 25, 2025. Panel qualified medical evaluator (QME), Sayed Miry, D.C., re-evaluated the applicant on June 27, 2025 and found him permanent and stationary as of the date of the re-evaluation. (Joint Exhibit #1, Report of QME Sayed Miry D.C., June 27, 2025, at p. 44.) However, the report, through no fault of any party, was not served onto the parties until July 15, 2025. In addition, the claims administrator, Sedgwick, was served at an out-of-state address in Lexington, Kentucky, which may have possibly further delayed action by defendant. The applicant continued to receive temporary disability payments after the re-evaluation with the QME and had no reason to believe he was not entitled to them.

Although not determinative, we note that when a dispute arises as to a credit for any overpayment of benefits pursuant to section 4909, a party make a request for overpayment by petition so as to clearly identify what relief is sought. (Cal. Code. Reg. tit. 8, §10555.) Here, it does not appear defendant has filed a petition for credit.

We find that it would be inequitable to charge applicant with an overpayment when the applicant was not responsible for the delay in service of the report relied on by defendant, it is unclear if service on an out of state defendant further compounded the delay, and defendant does not appear to have filed a petition for credit. Given the equities of this case and the reasons behind the nature and extent of the claimed overpayment, we do not believe defendant has met its burden

to establish its entitlement to credit and see no reason to disturb the WCJ's finding denying credit for overpayment.

Finally, we briefly address defendant's contention regarding the WCJ's clerical error in her Opinion wherein she referred to future medical treatment to applicant's left shoulder. We remind defendant that reconsideration is sought with respect to the "final order, decision, or award" (Lab. Code, § 5900) and that only "the findings and order, decision, or award" is enforceable (Lab. Code, §§ 5806, 5807). In sum, statements in a WCJ's opinion on decision have no legal effect, and unless a statement in the opinion appears to reflect the actual intention of the WCJ and is inconsistent with the "final order, decision, or award," it is not necessary to raise it on reconsideration. (See *Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558, [47 Cal.Comp.Cases 145] [a clerical error maybe corrected at any time and without necessity for further hearings or a petition for reconsideration].)

Accordingly, we deny the Petition for Reconsideration.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the December 23, 2025 Findings of Fact and Award is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 27, 2026

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

SAMSON TESFAMARIAM
BRITTANY HUYNH, ESQ.
COLEMAN CHAVEZ & ASSOCIATES

JL/abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION AND NOTICE OF TRANSMISSION TO WCAB

INTRODUCTION

Defendant seeks reconsideration of my December 23, 2025, Findings and Award. The substantive decision set forth therein was a finding of permanent disability, denial of defendant's petition for credit for temporary disability overpayment, and attorney fees. In its petition, defendant contends my order and award was issued without or in excess of the appeals board powers, the evidence does not justify the Findings of Fact, and the Findings of Fact to not support the Order, Decision or Award. The petition is timely and verified. I am not aware of an answer having been filed to date.

FACTS

1. Procedural background.

Applicant has an admitted, specific March 11, 2024, injury to his low back. The matter proceeded to trial on November 24, 2025. The issues were permanent disability, defendant's claim for credit for temporary disability overpayment, and attorney fees. At the trial, the parties offered two exhibits: reports of QME Sayed Miry, D.C., summarized below.
There was no witness testimony.

2. Evidence at trial and decision.

a. Medical Reports: Reports of QME Sayed Miry, D.C.

i. November 15, 2024, Report

Joint Exhibit 2 is a report of QME Sayed Miry, D.C., dated November 15, 2024. In his report, Dr. Miry provided a history of the injury. He stated that while applicant was working as a ramp agent "…repetitively lifting backs off the belt to place them on a cart, he experienced a sudden sharp pain in his lower back." (p. 2.) Dr. Miry went on to detail the subsequent treatment, periods of disability, and medical history.

Regarding complaints, he stated applicant, "…has frequent moderate to severe pain in the lumbar spine that radiates to both lower extremities and posterior thigh behind the knee, with tingling and numbness. The pain is aggravated by bending, standing for too long, twisting and lifting anything…The applicant has sleep issues." (p. 5.)

He reviewed an X-Ray of the spine, noting the findings and impression:

> Lumbar height and alignment appear normal. Loss of lordosis is consistent with muscle spasms. The disc spaces are narrowed L5-S1 but otherwise preserved… [¶]
>
> Muscle spasm, mild spondylosis without acute traumatic osseous abnormality.
>
> (p. 9)

Dr. Miry stated applicant had not reached permanent and stationary status. He provided work restrictions. He stated applicant was in need of future medical treatment. (pp. 27-28.)

b. June 27, 2025, Report

Joint Exhibit 1 is a reevaluation report of QME Dr. Miry dated June 27, 2025. In his report, Dr. Miry noted:

> Since my last evaluation with him, the applicant states that he was beginning to improve with the treatments being provided. However, on April 1, he had a major setback. He states that he felt a sudden onset of severe back pain that "twisted" his back up. Shortly after, he began noticing worsening pain in his left lower extremity down to his left heel. Despite taking ibuprofen, the pain has persisted since the incident. He experiences increased discomfort when walking, sitting, or standing for extended periods. Since my last evaluation with him, he has completed an additional 12 sessions of chiropractic. He also had 12 sessions of acupuncture since my last evaluation with him. He noted that the therapies have provided minimal relief for his lower back and left leg. No new injuries or symptoms have been reported. Further chiropractic care, physical therapy, and acupuncture have been recommended by his PTP, but nothing has been authorized.
>
> (p. 2.)

He reviewed additional medical records, including Kaiser records that predate the date of this injury.

Dr. Miry opined applicant had reached permanent and stationary status as of June 27, 2025. He provided the following impairment rating: 20% WPI for the lumbar spine using table 15-7. (p. 48.)

Regarding apportionment, he stated:

> [t]he MRI of the lumbar spine, dated June 1, 2024, demonstrates advanced bilateral L4 and L5-S1 neuro foraminal narrowing with degeneration advanced at L3-4 and L4-5, moderate at L5-S1, and mild at L2-3. These findings were likely present prior to the industrial injury. Although the applicant was working full duty in a physically demanding capacity – performing tasks such as lifting, bending, and twisting – prior to the date of injury, the degenerative findings are consistent with a chronic condition that would be expected to contribute to functional decline over time. While the patient did not report significant impairment in his [ADLs] prior to the injury, it is medically probable that the preexisting lumbar spine degeneration contributed to his current level of disability. Therefore, I apportion 20% of the applicant's current permanent disability to the preexisting degenerative condition and 80% to the industrial injury sustained in the course of his employment.
>
> (pp.45-46.)

Dr. Miry provided work restrictions. He recommended future medical treatment for this injury including injections. He found applicant is "unable to engage in his previous occupation". (p. 47.)

c. Decision

I found applicant's injury to low back has resulted in 41 percent permanent partial disability. I further found defendant had not met its burden of proof as to Labor Code section 4663 non-industrial apportionment. I also found defendant is not entitled to a credit for temporary disability indemnity paid from 06/27/2025 through 07/25/2025. I awarded attorney fees and future medical treatment for the low back[1].

[1] In its petition for reconsideration, defendant notes that my Opinion on Decision erroneously listed left shoulder instead of low back on pages 4 and 5. This was a typographical error and should read "low back". My Findings of Fact and Award remain correct.

d. Contentions on reconsideration.

In its petition for reconsideration, defendant contends this WCJ erred in finding defendant had not met its burden of proof as to apportionment. Defendant additionally contends this WCJ erred in not awarding the claimed credit for temporary disability overpayment.

DISCUSSION

1. Permanent Disability: Apportionment

To be substantial evidence, a medical opinion must be well-reasoned, based on an adequate history and examination, and it must disclose a solid underlying basis for the opinion. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (*en banc*). With respect to permanent disability, the applicant holds the burden of proof by a preponderance of the evidence. (Labor Code section 3202.5.) The defendant has the burden of establishing the percentage of permanent disability caused by nonindustrial factors. (*Escobedo, supra,* at 614; *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894, 898 (*en banc*).) In order to be considered substantial medical evidence on apportionment, the medical opinion "must set forth reasoning in support of its conclusions." (*Id.* at 621.)

I found the following permanent partial disability (that is not raised as an issue in defendant's petition for reconsideration):

- Lumbar spine: (15.02.02.06 - 20 - [1.4] 28 - 460H - 34 - 41%) 41%

- = 41% Permanent Disability

I found that Dr. Miry's apportionment opinion did not rise to the level of substantial evidence as that term has come to be defined within the context of Labor Code section 4663. My conclusion here is driven by the lack of analysis on the part of the QME to explain how and why he believes the nonindustrial conditions are responsible for causing twenty percent of the current disability. Although he comments on apportionment in his June 2025 report (Joint Exhibit 1), Dr. Miry's explanation boils down to a rather conclusory statement attributing 20% apportionment to applicant's probable pre-existing degeneration. In fact, Dr. Miry states applicant had no work restrictions or impacted ADLs due to back symptoms. Moreover, the QME discusses apportionment in relation to the injury itself, rather than the disability it caused.

In sum, between the lack of "how and why" and the apparent attempt to apportion causation of the injury and not the disability, the alleged apportionment is not supported by substantial evidence.

> To be substantial evidence on the issue of apportionment a medical opinion must set forth reasoning in support of its conclusions. If a physician states that a percentage of an injured worker's disability is caused by a pre-existing condition, the physician must explain the nature of the pre-existing condition, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for the percentage of the disability identified by the doctor. For example, if a physician determines that 50% of an employee's back disability is caused by degenerative disc disease … the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.
>
> *Smith v. Golden Gate Bridge* (2019) 2019 Cal. Wrk. Comp. P.D. LEXIS 440, *5 (internal citations omitted).

Even where a medical 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 under section 4663(a), the report may not be relied upon unless it also constitutes substantial evidence.

In its petition, defendant cites *Kos v. WCAB* (2008) 73 CCC 529 (writ denied). The analysis fails under *Kos* as well: Dr. Miry references no pre-injury symptoms or treatment in his reports. As stated above, even Dr. Miry said there is no record of pre-injury work restrictions or lost work time.

In this case, I found the QME's reports do not meet this standard. Defendant bears the burden of proof as to apportionment. I found defendant's burden of proof had not been met, and non-industrial apportionment does not apply.

2. Defendant's claim for credit for temporary disability indemnity paid from June 27, 2025 through July 25, 2025

The parties stipulated that defendant paid temporary disability indemnity from June 15, 2024 to July 25, 2025. Dr. Miry found applicant had reached permanent and stationary status on June 27, 2025. (Joint Exhibit 1.) The proof of service on the report shows it was served on the

parties on July 15, 2025. Defendant contends it is entitled to a credit for temporary disability indemnity paid during this period.

On the issue of credit towards permanent disability, pursuant to section 4909, the Appeals Board is allowed to "take[] into account," (i.e., to allow a credit) for any payment, allowance, or benefit paid by the defendant to the injured employee when it was not then due and payable or when there was a dispute or question concerning the right to compensation. (Lab. Code, § 4909.) The Supreme Court has stated that the allowance of credit is within the Appeals Board's discretion. (*Herrera v. Workmen's Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 258.) An Appeals Board panel stated that "[w]hether a credit is to be allowed is a matter directed to the discretionary authority of the trier of fact to be weighed in the light of the circumstances of the particular case and should not be subjected to a harsh dictate that avoids the equities presented." (*Cordes v. General Dynamics-Astronautics* (1966) 31 Cal.Comp.Cases 429.) Thus, the allowance of a credit is a matter of discretion and not a legal entitlement. In *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 827, the Court of Appeal stated that equitable principles are frequently applied to workers' compensation matters, that equity favors allowance of a credit if the credit is small and does not cause a significant interruption of benefits, that the allowance of a credit of overpayment of one benefit against a second benefit can be disruptive and in some cases totally destructive of the purpose of the second benefit, and that the injured employee should not be prejudiced by defendant's actions when the employee received benefits in good faith with no wrong-doing on their part. (*Id*. at pp. 837-838.)

Here, there is no evidence of wrong-doing on applicant's part. He was receiving temporary disability payments while he had work restrictions and was not yet on notice of having been deemed permanent and stationary by the QME. At trial, defendant had not put forth any evidence or argument as to why the credit is warranted. I therefore found that defendant is not entitled to a credit.

RECOMMENDATION

For the foregoing reasons, I recommend that defendant's Petition for Reconsideration, filed herein on January 7, 2026, be denied. This matter is being transmitted to the Appeals Board on the service date indicated below my signature.

Hillary R. Allyn
Workers' Compensation Judge
Workers' Compensation Appeals Board

The Report and Recommendation on Petition for Reconsideration was filed and served on all parties listed in the Official Address Record pursuant to Rule 10628 and the case was transmitted to the Appeals Board on this date.

Date: January 13, 2026