

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

SERVANDO ALVAREZ, *Applicant*

vs.

**CORONADO LIVERY, INC.;;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ10128397
San Diego District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Petitioner and defendant State Compensation Insurance Find (SCIF) seeks reconsideration of our June 23, 2025 Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration (Decision), which amended the April 7, 2025 Findings and Award (F&A) of the workers' compensation administrative law judge (WCJ) to a finding and award of 96 percent permanent disability, based on the lack of substantial medical evidence in support of apportionment.

Petitioner State Compensation Insurance Find (SCIF) asserts that (1) the evidence does not support our Decision, because the evidentiary record provides substantial medical evidence on the issue of apportionment, (2) the Decision failed to adequately state the evidence and reasons on which it was based, as required by Labor Code section 5313, (3) the Combined Values Chart (CVC) should have been used to combine disabilities instead of using addition in accordance with *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc), and (4) the record should be developed on the issue of apportionment.

Applicant has filed an Answer that agrees with our Decision and requests that reconsideration be denied.

We have considered the allegations of the Petition for Reconsideration and the Answer thereto. Based on our review of the record, based on our Decision, which we adopt and incorporate, and for the reasons stated below, we will deny reconsideration of the June 23, 2025 Decision.

FACTS

Following are the facts set forth in our June 23, 2025 Decision:

At trial on February 20, 2025, the parties stipulated that during the period from August 22, 2014 to August 22, 2015, applicant sustained injury arising out of and in the course of employment to his knees and shoulders while employed as a driver by Coronado Livery, Inc., insured by State Compensation Insurance Fund. Applicant was 61 years of age at the end of this stipulated period of cumulative trauma. The parties further stipulated that at the time of injury, applicant's earnings were \$358.19 per week, warranting indemnity rates of \$238.79 for temporary disability and \$238.79 for permanent disability, and that the applicable Occupational Group Number is 250. (Minutes of Hearing and Summary of Evidence dated February 20, 2025, p. 2, numbered lines 3-11.)

The only exhibits admitted into evidence at trial were a deposition transcript and five reports of Qualified Medical Evaluator (QME) Christopher Pallia, M.D., admitted as Joint 1 through 6, and a report of treating physician James McSweeney, M.D. dated February 8, 2021. (*Id.* at p. 3, numbered lines 7-22.) According to the history in Dr. Pallia's first report, dated January 13, 2016¹, applicant was hired by Coronado Livery on June 25, 2014 to transport people from Coronado Island to the airport. His passengers included soldiers with heavy duffle bags, which he had to carry and lift into a van. He first noticed increasing pain in his shoulders from carrying and lifting passengers' baggage in April or May of 2015. (Joint 6, Report of Dr. Chris Pallia dated January 13, 2016, p. 2, l. 14-18.)

Dr. Pallia did not review contemporaneous records of any prior treatment, but applicant did tell him that he had previously sustained work injuries without permanent disability, from which he felt he had recovered. Applicant also reported having prior pain in his knees, and facial surgery for eye cancer. (*Id.* at p. 4, lines 1-7, and p. 7, lines 16-23.) Dr. Pallia's initial report defers any opinion on causation of injury, due to the lack of any records of prior treatment. (*Id.* at p. 8, lines 15-21.)

Dr. Pallia issued a supplemental report dated March 22, 2016, reviewing a March 11, 2016 MRI of the right knee, but he once again deferred any opinion on causation because he did not receive requested reports from applicant's treating physicians. In a second supplemental report dated November 8, 2016², Dr. Pallia reviewed treatment reports including x-ray reports from Physician's Radiology Group, an operative report from Dr. Myer, and progress reports from Dr. Myer and physician's assistant Lora Rancourt. At this point, Dr. Pallia

¹ The dates used in the headings of Dr. Pallia's evaluation reports, and in the February 20, 2025 Minutes of Hearing and Summary of Evidence, refer to the date of Dr. Pallia's examination of applicant, and not to the date that the report was signed. For the sake of convenience and clarity, these dates are referred to as the date of the report.

² The Minutes of Hearing and Summary of Evidence erroneously refer to November 16, 2019 as the date of this report, which was admitted into evidence as Joint 4. (Minutes of Hearing and Summary of Evidence dated February 20, 2025, p. 3, numbered lines 14-15.)

expressed his belief that applicant sustained a rotator cuff tear and a medial meniscus tear prior to his job with Coronado Livery, even though there are no contemporaneous records of a rotator cuff tear prior to 2014 (See Joint 4, Report of Dr. Chris Pallia dated November 8, 2016, pp. 1-3.) Dr. Pallia then apportioned 80 percent of shoulder disability and 100 percent of knee disability to preexisting conditions, but he did not describe the mechanism by which those preexisting conditions were causing present permanent disability. The report did not explain how or why Dr. Pallia chose 80 percent as the percentage of apportionment, as opposed to 70 percent, 90 percent, or some other percentage for the shoulders. Furthermore, the report did not explain how and why applicant's reported strain of the knee and increased pain at work from repeated lifting of heavy suitcases and duffel bags had played no role in his bilateral knee condition.

About a year after QME Dr. Pallia's third report, the parties stipulated to an award of 20 percent permanent disability based not on the QME, but on treating physician Dr. Thomas Harris, whose reports are not currently in evidence. On September 6, 2018, applicant's counsel filed a timely petition to reopen the 20 percent award for new and further disability.

Approximately one year after the petition to reopen for new and further disability, Dr. Pallia re-evaluated applicant on September 18, 2019. In his reevaluation report, Dr. Pallia reviewed treating physician reports of Dr. Harris and Dr. McSweeney, as well as second and third surgical opinions and various studies, none of which predated the period of cumulative injurious exposure in the present case. Dr. Pallia noted that applicant underwent a total replacement of the right knee and acknowledges that the left knee pain had worsened to a constant 7 out of 10. Dr. Pallia further noted that applicant was using a cane because the left knee "feels loose and it gives way on him occasionally." (Joint 3, Report of Dr. Chris Pallia dated September 18, 2019, p. 7, last paragraph, and p. 8, lines 3-4.) At this point, Dr. Pallia indicated industrial causation of injury to the left knee. Although he felt that applicant had not yet reached maximal medical improvement (MMI), Dr. Pallia prognosticated that 80 percent of permanent disability would ultimately be caused by preexisting conditions.

On February 8, 2021, treating physician James E. McSweeney, M.D., evaluated applicant and issued a permanent and stationary report, admitted into evidence as Applicant's 7. This report, which was the sole treating physician report admitted into evidence at trial, indicated 20 percent Whole Person Impairment (WPI) in each knee using Table 17-35 of the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides). Dr. McSweeney apportioned 25 percent of permanent disability of the knees to "a rather significant degenerative condition." (Joint 7, Report of Dr. James McSweeney dated February 8, 2021, p. 6, lines 16-17.) Dr. McSweeney did not explain the mechanism of this apportionment, nor why he chose 25 percent as opposed to some other number.

On July 31, 2024, QME Dr. Pallia re-evaluated applicant a second time, and reviewed 416 pages of records, some previously reviewed, but none of them clearly predating the cumulative injury period. Only one of the reviewed records was prior to 2015, a 2014 x-ray of the knees, and that record was described as “illegible” except for “Conclusion: bilateral osteoarthritis.” (Joint 2, Report of Dr. Chris Pallia dated July 31, 2024, p. 1, last line and p. 2, first line.) Dr. Pallia noted that at this point, both of applicant’s knees had been replaced. Applicant was found to have reached MMI status on the date of examination, July 31, 2024.

Dr. Pallia’s report of July 31, 2024 provided opinions on impairments under the AMA Guides. (*Id.* at p. 20, paragraphs 2-3.) Like Dr. McSweeney, Dr. Pallia indicated that there is 20 percent WPI of each knee, using Table 17-35 of the AMA Guides.

For the right shoulder, Dr. Pallia found that applicant has 8 percent Upper Extremity (UE) impairment, based on range of motion. Eight percent UE is equivalent to 5 percent WPI, to which Dr. Pallia added another 3 percent for pain using Chapter 18, stating, “I believe that the patient is entitled to an additional 3% whole person impairment for pain of the right shoulder that is ongoing, is not adequately represented [in] just the loss of range of motion.” (*Id.* at p. 20, para. 3, l. 12-13.) Thus, Dr. Pallia concluded that applicant has 8 percent WPI of his right shoulder using the AMA Guides.

For the left shoulder, Dr. Pallia found 3 percent UE based on range of motion, to which he added 10 percent UE for a distal clavicle excision. Thirteen percent UE is equivalent to 8 percent WPI of applicant’s left shoulder.

The apportionment opinion offered in Dr. Pallia's report of July 31, 2024 is as follows:

Apportionment is important in this case. For the knees, I opined that 80% of the applicants permanent impairment can be attributable to the underlying preexistent arthritic disease and its natural progression and 20% can be attributable to the industrial aggravation of that arthritis on a work related basis, especially because the patient had only worked for one year at that job, I think that is reasonable.

With regard to the shoulders, I have not made any comments on shoulder apportionment. I think it may be reasonable to apportion 20% of the patients permanent impairment with regard to the shoulders for pre-existent underlying arthritic changes and 80% to the effects of the industrial injury, because the patient did have some prior arthritic change of the AC joint of the left shoulder and underlying impingement morphology.

(*Id.* at p. 20, last paragraph and p. 21, first paragraph.)

The parties took Dr. Pallia's deposition on October 31, 2024, the transcript of which was admitted into evidence as Joint 1.³ Both the defense attorney and applicant's attorney questioned the QME about apportionment and his recommendation to add the bilateral shoulder and knee impairments instead of combining them on the Combined Values Chart. Both attorneys asked Dr. Pallia to apply the criteria set forth in *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc). Dr. Pallia concluded that the effect on activities of daily living caused by impairment of the shoulders does not overlap with the effect of impairment of the knees, and therefore disability based on impairment of the shoulders should be added to, and not combined with, the disability based on impairment of the knees. (Joint 1, Deposition of Christopher Pallia, M.D., October 31, 2024, at p. 20, l. 16 through p. 21, l. 4.) He also explained that although the effect of impairment in each knee does overlap with the effect of the impairment of the other knee, having impairment in both limbs increases the effect of each impairment because there is no healthy limb that can be used in lieu of the other. (*Id.* at p. 40, l. 4-16.)

At deposition, Dr. Pallia did not change his opinions with respect to percentages of impairment under the AMA Guides. He discussed his prior opinions regarding apportionment, offering the following comments with respect to the knees:

I obviously don't remember off the top of my head here, but I don't believe he had a prior injury to his knees. I might have just meant that -- because there were notes where he had been seeing his primary care physician and had been complaining of knee pain. There's one note where there's complaints. It states that the patient had knee pain for five years and that was on a -- let's see, that was on -- I'll just say that was a report from June 19th of 2015. It says, "patient complaints of bilateral knee pain, eight out of ten, left greater than right. Five-year history of pain is continuous."

(*Id.* at p. 12, lines 5-16.)

Dr. Pallia explained why he changed his initial opinion that causation of injury of the knees was nonindustrial:

In my '16 report, I stated that "100 percent of the patients arthritis in both knees could be apportioned to natural degenerative causes and underlying anatomic varus alignment," but I wasn't talking about apportionment of impairment, if you know what I mean, at that time period and furthermore, the patient hadn't had surgical treatment for the arthritis of the knees on an industrial basis... which was by the carrier. ... So the main reason I changed is because the patient had surgical treatment of

³ Joint 1 is clearly a deposition transcript but is misidentified in the Minutes of Hearing and Summary of Evidence as "reports." (Minutes of Hearing and Summary of Evidence dated February 20, 2025, p. 3, numbered lines 14-15.)

his arthritis. If he had just had the meniscus tear treated arthroscopically and was made permanent and stationary and never had any further treatment, then my opinions would have been similar.

(*Id.* at p. 15, lines 9-14.)

When asked why he chose 80 percent as the percentage of nonindustrial apportionment following the knee surgeries, Dr. Pallia offered the following explanation:

Again, you can just look back in time, right? I mean, on June 19th of 2015, he had a five year history of pain and had a diagnosis of osteoarthritis of the bilateral knees, which is soon - - you know, it was during the time when he filed his cumulative trauma so he obviously had pre-existing arthritis and it was starting to affect his work and maybe he was aggravating the arthritis from the work -- or not maybe, but he was aggravating his arthritis from the work -- from the work duties, but there was good portion that was naturally progressive.

He has an ultrasound report on July 10th of 2015 that says left side nearly bone to bone. He no, just kind of correlating the severity of the arthritis there that was ongoing. And that takes years to develop, so to speak.

And then I also stated that I believed the patient had worked only one year at the Coronado livery, so he didn't have a large exposure, a large time period of exposure. I mean, if he had worked his whole career there, then we might apportion a higher percentage of his impairment to his job -- you know, to his job duties, but because he only worked a year and he had pre-existing arthritis for four years prior to working there -- or at least prior complaints of bilateral knee pain for four years prior to working there.

That's the reasons for my opinions except, finally, he had total knee arthroplasty, so basically all the arthritis was removed from his knees and he had large surgeries, and the impairment that he has is more of, you know, at least a result of the surgeries.

(*Id.* at p. 16, line 8 to p. 17, line 13.)

With respect to the knees, Dr. Pallia concluded, "the way his knees are now, you know, are kind of representative of the surgery that he had under treatment for this claim from this employer." (*Id.* at p. 18, lines 22-24.)

With respect to the left shoulder, Dr. Pallia clarified that he considered applicant's rotator cuff tear to be industrial in origin:

I believe he had surgery by Dr. Meyer on the left shoulder with a rotator cuff repair in August of 2015 and he also underwent A

distal clavicle resection, which is done for arthritis of the AC joint. Again, I felt that, you know, the rotator cuff tear essentially arose from the job duties. I believe that was my opinion... So my opinions were that it seems like the left shoulder was mostly all due to his work duties.

(*Id.* at p. 20, lines 1-7.)

Dr. Pallia explained that applicant's right shoulder impairment was the result of unsuccessful industrial treatment:

So I kind of -- but the right shoulder was kind of a quiescent impingement syndrome when I saw him back in 2016, but somehow he received two more surgeries -- two surgeries on his right shoulder that ended up causing kind of an adhesive capsulitis and a frozen shoulder post surgery and he ended up having some complications from the surgery, so again instead of just having this underlying pre-existent bursitis of the shoulder, which probably just could have been left alone, he would have been doing better, he underwent surgical intervention for that right shoulder and ended up with a worse shoulder than he did before. So this is another case of where the impairment of the shoulder arose more from the surgical treatment maybe then we'll say the pre-existing disease, unfortunately, in this case.

(*Id.* at p. 20, line 14 to p. 21, line 4.)

Dr. Pallia concluded that apportionment of shoulder impairment is "20 percent due to pre-existent activities or a pre-existent condition and 80 percent was really of his shoulder and his ongoing pain and the stiffness was due to the job exposure and the surgical treatment for his shoulders." (*Id.* at p. 22, line 23 to p. 23, line 2.)

Based on the reports and deposition testimony of QME Dr. Pallia, the WCJ issued a Findings and Award of 32 percent permanent disability after apportionment. Citing *Escobedo* [(2005) 70 Cal.Comp.Cases 604 (Appeals Board en banc)], the WCJ found that apportionment to pre-existing pathology such as arthritis is permissible, and concluded that Dr. Pallia's opinion is the most persuasive, and that it constitutes substantial medical evidence, as it was "based on an adequate medical history, examination and facts; the opinion was not speculative, it set forth the reasoning behind the physician's conclusions." (Findings and Award and Order; Opinion on Decision dated April 7, 2025, p. 2, lines 15-19 and p. 3, lines 5-11.) The percentage of permanent disability was explained in the WCJ's Opinion with the following rating strings:

Left Shoulder/Other	80% (16.02.02.00 - 8[1.4] - 11 - 250F - 11 - 14) 11 PD (A)
Left Knee	20% (17.05.10.08 - 20[1.4] - 28 - 250F - 28 - 34) 7 PD (A)
R Shoulder/LOM	80% (16.02.01.00 - 851.4] - 7 - 250F - 7 - 9) 7 PD (A)
R Knee	20% (17.05.10.08 - 20[1.4] - 28 - 250F - 28 - 34) 7 PD (A)

The WCJ added 11, 7, 7, and 7 percent permanent disability, citing *Athens*

Administrators v. Workers' Comp. Appeals Bd. (Kite) (2103) 78 Cal.Comp.Cases 213.

Applicant has filed a timely Petition for Reconsideration of the April 7, 2025 Findings and Award, contending that Dr. Pallia's opinion regarding apportionment does not meet the standards for substantial medical evidence set forth in *Escobedo, supra*, and that the award of permanent disability should have been based upon the opinions of treating physician Dr. McSweeney. After considering the allegations of the Petition for Reconsideration and the contents of the Report of the WCJ with respect thereto, as well as our review of the record, we granted reconsideration and amended the WCJ's decision of April 7, 2025 to find that applicant's injury caused 96 percent permanent disability and awarded an unapportioned award of 96 percent permanent disability.

(Decision, pp. 1-8.)

On June 23, 2025, we issued a Decision, which amended the WCJ's F&A to find and award 96% permanent disability, because none of the apportionment opinions in evidence were substantial.

Petitioner SCIF then filed a Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration [of the] Findings & Award Issued on June 23, 2025 (Petition) on July 10, 2025.

DISCUSSION

I.

Former Labor Code⁴ 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. (Labor 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.

⁴ All further statutory references are to the California Labor Code unless otherwise specified.

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 April 27, 2026. This decision is issued by or on April 27, 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, we did not receive a Report and Recommendation by a workers’ compensation administrative law judge because the petition for reconsideration is taken from a decision of the Appeals Board itself, and not from the decision of a trial judge. No other notice to the parties of the transmission of the case to the Appeals Board was provided 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 February 27, 2026.

II.

We address here each of the main contentions of the Petition.

(1) The evidence does not provide substantial medical evidence of apportionment

We agree with applicant that Dr. Pallia’s opinions regarding apportionment do not constitute substantial medical evidence. At the same time, we disagree with applicant’s contention that the medical report of Dr. McSweeney constitutes substantial medical evidence. We repeat here what was already stated in our previous Decision.

First, Dr. Pallia provides an insufficient description of the mechanism of causation of disability and an insufficient justification of the percentage that he chose. While it is true that the *Escobedo* case, cited *supra*, confirmed that degenerative changes can provide a valid basis for apportionment, it also confirmed that “any decision of the WCAB must be supported by substantial evidence.” *Escoboedo, supra*, 70 Cal.Comp.Cases 604, 620, citing Lab. Code, § 5952(d), *Lamb v. Workmen’s Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310], *Garza v. Workmen’s Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].)

The en banc *Escobedo* opinion explains that for an apportionment opinion to constitute substantial medical evidence, 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.” (*Escoboedo, supra*, 70 Cal.Comp.Cases 604, 621.) An example is provided in *Escobedo* to emphasize the requirement that a physician explain both the mechanism by which degenerative changes are causing permanent disability and the reasons for selecting an approximate percentage of apportionment:

For example, if a physician opines that approximately 50% of an employee’s back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines 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.”

(*Escobedo, supra*, 70 Cal.Comp.Cases 604, 621.)

In this case, Dr. Pallia identified 80% as the percentage of disability caused by what he believed to be preexisting arthritis and effects of industrial surgery, but he did not explain how and why arthritis was causing permanent disability at the time of his evaluation, or how and why it was responsible for 80% of the disability, other than a speculative assumption regarding applicant’s history that is unsupported by any contemporaneous medical evidence.

In this respect, the opinion of treating physician Dr. McSweeney is no better than that of the QME, Dr. Pallia, because Dr. McSweeney attributes 25 percent apportionment of permanent disability of the bilateral knees to a “degenerative condition” without identifying how or why the

degenerative condition is causing present disability, and without any explanation of how or why he chose the approximate percentage of apportionment. Dr. McSweeney's report does not include any discussion of disability or apportionment of the shoulders. His entire discussion of apportionment with respect to the knees is as follows:

The patient to my knowledge has not sustained a prior injury to the bilateral knees to which apportionment would be indicated. He is noted to have a rather significant degenerative condition, which likely predated the industrial injury, although was aggravated by such. The preexisting degenerative condition of the bilateral knees is considered a contributing factor to the patient's knee for the bilateral total knee arthroplasty and resultant impairment. For this individual when taking into consideration the degree of degenerative changes and the industrial injury, I find it reasonable to indicate 25% of the patient's present disability is due to nonindustrial factors, with the remaining 75% apportioned to the industrial injury in question.

(Joint 7, Report of Dr. James McSweeney dated February 8, 2021, at p. 6, lines 15-23.)

We also note that the reasoning in *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679], which held that the results of unsuccessful industrial treatment should not be a basis for apportionment, weighs against the application of nonindustrial apportionment to applicant's right shoulder or knees. Impairment of these body parts was primarily caused by industrial surgeries according to QME Dr. Pallia. Dr. Pallia explained this as follows with respect to the left shoulder:

"somehow he received two more surgeries -- two surgeries on his right shoulder that ended up causing a kind of an adhesive capsulitis and a frozen shoulder post surgery and he ended up having some complications from the surgery, so again instead of just having this underlying pre-existent bursitis of the shoulder, which probably just could have been left alone, he would have been doing better, he underwent surgical intervention for that right shoulder and ended up with a worse shoulder than he did before. So this is another case of where the impairment of the shoulder arose more from the surgical treatment maybe than will say the pre-existing disease, unfortunately, in this case.

(Joint 1, Deposition of Christopher Pallia, M.D., October 31, 2024, p. 20, l. 16 through p. 21, l. 4.)

Dr. Pallia also testified that applicant's knee impairments are primarily a result of his knee surgeries: "he had total knee arthroplasty, so basically all the arthritis was removed from his knees and he had large surgeries, and the impairment that he has is more of, you know, at least a result of the surgeries." (*Id.* at p. 17, lines 10-13.) "The way his knees are now, you know, are kind of representative of the surgery that he had under treatment for this claim from this employer." (*Id.* at p. 18, lines 22-24.)

In the case of *County of Santa Clara v. Workers' Comp. Appeals Bd. (Justice)* (2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467], the reasoning in *Hikida* was not applied where bilateral knee replacements were successful, and not unsuccessful like the surgery in *Hikida*. As in the *Justice* case, the present case involves successful bilateral knee replacements. However, apportionment cannot be applied to the knees as it was in *Justice* because of Dr. Pallia's insufficient history and lack of justification of the percentage chosen, as explained above. Additionally, Dr. Pallia's deposition testimony indicates that his apportionment opinion is based upon an incorrect legal theory with respect to applicant's knees. Dr. Pallia testified at his deposition that he used apportionment to cut back on what he felt was an excessive provision of WPI for a total knee replacement: Now he's had knee replacements, he can walk for half an hour for both of his knees, but the guidelines rate knee replacements the way they do and so he ends up with a 20% impairment for each knee, so the impairment estimates don't correlate to his functional level, if you understand... So I'm kind of compensating for that issue with my apportionment in this case... Maybe that's not correct, but that's how I feel is the reasonable way to approach this case.

(*Id.* at p. 40, lines 4-16.)

Apportionment cannot be used by a physician to “compensate” for what the physician feels is excessive impairment under the AMA Guides. The correct legal approach would have been for Dr. Pallia to use other tables and criteria within the four corners of the AMA Guides to fashion a more accurate percentage of WPI than the one indicated under Table 17-35, as described in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Almaraz-Guzman III)* (2010) 187 Cal.App.4th 808, 852-853 [75 Cal.Comp.Cases 837].)

A grant of reconsideration has the effect of causing “the whole subject matter [to be] reopened for further consideration and determination” (*Great Western Power Co. v. Industrial Acc. Com. (Savercool)* (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of “[throwing] the entire record open for review.” (*State Comp. Ins. Fund v. Industrial Acc. Com. (George)* (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com.* (1958) 50 Cal.2d 360, 364.) “[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied.”; see generally Lab. Code, § 5803 [“The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an

opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.]”.)

Thus, we concluded that both Dr. Pallia and Dr. McSweeney failed to provide substantial medical evidence that would support a finding of apportionment. We concluded that applicant is therefore entitled to an unapportioned award of 96 percent permanent disability (PD), based on rating strings set forth in the Decision, with impairment percentages and adjustments that do not appear to be contested by the Petition, apart from the absence of apportionment.

(2) The Decision adequately stated the evidence and reasons on which it was based, as required by Labor Code section 5313

Section 5313 states:

The appeals board or the workers’ compensation judge shall, within 30 days after the case is submitted, make and file findings upon all facts involved in the controversy and an award, order, or decision stating the determination as to the rights of the parties. Together with the findings, decision, order or award there shall be served upon all the parties to the proceedings a summary of the evidence received and relied upon and the reasons or grounds upon which the determination was made.

(Lab. Code, § 5313.)

Here, the Decision included all of the facts included in block quotes above, as well as all of the reasons recited in the preceding segment of discussion. This explanation of the relevant evidence and grounds was sufficient, insofar as it “enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc) (*Hamilton*), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350, 351].) As required by section 5313 and explained in *Hamilton*, the Decision “refer[s] to the evidence in the opinion on decision,” and “clearly designat[es] the evidence that forms the basis of the decision.” (*Hamilton, supra*, at p. 475.) The Decision is “based on admitted evidence in the record” (*Hamilton, supra*, at p. 478), and it is supported by numerous specific references to admitted evidence to show how and why there is insufficient evidence to support a finding of nonindustrial apportionment.

(3) The parties have waived the issue of whether the Combined Values Chart (CVC) should have been used to combine disabilities instead of using addition in accordance with Vigil, which is nevertheless justified by the evidence

Section 5904 dictates that a petitioner seeking reconsideration “shall be 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.”

Because neither applicant nor defendant petitioned for reconsideration of the WCJ’s opinion that all disabilities should be added instead of combined on the CVC, that aspect of the WCJ’s decision “shall be deemed waived” under section 5904.

However, as noted in the previous Decision, we observe that as noted in the discussion of facts above, Dr. Pallia’s deposition testimony does provide a sufficient basis for adding rather than combining disabilities in a manner consistent with *Vigil*, cited *supra*, which currently provides the correct standards for rebuttal of the CVC.

As noted above, both the defense attorney and applicant’s attorney questioned the QME about his recommendation to add the bilateral shoulder and knee impairments instead of combining them on the CVC. Both attorneys asked Dr. Pallia to apply the criteria set forth in *Vigil, supra*, which held that the CVC may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either: (a) there is no overlap between the effects on ADLs as between the body parts rated, or (b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs. (*Vigil, supra*, 89 Cal.Comp.Cases 686, 688-689.)

Dr. Pallia testified that the effect on activities of daily living caused by impairment of the shoulders does not overlap with the effect of impairment of the knees, and therefore disability based on impairment of the shoulders should be added to, and not combined with, the disability based on impairment of the knees. (Joint 1, Deposition of Christopher Pallia, M.D., October 31, 2024, at p. 20, l. 16 through p. 21, l. 4.) He also explained that although the effect of impairment in each knee does overlap with the effect of the impairment of the other knee, having impairment in both limbs increases the effect of each impairment because there is no healthy limb that can be used in lieu of the other. (*Id.* at p. 40, l. 4-16.) Thus, Dr. Pallia clearly and directly referenced provision (b) in *Vigil* regarding the two ways that the CVC may be rebutted, and he substantiated that opinion by explaining how and why there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

(4) The record should not be developed on the issue of apportionment

The Appeals Board has the power to order development of the record, as explained in *McDuffie v. L.A. County Metro. Transit Auth.* (2002) 67 Cal.Comp.Cases 138, 141 (Appeals Board en banc):

As set forth in *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [65 Cal Rptr. 2d 431] [62 Cal.Comp.Cases 924, 926–927], Labor Code sections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings. (See also *Lundberg v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 436 [445 P.2d 300, 71 Cal. Rptr. 684] [33 Cal.Comp.Cases 656, 659]; *King v. Workers' Comp. Appeals Bd.* (1991) 231 Cal.App.3d 1640 [283 Cal. Rptr. 98] [56 Cal.Comp.Cases 408, 414]; *Raymond Plastering v. Workmen's Comp. Appeals Bd. (King)* (1967) 252 Cal.App.2d 748 [60 Cal. Rptr. 860] [32 Cal.Comp.Cases 287, 291].) Before directing augmentation of the medical record, however, the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete. (*Tyler, supra*, 62 Cal.Comp.Cases at p. 928 (WCJ determined that neither reporting physician was credible and thus their reports were not substantial evidence); *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [72 Cal. Rptr. 2d 898] [63 Cal.Comp.Cases 261, 265] (Court of Appeal remanded matter to the Board to determine whether to exercise its discretion to seek additional evidence where none of the medical reports adequately discussed the crucial issue of causation.)) (*McDuffie v. L.A. County Metro. Transit Auth.* (2002) 67 Cal.Comp.Cases 138, 141 (Appeals Board en banc).)

In the present case, we rendered a decision based on the existing record, and petitioner failed to show that substantial evidence on the issue of apportionment was not available or could not have been discovered by the exercise of due diligence prior to the date that the parties jointly requested trial. No party requested that the WCJ order further development of the record, and the parties proceeded to trial on the submitted evidence. On the contrary, the parties should have been aware of the applicable legal standards and had ample opportunity to develop the record in order to meet those standards. Both parties knew, or should have known, the standards for substantial medical evidence set forth in *Escobedo, supra*, and with reasonable diligence, petitioner could have asked Dr. Pallia and Dr. McSweeny a few more questions in order to ensure that either or both of their apportionment percentages were accompanied by a cogent and persuasive explanation of the mechanism of causation, and not based upon an incorrect legal theory.

Accordingly, we deny defendant's Petition for Reconsideration and affirm our previous Decision.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the Opinion and Order Granting Petition for Reconsideration and Decision after Reconsideration issued by the Workers' Compensation Appeals Board on June 23, 2025 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 24, 2026

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

**SERVANDO ALVAREZ
LAW OFFICE OF JOHN A. DON
STATE COMPENSATION INSURANCE FUND**

CWF/cs

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