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WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

MICHAEL BOONE,

Applicant,

vs.

**STATE OF CALIFORNIA – DEPARTMENT
OF TRANSPORTATION,**

Defendant.

Case No. **ADJ7974582**
(Riverside District Office)

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of this Appeals Board's Opinion and Decision After Reconsideration of July 23, 2018, in which we amended the permanent disability and apportionment findings of the workers' compensation judge (WCJ), as set forth in the WCJ's Findings and Award of June 30, 2016. Therein, the WCJ found that the industrial injury suffered by applicant on September 24, 2010, in the form of a stroke, resulted in permanent disability of 40% after apportionment. In our Decision After Reconsideration of July 23, 2018, we amended the WCJ's decision to find instead that defendant failed to meet its burden of proving apportionment under Labor Code section 4663, and that the industrial stroke suffered by applicant on September 24, 2010 resulted in permanent disability of 100%.¹

Defendant contends that it met its burden of proving that 60% of applicant's permanent disability was caused by nonindustrial factors, as demonstrated by Dr. Green's medical opinion in the specialty of internal medicine. Defendant further contends that even if Dr. Green's medical opinion is not substantial

¹ The Opinion and Decision After Reconsideration of July 23, 2018 was signed by Deputy Commissioner Anne Schmitz, who is no longer with the Board. A new panel member has been substituted in her place.

1 evidence, the Board should exercise its discretion to order further development of the medical record on
2 the issue of apportionment.

3 Applicant filed an answer.

4 We have considered the contentions of defendant's petition for reconsideration, and we have
5 reviewed the record and our July 23, 2018 Opinion and Decision After Reconsideration in light of those
6 contentions. Based on our review of the record, and for the reasons stated in our July 23, 2018 Opinion
7 and Decision After Reconsideration, which we adopt and incorporate, we will deny reconsideration.

8 In addition, we note defendant contends that in his report of October 9, 2014, at pp. 6-7, Dr.
9 Green found that applicant had underlying kidney disease, a history of smoking contributing to hardening
10 of the arteries, and malignant hypertension, all of which contributed to his stroke. (Joint Exhibit DD.)
11 Referring to those preexisting conditions, Dr. Green concluded that "60% of the impairment is related to
12 these nonindustrial factors with the remainder, or 40%, related to the patient's work for the State."
13 However, Dr. Green never described in detail the exact nature of the apportionable disability, which is
14 one of the elements of substantial evidence required to prove legal apportionment under *Escobedo v.*
15 *Marshalls* (2005) 70 Cal.Comp.Cases 604 [Appeals Board en banc]. The same deficiency is found in Dr.
16 Green's report of March 12, 2012, at pp. 11-12, which defendant also attempts to rely upon to justify
17 apportionment. (Joint Exhibit O.) In Dr. Green's deposition of January 29, 2014, at p. 24, the doctor
18 testified that applicant had preexisting kidney disease and kidney failure at the time of the industrial
19 stroke. (Joint Exhibit EE.) Again, however, Dr. Green never described the nature of the permanent
20 disability allegedly caused by applicant's kidney disease before he suffered the stroke.

1 In sum, the specific portions of Dr. Green's opinion relied upon by defendant show that applicant
2 had serious medical problems, including kidney disease and malignant hypertension, that contributed to
3 his stroke. However, there is no evidence that these conditions caused permanent disability before or
4 after the stroke. For this reason, Dr. Green's opinion that 60% of applicant's impairment is related to
5 these nonindustrial factors is founded on speculation, which is not substantial evidence of apportionment.
6 (*Heggin v. Workers' Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93]; *Place v.*
7 *Workmen's Workers' Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)

1 Finally, defendant contends that further development of the record is appropriate. Defendant
2 points to Dr. Green's report of March 12, 2012 (p. 8), wherein the doctor reviewed a medical record
3 indicating that applicant's father had a stroke at age 63. (See *City of Jackson v. Workers' Comp. Appeals*
4 *Bd. (Rice)* (2017) 11 Cal.App.5th 109 [82 Cal.Comp.Cases 437] (genetic cause of degenerative disease
5 may provide basis for apportionment).) However, Dr. Green never stated that applicant's family history
6 provided a basis for his conclusion that 60% of applicant's impairment is nonindustrial. Further, we note
7 that Dr. Green issued four narrative reports and had his deposition taken twice. This is a well-developed
8 medical record, but defendant has been unable to meet its burden of proving apportionment
9 notwithstanding the introduction of ample evidence. Therefore, we are not persuaded that further
10 development of the medical record is appropriate.

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1 For the foregoing reasons,

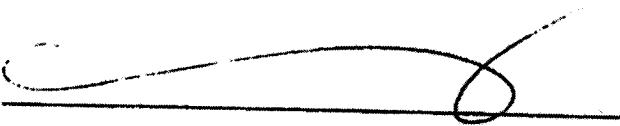
2 **IT IS ORDERED**, that defendant's petition for reconsideration is **DENIED**.

3
4 **WORKERS' COMPENSATION APPEALS BOARD**

5  **CHAIR**

6 **KATHERINE ZALEWSKI**

7 **I CONCUR,**

8
9 

10 **MARGUERITE SWEENEY**

11
12 **CONCURRING, BUT NOT SIGNING**

13 **PATRICIA A. GARCIA**

DEPUTY

14
15 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

16 **OCT 15 2018**

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

19 **MICHAEL BOONE**
20 **ROWEN GURVEY WIN**
21 **STATE COMPENSATION INSURANCE FUND**
22 **BOEHM ASSOCIATES**

23 **JTL/bea**

24
25 **OCT 17 2018**