WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

TYSON SILVESTRI, ***Applicant***

vs.

COUNTY OF VENTURA, permissibly self-insured, administered by Sedgwick Claims Management Services, Inc., ***Defendant***

Adjudication Number: ADJ10896001
Oxnard District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings and Award and Order (FA&O) issued on January 25, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant, while employed on October 28, 2016, as a maintenance plumber, sustained industrial injury to his thoracic spine, lumbar spine, and in the form of a hernia. The WCJ also found that applicant's injury caused 9% permanent disability after apportionment; that there is apportionment of 75% of both the lumbar and thoracic spine disabilities and 50% of the hernia disability to nonindustrial factors; and that defendant made a valid offer of temporary modified alternative work, which justified the termination of temporary disability indemnity on January 4, 2017.

Applicant contends that the WCJ erred in finding that defendant's return to work offer was proper and valid; and erroneously relied on the opinions of Panel Qualified Medical Examiner (PQME) H. Leon Brooks, M.D., arguing that his reporting on permanent disability, apportionment, and permanent and stationary status does not constitute substantial evidence.

[1] Commissioners Sweeney and Lowe were on the panel that issued the order granting reconsideration. Commissioners Sweeney and Lowe no longer serve on the Appeals Board. New panel members have been appointed in their places.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations in applicant's Petition and defendant's Answer and the contents of the WCJ's Report. Based on our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we rescind the WCJ's FA&O dated January 25, 2022, and substitute a new FA&O finding defendant did not make a bona fide offer of modified work (Finding of Fact 3); that applicant is entitled to temporary disability from November 2, 2016 to September 19, 2017 (Finding of Fact 4); and that applicant sustained 27% permanent disability without apportionment (Finding of Fact 5). We otherwise make no substantive changes to the decision.

BACKGROUND

The parties stipulated that applicant, while employed as a maintenance plumber on October 28, 2016, sustained industrial injury to his thoracic spine, lumbar spine, and in the form of a hernia. (Minutes of Hearing / Summary of Evidence (MOH/SOE), 07/20/2021, 2:10-12.)

In addition, the parties stipulated that defendant paid temporary disability at $757.64 per week during the period November 2, 2016 to January 4, 2017. (MOH/SOE, 2:15-17.)

At trial on July 20, 2021, among the issues the parties sought to adjudicate, were the issues of whether applicant was entitled to payment of temporary disability indemnity from November 2, 2016 to April 24, 2020, and permanent disability and apportionment. (MOH/SOE, 07/20/2021, 3:2-5, 9-10.)

Applicant submitted into evidence the primary treating physician reports and deposition of Richard D. Scheinberg, M.D. (App. Exs. 1-23.) Defendant submitted into evidence the PQME reports and depositions of Dr. Brooks (Def. Exs. A-H) and the PQME reports of Omar Tirmizi, M.D. (Def. Exs. M-N).

Applicant testified in pertinent part as follows:

On October 28, 2016, while snaking a clogged drain, he slipped and fell while withdrawing the snake, landing on his tailbone and sustaining injury. (MOH/SOE, 07/20/2021, 8:22-24.) He attended a meeting on November 8, 2016, to discuss potential accommodations, where defendant granted him a leave of absence until November 23, 2016, yet defendant made no offer

of modified alternative duties at that time. (MOH/SOE, 07/20/2021, 9:22-24, 10:5-6; 10/15/2021, 3:4-6.) He subsequently received a letter dated January 3, 2017, which ordered him to report to a modified job on January 5, 2017. (MOH/SOE, 07/20/2021, 11:7-8.) He noted the notice failed to specify what the actual job duties would entail. (MOH/SOE, 07/20/2021, 11:12-13.) He e-mailed defendant on January 4, 2017, stating his prescribed pain medications left him under the influence, which he assumed would preclude him from driving a county vehicle. (MOH/SOE, 07/20/2021, 11:16-21.) He received no response detailing the modified duties and did not return to work on January 5, 2017. (MOH/SOE, 07/20/2021, 11:21-23.) On that same day, he received an email from claims adjuster Andre Pickett threatening to close the case for non-compliance. (MOH/SOE, 08/27/2021, 2:18-19.) Applicant confirmed speaking with Mr. Pickett, noting he said he would close the case, but applicant's actual termination came from the employer. (MOH/SOE, 10/15/2021, 4:2-4.) Applicant also received a termination notice on January 5, 2017, the same day defendant ordered him to return to work. (MOH/SOE, 08/27/2021, 2:24-25.)

He admitted that his prior deposition statements regarding an inability to drive were "mistaken," acknowledging that he did drive his children to school and visit multiple stores in January 2017. (MOH/SOE, 08/27/2021, 3:21-24, 4:17-20.) He confirmed he drove between November 2016 and January 2017, admitting he recalled incorrectly in his deposition after viewing sub rosa videos showing him driving on January 13, 2017 and January 25, 2017. (MOH/SOE, 07/20/2021, 8:5-8; 10/15/2021, 2:23-25 to 3:1-3; 12/03/2021, 2:22-23.) He further clarified that his inability to drive referred to driving in a professional capacity, as he was concerned about violating employer policies while taking opioid medications. (MOH/SOE, 12/03/2021, 4:18-22.) He explained he could choose not to take medications to drive his kids, but that was an entirely different matter from having to drive while at work. (MOH/SOE, 10/15/2021, 3:2-4.)

Employer representative Douglas Cooke testified that human resources instructed him to compile a list of trivial tasks, such as sorting and documenting parts, that applicant could perform as light work within his medical restrictions upon returning. (MOH/SOE, 10/15/2021, 6:3-5.) Mr. Cooke stated that he provided this list to Monika Maine and Paula Oberst but admitted he never communicated the specific modified duties to applicant. (MOH/SOE, 10/15/2021, 6:5-7.) Mr. Cooke testified that he expected applicant to perform office tasks like filing and expected him to return to work on January 5, 2017. (MOH/SOE, 11/05/2021, 3:1-3, 3:20-21.) Instead, applicant

did not return to work and signed a separation of service letter dated January 10, 2017. (MOH/SOE, 11/05/2021, 3:8-11.)

Human resources manager Ms. Maine testified that she drafted the January 3, 2017 letter as an order to return to work, rather than an offer, because applicant had previously missed scheduled interactive meetings. (MOH/SOE, 11/05/2021, 4:17-20.) Ms. Maine acknowledged that the letter did not identify the specific modified work duties, explaining that the supervisor intended to outline the assigned tasks upon applicant's arrival at work. (MOH/SOE, 11/05/2021, 5:24-25.)

Investigator Michael Schulhof testified that he conducted surveillance on applicant and captured video on January 13, 2017, and January 25, 2017. (MOH/SOE, 12/03/2021, 2:22-23.) Mr. Schulhof observed applicant driving a vehicle to multiple locations, including a school, an auto parts store, a healthcare facility, a market, and a fast food restaurant. (MOH/SOE, 12/03/2021, 3:1-3.) The admitted sub rosa video footage from January 13, 2017, depicted applicant driving a truck, lifting a young child and carrying her to the vehicle, and pushing a shopping cart with his child at a grocery store. (MOH/SOE, 11/05/2021, 7:18-21, 8:1-2.) Additional video footage from January 25, 2017, showed him driving the truck through traffic on multiple occasions and waiting in the driver's seat. (MOH/SOE, 11/05/2021, 8:13-18.)

On February 21, 2017, applicant began orthopedic treatment with Dr. Scheinberg, who found applicant temporarily partially disabled with a work restriction of no lifting over 20 pounds and no repetitive bending or stooping. (App. Ex. 1, p. 3.) In his report dated April 7, 2017, Dr. Scheinberg diagnosed applicant with a 5 mm disc protrusion from L5-S1 with neural encroachment and radiculopathy with spondylosis and facet osteoarthropathy. (App. Ex. 2, p. 1-2.) In his report dated April 28, 2017, Dr. Scheinberg diagnosed minimal degenerative changes and disc bulges at the T6-7, T8-9 and T9-10. (App. Ex. 3, p. 1-2.) In his report dated November 28, 2017, Dr. Scheinberg increased his work restrictions to no lifting, bending, or stooping. (App. Ex. 9, p. 2.) On February 5, 2020, Dr. Scheinberg found applicant reached maximum medical improvement. (App. Ex. 19, p. 3.)

In his report dated April 24, 2020, Dr. Scheinberg assigned, in accordance with the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), 13% WPI for the lumbar spine based on DRE Category III under Table 15-3. (AMA Guides, p. 384.) In addition, he assigned 8% WPI for the thoracic spine based on DRE Category II under Table 15-4. (AMA Guides, p. 389.) He based the WPIs on limitations in activities of daily living (ADLs).

Regarding apportionment, he found no basis to apportion any permanent disability to any nonindustrial factors. (App. Ex. 21, p. 3.)

On September 20, 2017, PQME Dr. Brooks issued a report, after evaluating applicant in the field of orthopedics. He determined that the lumbar spine revealed midline tenderness at L5-S1 and a uniform 50% restriction in range of motion across flexion, extension, right and left lateral bending, and right and left rotation. He further determined that the lower extremities exhibited normal pulses, sensation, and reflexes, though straight leg raising tests were objectively limited to 75° on the right and 70° on the left, with the left-sided test eliciting accompanying lower back pain. (Def. Ex. E, p. 5.) Neurological assessments confirmed intact motor function, equal and active tendon reflexes, and normal sensory perceptions to pin scratch, position, and vibration. Consequent to these objective clinical findings, PQME Dr. Brooks determined applicant's clinical diagnoses to be thoracic spondylosis and a disc protrusion at L5-S1 in the lumbosacral spine. (*Id.* at p. 6.)

In his supplemental report dated October 12, 2017, PQME Dr. Brooks stated that applicant presented with objective factors of disability that include a decreased range of motion and specific abnormalities identified through diagnostic imaging. (Def. Ex. F, p. 5.) Radiological records note slight anterior wedging at T9-11, alongside minimal degenerative changes and multiple-level disc bulges at T6-7, T8-9, and T9-10. (*Id.* at pp. 2, 3-4.) Furthermore, objective findings in the lumbar region include a 5 mm disc protrusion at L5-S1 with neural encroachment, lumbar spondylosis with facet osteoarthropathy, and documented clinical signs of radiculopathy. (*Id.* at pp. 3-4.) Relying upon these objective findings and the comprehensive review of medical records, PQME Dr. Brooks maintained the clinical diagnoses of thoracic spondylosis and a disc protrusion at the L5-S1 level of the lumbosacral spine. (*Id.* at p. 1.) PQME Dr. Brooks deemed applicant to have reached maximum medical improvement and assigned 10% WPI for the lumbar spine based on DRE Category III under Table 15-3 (AMA Guides, p. 384) due to applicant having an injury and signs of radiculopathy. In addition, PQME Dr. Brooks assigned 8% WPI for the thoracic spine based on DRE Category II under Table 15-4 (AMA Guides, p. 389) due to constant pain with no evidence of radiculopathy. (*Id.* at pp. 4, 6.) Regarding apportionment, 50% of the permanent disability for both the thoracic and lumbar spine relate to the October 28, 2016 injury with the remainder to nonindustrial causes. (*Id.* at p. 5.)

In his deposition of September 12, 2019, PQME Dr. Brooks testified that with respect to the thoracic spine, he identified objective findings through an MRI dated April 4, 2017, which revealed disc bulges at T6-7, T8-9, and T9-10. During a physical examination, he noted tenderness to palpation in the thoracic spine bilaterally from T8 to T10. (Def. Ex. G, 9:13-25) Although he acknowledged that tenderness could be a subjective response, PQME Dr. Brooks noted it was significant because he observed applicant's facial reactions while standing behind him. (*Id.* at p. 10:8-14.) PQME Dr. Brooks diagnosed applicant with a DRE Category II thoracic spine impairment and reduced the rating to 7% WPI rating after considering the clinical findings and imaging abnormalities. (*Id.* at pp. 11:19-25 to 12:1-9.)

For the lumbar spine, PQME Dr. Brooks initially considered a higher impairment rating but revised his diagnosis to DRE Lumbar Category II after reviewing an MRI dated March 21, 2017 showing a 4 to 5 mm disc protrusion at L5-S1. (*Id.* at pp. 13:24-25 to 14:1-2.) While a straight leg-raising test was limited bilaterally, indicative of radiculopathy, he noted that subsequent reviews showed no evidence of nerve root displacement or sensory deficits to verify a more severe diagnosis. (*Id.* at pp. 14:2, 17-22; 26:20-24.) Consequently, he reduced the impairment to 7% WPI for the lumbar spine. (*Id.* at p. 15:16-22.)

With respect to apportionment, PQME Dr. Brooks revised his apportionment for the thoracic spine from 50% non-industrial to 75% non-industrial. (*Id.* at p. 13:1-12.) He attributed this 75% nonindustrial apportionment to applicant's mild degenerative MRI findings, his 16 years of previous employment in the construction industry, his sports activities, and his limited 60-day employment with the county. (*Id.* at p. 13:14-23.) PQME Dr. Brooks similarly modified his apportionment opinion regarding the lumbar spine, allocating 75% to other factors and 25% to the October 28, 2016 injury. (*Id.* at p. 16:11-16.) He grounded this nonindustrial apportionment in applicant's prior MRI findings, prior work history, prior activities, and limited time working for the employer. (*Id.* at pp. 16:17-25 to 17:1-2.) PQME Dr. Brooks clarified that he assigns 25% apportionment to the October 28, 2016 injury for both the thoracic and lumbar spine because he concluded the single specific injury likely did not cause the total impairment. (*Id.* at p. 24:8-19.) He further noted that, based on applicant's diagnostic imaging and his past history, he likely would have developed 75% of the impairment even absent the October 28, 2016 injury. (*Id.* at p. 25:2-9.)

In his supplemental reports dated January 20, 2020 and March 10, 2020, PQME Dr. Brooks provided updated clinical findings and diagnoses for applicant based on a review of new

electrodiagnostic records. (Def. Ex. B, p. 1.) Electrodiagnostic studies performed on July 1, 2019, formed the primary objective findings demonstrating normal lumbar electromyography and nerve conduction velocity in both lower limbs. Based on these objective results, PQME Dr. Brooks concluded as a clinical diagnosis that applicant does not suffer from radiculopathy affecting the lower extremities. Consequently, PQME Dr. Brooks revised his previous clinical diagnosis of the lumbar spine from a DRE Category III to a DRE Category II. (*Id.* at p. 2.) While PQME Dr. Brooks had previously assigned a 10% WPI to the lumbar spine and 8% WPI to the thoracic spine, in his report dated October 12, 2017,[2] his previous reduction of the lumbar impairment to 7% WPI remained unchanged due to the lack of radiculopathy.[3] (*Id.* at pp. 1-2; Def. Ex. A, p. 1.)

In his report dated March 21, 2018, following his evaluation of applicant, PQME Dr. Tirmzi reported that applicant had a preexisting umbilical hernia that remained stable until he participated in physical therapy for his admitted industrial back injury, performing stretching and maneuvers, at which point the hernia enlarged and worsened. (Def. Ex. M, pp. 2, 13). Upon examination, he assessed 1% WPI for the umbilical hernia, classifying it as a Class 1 impairment under Table 6-9 (AMA Guides, p. 136) because the defect is easily reducible, minimally discomforting, and does not preclude applicant's ADLs. He apportioned 50% of the resulting impairment to the preexisting condition and 50% to the industrial aggravation caused by applicant's physical therapy exercises. (*Id.* at p. 13.)

On January 25, 2022, the WCJ issued the FA&O, awarding applicant temporary disability from November 2, 2016 to January 4, 2017 and 9% permanent disability with 75% apportionment to nonindustrial factors for the lumbar and thoracic spine and 50% apportionment to nonindustrial factors for the hernia.

In the Opinion, the WCJ stated as follows:

> Based on the chain of events documented by evidentiary exhibits and applicant's own testimony, it is found that he was offered modified work within his treating physician's restrictions. Getting to and from work by driving or otherwise was not the employer's responsibility in accommodating work restrictions. Applicant

---

[2] PQME Dr. Brooks incorrectly referenced his October 30, 2018 report.

[3] PQME Dr. Brooks had already previously reduced the thoracic spine impairment to 7% WPI per his deposition dated September 20, 2017. (Def. Ex. G, 11:19-25 to 12:1-9.)

> acknowledged that his concerns about driving while on medications were related to driving as part of his work duties.
>
> Applicant could not reasonably object to work duties as beyond his restrictions until he at least found out what they would be. His supervisor Doug Cooke testified that he "was told to make a list of trivial things that Applicant can do as light work, to list things like sorting and documenting parts and inventory" (Summary of Evidence 10/15/2021, page 6).
>
> Accordingly, it is found that applicant suffered temporary disability from 11/02/2016 through and including 01/04/2017, which has been paid by defendant.

(Opinion on Decision, 01/31/2023, pp. 2-3.)

It is from this FA&O that applicant seeks reconsideration.

DISCUSSION

I.

Temporary disability indemnity provides workers' compensation benefits to employees who cannot work due to a work-related injury, primarily substituting for lost wages. (*Herrera v. Workers' Comp. Appeals Bd.* (1969) 71 Cal.2d 254, 257 [34 Cal.Comp.Cases 382]; *Gonzales v. Workers' Comp. Appeals Bd.* (1998) 68 Cal.App.4th 843, 847 [63 Cal.Comp.Cases 1477]; *J. T. Thorp, Inc. v. Workers' Comp. Appeals Bd. (Butler)* (1984) 153 Cal.App.3d 327, 333 [49 Cal.Comp.Cases 224].) The need for temporary disability occurs when a person is unable to work while undergoing medical treatment in order to restore their ability to work. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631] citing *W. M. Lyles Co. v. Workmen's Comp. App. Bd.* (*Butz*) (1969) 3 Cal.App.3d 132, 136 [34 Cal.Comp.Cases 652].) "Temporary disability indemnity is intended primarily to substitute for the worker's lost wages, in order to maintain a steady stream of income." (*Chavira, supra,* 235 Cal.App.3d at p. 473.)

"If the employee is able to obtain some type of work despite the partial incapacity, the worker is entitled to compensation on a wage loss basis. ([Lab. Code,] § 4657.) If the partially disabled worker can perform some type of work but chooses not to, his 'probable earning ability' will be used to compute wage-loss compensation for partial disability." (*Huston v. Workers' Comp.*

Appeals Bd. (1979) 95 Cal.App.3d 856, 868 [44 Cal.Comp.Cases 798].) "If the temporary partial disability is such that it effectively prevents the employee from performing any duty for which the worker is skilled or there is no showing by the employer that work is available and offered, the wage loss is deemed total and the injured worker is entitled to temporary total disability payments." (*Ibid.* citing *Pacific Employers Ins. Co. v. I.A.C.* (*Stroer*) (1959) 52 Cal.2d 417, 421 [24 Cal.Comp.Cases 144] and *Transport Indem. Co. v. I.A.C.* (*Cooper*) (1958) 157 Cal.App.2d 542, 546 [23 Cal.Comp.Cases 30].)

Temporary disability ends when the employee returns to work, when medical professionals determine they can return, or when their condition stabilizes as permanent and stationary. (*Huston*, *supra*, 95 Cal.App.3d at p. 868; *Bethlehem Steel Company v. I.A.C.* (*Lemons*) (1942) 54 Cal.App.2d 585, 587 [7 Cal.Comp.Cases 250]; *Industrial Indemnity Exchange v. I.A.C.* (*Riccardi*) (1949) 90 Cal.App.2d 99, 101 [14 Cal.Comp.Cases 25].)

"Defendant has the burden to identify and offer physically appropriate modified or alternative work if defendant wants to be relieved of the liability to pay temporary disability." (*Navarrete Medrano v. Santa Rosa City Sch. Dist.* [2025 Cal. Wrk. Comp. P.D. LEXIS 355, *16-17][4] citing *SME Steel Contractors, Inc. v. Workers' Comp. Appeals Bd.* (*Watkins)* (2019) 84 Cal.Comp.Cases 856 (writ denied); *Meyers v. I.A.C.* (*Titsworth*) (1940) 39 Cal. App. 2d 665, 669 [5 Cal. Comp. Cases 149].) "Preliminary negotiation or an invitation to make an offer is not a legally operative offer. As noted by the California Supreme Court, '[a]n offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" (*Navarrete Medrano*, *supra*, 2025 Cal. Wrk. Comp. P.D. LEXIS at pp. 15-16 citing *City of Moorpark v. Moorpark Unified Sch. Dist.* (1991) 54 Cal.3d 921, 930.) Furthermore, an offer of regular, modified, or alternative work must be bona fide for the employer to avoid liability, even if there are circumstances that prevent the making of a bona fide offer. (See *Dennis v. State of California* (2020) 85 Cal.Comp.Cases 389, 405-406 (Appeals Board en banc).) An employee who refuses modified work without giving a

[4] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

good reason may be estopped from claiming temporary total disability. (*Jamison v. Five Acres* [2022 Cal. Wrk. Comp. P.D. LEXIS 71, *2] citing *Seale v. Workers' Comp. Appeals Bd.* (1974) 39 Cal.Comp.Cases 676, 677 (writ denied); *Vittone v. Workers' Comp. Appeals Bd.* (2001) 66 Cal.Comp.Cases 435, 437 (writ denied).)

The law requires the Appeals Board to base its decisions on substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, a medical opinion must state its conclusions in terms of reasonable probability, avoid speculation, rely on pertinent facts and an adequate examination and history, and explain the reasoning supporting its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Medical reports do not constitute substantial evidence when they contain known errors or rely on facts that are no longer germane, inadequate medical histories or examinations, or incorrect legal theories. Likewise, a medical opinion cannot support the Board's findings if it rests on surmise, speculation, conjecture, or guesswork. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Accordingly, the Board may reweigh the evidence and reach a decision different from the WCJ's determination when other evidence of substantial probative value supports a contrary conclusion. (*Lamb*, *supra*, 11 Cal.3d at p. 281; *Garza*, *supra*, 3 Cal.2d at pp. 318-319.)

Here, defendant failed to meet its burden of proof to identify and offer physically appropriate modified or alternative work to relieve itself of the liability to pay temporary disability indemnity. Human resources manager Ms. Maine explicitly testified that she drafted the January 3, 2017 letter as an order to return to work rather than a formal offer. Furthermore, Ms. Maine acknowledged the correspondence but failed to identify any specific modified work duties. Employer representative Mr. Cooke admitted he compiled a list of trivial tasks for applicant to perform but failed to communicate these specific modified duties to applicant prior to the proposed January 5, 2017 return date. An employer cannot compel an employee to accept an unseen and undefined position. Because defendant withheld the specific duties from applicant, the January 3, 2017 letter functions as a mere directive rather than a legally operative and bona fide offer of

modified work. Consequently, defendant possessed no legal justification to terminate temporary disability indemnity on January 4, 2017.

Because defendant failed to provide a valid offer of modified duty, applicant remained entitled to temporary total disability indemnity until his medical condition became permanent and stationary.

Turning to the appropriate permanent and stationary date, the opinion articulated by PQME Dr. Brooks is demonstrably more persuasive and firmly grounded in substantial evidence than the conclusion posited by Dr. Scheinberg. While Dr. Scheinberg concluded that applicant reached maximum medical improvement on February 5, 2020, the overall analysis relied heavily upon generalized assessments of his ADLs and lacked a critical evaluation of objective diagnostic findings. Conversely, PQME Dr. Brooks evaluated applicant on September 20, 2017 and determined in a subsequent October 12, 2017 supplemental report that he had achieved maximum medical improvement. The evidentiary record supports this timeline, demonstrating that he remained incapable of returning to work precisely up until that September 20, 2017 evaluation. By deliberately reconciling the subjective complaints with objective medical evidence, PQME Dr. Brooks exercised a significantly higher degree of forensic reliability in stark contrast to Dr. Scheinberg's comparatively generalized reporting.

Therefore, applicant is entitled to temporary disability indemnity from November 2, 2016 to September 19, 2017.

II.

Permanent disability refers to the lasting, irreversible effects of an injury. It includes conditions that impair earning capacity, limit the normal use of a body part, or create a competitive disadvantage in the labor market. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1270 [75 Cal.Comp.Cases 624].) Permanent disability payments compensate workers for both physical loss and the reduction, partial or total, of their future earning potential. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565]; *Chavira*, *supra,* 235 Cal.App.3d at p. 473.) "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well

stabilized, and unlikely to change substantially in the next year with or without medical treatment." (Cal. Code Regs., tit. 8, § 10152.)

Upon comprehensive review of the medical record, we conclude that the reporting of PQME Dr. Brooks is more persuasive and more thoroughly reasoned than that of Dr. Scheinberg with respect to the nature and extent of permanent disability involving both the thoracic and lumbar spines. Although Dr. Scheinberg assigned 8% WPI to the thoracic spine and 13% WPI to the lumbar spine based primarily on asserted limitations in ADLs, his analysis does not reflect the same level of diagnostic precision or critical evaluation of objective findings. By contrast, PQME Dr. Brooks employed a methodical and iterative diagnostic approach, initially contemplating a higher impairment rating for the lumbar spine before carefully reassessing the clinical picture in light of the March 21, 2017 MRI studies and ultimately revising the diagnosis to a DRE Category II impairment. His conclusions were further substantiated by the incorporation of July 1, 2019 electrodiagnostic testing, which demonstrated the absence of radiculopathy and supported a final lumbar impairment rating of 7% WPI. Notably, PQME Dr. Brooks applied a similarly disciplined evaluative framework to the thoracic spine determining 7% WPI, declining to assign additional impairment in the absence of corroborating objective pathology or neurologic deficit, thereby ensuring internal consistency across spinal regions. This deliberate reconciliation of subjective complaints with objective medical evidence, including clinical observations such as applicant's facial responses during palpation to assess the validity of reported tenderness, reflects a higher degree of forensic rigor. Accordingly, the reporting of PQME Dr. Brooks constitutes a more reliable and substantial evidentiary foundation for the determination of permanent disability than the less analytically supported assessments offered by Dr. Scheinberg.

Accordingly, we discern no error in the WCJ's reliance on PQME Dr. Brooks with respect to permanent disability.

III.

Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors, to allocate legal responsibility fairly. (*Brodie*, *supra*, 40 Cal.4th at p. 1321; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 911 [70 Cal.Comp.Cases 787.].)

The mere fact that a medical report assigns approximate percentages of industrial and nonindustrial causation does not make the report reliable medical evidence by itself. (*E.L. Yeager*

Construction v. Workers' Comp. Appeals Bd. (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].) Instead, apportionment of permanent disability is "based on causation" and the "employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, §§ 4663(a) and 4664(a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 611.) Apportionment now includes pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial evidence establishing that these other factors have caused permanent disability. Pursuant to *Escobedo*, a physician's opinion must rely on reasonable medical probability, cannot be speculative, must rely on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of its conclusions. (*Id.* at p. 621.) That is, a physician must explain the "how and why" of their apportionment opinion (*Ibid.*) and consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or condition. (*Benson v. Permanente Med. Group* (2007) 72 Cal.Comp.Cases 1620, 1622 (Appeals Board en banc).)

In addition, when medical treatment for an industrial injury causes a new iatrogenically induced injury to an independently separate body part or system, there can be no basis for apportionment. (*Applied Materials v. Workers' Comp. Appeals Bd.* (2021) 64 Cal.App.5th 1042, 1074 [86 Cal.Comp.Cases 331]; *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249, 1261 [82 Cal.Comp.Cases 679]; *Yeghiazaryan v. State of California IHSS* [2023 Cal. Wrk. Comp. P.D. LEXIS 230, *9]; *Rodriguez v. Southland Care Ctr.* [2022 Cal. Wrk. Comp. P.D. LEXIS 206, *11-12].) This is based on the concern that applying apportionment could delay or deny an employee's treatment and the principle that workers' compensation should cover all consequences of work-related injuries, leaving no grounds for a separate negligence claim against the employer. (*Hidika*, *supra*, 12 Cal.App.5th at p. 1263.)

The burden of proof to establish apportionment falls on defendant. (*Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In other words, an employee does not have the burden of disproving apportionment while defendant remains passive. (*Alcantar v. Martinez* [2025 Cal. Wrk. Comp. P.D. LEXIS 231, *9]; *Moraido v. County of San Diego* [2024 Cal. Wrk. Comp. P.D. LEXIS 375, *13, fn. 3]; *Arias v.*

William Roofing Co. [2024 Cal. Wrk. Comp. P.D. LEXIS 29. *5]; *Matias v. Naturipe Berry Growers* [2024 Cal. Wrk. Comp. P.D. LEXIS 52, *4]; *Herrera v. Maple Leaf Foods* [2018 Cal. Wrk. Comp. P.D. LEXIS 430, *15].)

Finally, we further observe that 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. I.A.C.* (*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. I.A.C.* (*George*) (1954) 125 Cal.App. 2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once having granted reconsideration, 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. I.A.C.* (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.].)

Here, a careful review of the medical reporting in this matter reveals that the apportionment opinions provided by both PQME Dr. Brooks and PQME Dr. Tirmizi fail to meet this rigorous evidentiary standard. The apportionment analysis proffered by PQME Dr. Brooks regarding applicant's thoracic and lumbar spine relies upon generalized factors rather than a precise medical explanation of causation. PQME Dr. Brooks assigned 75% nonindustrial apportionment to both spinal regions, attributing this allocation to applicant's mild degenerative MRI findings, his 16 years of previous employment in the construction industry, his participation in sports activities, and his limited 60-day tenure with defendant. PQME Dr. Brooks justified this determination by concluding that a single specific injury likely did not cause the total impairment and positing that applicant likely would have developed 75% of the impairment even absent the October 28, 2016 injury. This rationale is fundamentally speculative. The mere fact that a medical report assigns approximate percentages of industrial and nonindustrial causation does not make the report reliable medical evidence by itself. By relying on applicant's prior work history and sports activities

without demonstrating exactly how these historical factors translated into actual, quantifiable permanent disability concurrent with or prior to the industrial injury, PQME Dr. Brooks engages in impermissible guesswork. His assertion that applicant would have likely developed the impairment regardless of the specific injury fails to articulate the requisite "how and why" the preexisting pathology directly causes the current level of permanent disability. Consequently, PQME Dr. Brooks' apportionment conclusions do not constitute substantial medical evidence.

Similarly, the apportionment determination issued by PQME Dr. Tirmizi concerning applicant's umbilical hernia lacks the requisite explanatory rigor to serve as substantial evidence. PQME Dr. Tirmizi assessed a 1% WPI for the hernia, apportioning 50% of the resulting impairment to a preexisting condition and 50% to the industrial aggravation caused by applicant's physical therapy exercises. However, PQME Dr. Tirmizi explicitly reported that applicant possessed a preexisting umbilical hernia that remained stable until he participated in physical therapy for his admitted industrial back injury, at which point the hernia iatrogenically enlarged and worsened causing disability and the need for medical treatment on an industrial basis. Apportionment must directly account for the factors that caused the permanent disability and PQME Dr. Tirmizi failed to explain medically how a preexisting, stable condition that caused no apparent disability before the industrial aggravation actively contributes to the current permanent disability rating. While asymptomatic prior conditions can be a valid basis for apportionment, there must be substantial evidence establishing that these specific factors have caused permanent disability. Because PQME Dr. Tirmizi merely assigns an arbitrary mathematical division of 50% to the prior stable pathology without elucidating the precise mechanism by which the preexisting condition presently contributes to the permanent disability, his opinion lacks the necessary analytical foundation and is legally insufficient to support a finding of apportionment.

Having eliminated apportionment, and relying on PQME Dr. Brooks' WPIs in his deposition dated September 12, 2019, as well as PQME Dr. Tirmizi's WPI in his report dated March 21, 2018, the permanent disability strings are as follows:

THORACIC SPINE – DRE CATEGORY II
100% (15.02.01.00 - 07 - 10 - 481I - 15 - 14%) 14%
LUMBAR SPINE – DRE CATEGORY II
100% (15.03.01.00 - 07 - 10 - 481I - 15 - 14%) 14%
HERNIAS
100% (06.05.00.00 - 01 - 01 - 481H - 02 - 02%) 02%
14 C 14 C 2 = 27% permanent disability

Accordingly, as our Decision After Reconsideration, we rescind the WCJ's January 25, 2022 FA&O and substitute a new FA&O finding defendant did not make a bona fide offer of modified duties (Finding of Fact 3); that applicant was entitled to temporary disability from November 2, 2016 to September 19, 2017 (Finding of Fact 4); and that applicant sustained 27% permanent disability without apportionment (Finding of Fact 5). We otherwise make no substantive changes to the decision.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order issued by the WCJ on January 25, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Tyson Silvestri, while employed on October 28, 2016, as a maintenance plumber, occupational group number 481, by the County of Ventura, sustained injury arising out of and in the course of employment to his thoracic spine, lumbar spine, and in the form of a hernia.

2. Defendant's Exhibits S and T are excluded from evidence.

3. Defendant did not make a bona fide offer of modified duties to applicant.

4. Applicant was temporarily and totally disabled from November 2, 2016 to September 19, 2017.

5. Applicant's injury caused 27% permanent disability after apportionment entitling him to weekly indemnity of $290.00 for a period of 112.75 weeks all accrued in a total sum of $32,697.50 less attorney fees.

6. There is no reasonable basis for apportionment.

7. Applicant is entitled to further medical treatment.

8. The issue of liability for self-procured medical treatment is deferred, with jurisdiction reserved.

9. A reasonable attorney fee is $5,165.63 to be subtracted from permanent disability indemnity and withheld by defendant pending further order upon agreement or adjudication of the division of the fee between applicant's former and present counsel.

10. The lien of Scott Schwartz, Esq., is deferred with jurisdiction reserved.

AWARD

AWARD is made in favor of Tyson Silvestri, against the County of Ventura, permissibly self-insured, administered by Sedgwick Claims Management Services, Inc., as follows:

1. Temporary disability in accordance with Finding of Fact 4 above.
2. Permanent disability in accordance with Finding of Fact 5 above.
3. Further medical treatment in accordance with Finding of Fact 7 above.
4. Attorney fees in accordance with Finding of Fact 9 above.

ORDER

IT IS ORDERED that Defendant's Exhibits S and T are excluded from evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 18, 2026

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

TYSON SILVESTRI
ANTON LAW GROUP, APC
LAW OFFICES OF STEPHEN D. ROBERSON

DLP/md

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