

1 **WORKERS' COMPENSATION APPEALS BOARD**

2 **STATE OF CALIFORNIA**

3
4 **AARON LINDE,**

5 *Applicant,*

6
7 **vs.**

8 **CITY OF PETALUMA, Permissively Self-**
9 **Insured; and REDWOOD EMPIRE**
10 **MUNICIPAL INSURANCE FUND (Claims**
11 **Administrator),**

12 *Defendants.*

Case No. ADJ10032593
(Santa Rosa District Office)

OPINION AND DECISION
AFTER RECONSIDERATION

13 We previously granted reconsideration to further study the factual and legal issues. This is our
14 Decision After Reconsideration.

15 Defendant, the City of Petaluma, seeks reconsideration of the Amended Findings and Award
16 issued by the workers' compensation administrative law judge (WCJ) on September 11, 2017. In that
17 decision, the WCJ found in relevant part that applicant's stipulated June 16, 2015 industrial injury to his
18 left eye, which he sustained while employed as a police officer by defendant, caused 40% permanent
19 disability without apportionment.

20 In its petition for reconsideration, defendant contends in substance that the WCJ should have
21 found 6% permanent disability after apportionment, consistent with: (1) Labor Code sections 4663 and
22 4664(a),¹ which provide that apportionment of permanent disability shall be based on causation and that
23 an employer shall be liable only for the permanent disability directly caused by the industrial injury; and
24 (2) case law establishing that apportionment to non-industrial causation may include disability caused by
25 preexisting pathology or asymptomatic conditions or caused by hereditary/genetic conditions.

26
27 ¹ All further statutory references are to the Labor Code.

1 The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report)
2 recommending that his September 11, 2017 decision be affirmed. Applicant filed an answer that also
3 argued for affirmance.

4 We have reviewed the record, the allegations of defendant's petitions for reconsideration and
5 applicant's answer, and the contents of the WCJ's Report. Based on our review and for the reasons we
6 shall explain, we affirm the WCJ's finding of 40% permanent disability without apportionment.

7 **I. BACKGROUND**

8 Applicant was employed as a police officer by the City of Petaluma, working as a patrol officer
9 and a canine handler.

10 In approximately May 2015, he attended a three-day "agitator" training, which involved wrestling
11 with muzzled K-9 dogs.² During this training, he received multiple blows to the head from different
12 dogs, but at that time he suffered no loss of vision or other vision problems in his left eye.

13 Following the agitator training, applicant suffered severe headaches lasting between several hours
14 to one or two days.

15 On May 27, 2015, applicant saw Maya Land, M.D., a physician at The Permanente Medical
16 Group ("Kaiser"), complaining of a "5 year history of increasing headaches," but no "visual changes."
17 However, with regard to his five-year history of headaches, applicant stated: "I have had migraine
18 headaches in the past and these headaches are not migraine."

19 On June 16, 2015, while off-duty, applicant suddenly lost all vision in his left eye at a barbecue at
20 home. He had last worked a couple of days before his sudden vision loss, and he had suffered no blow to
21 the head immediately prior to the vision loss.

22 On June 17, 2015, applicant was seen at Kaiser by a Dr. Sam, who diagnosed a central vein
23 occlusion and retinal artery occlusion of the left eye. Dr. Sam opined it was unlikely that applicant's loss
24 of left eye vision was due to stress at work because applicant was young.

25
26 ² The WCJ's Summary of applicant's May 18, 2017 trial testimony does not specify when applicant's agitator K-9
27 training occurred, although both the WCJ's Opinion on Decision and his Report indicate that it occurred in May 2015. Because the WCJ apparently understood applicant's testimony to mean that his training occurred in May 2015, we will accept the WCJ's view. We observe, however, that there are indications in the record that applicant's agitator K-9 training may have occurred in March 2015. Fortunately, the actual date of the training does not appear to matter for purposes of our analysis.

1 Thereafter, applicant had a series of visits to Kaiser and UCSF Medical Center relating to his left
2 eye.³

3 On December 21, 2015, applicant was examined by David B. Kaye, M.D., as the panel qualified
4 medical evaluator (PQME) in ophthalmology. Dr. Kaye issued a December 29, 2015 report regarding
5 that evaluation. (Joint Exhibit 4.) Dr. Kaye diagnosed applicant to have, among other things, loss of
6 vision in his left eye directly related to left ischemic optic neuropathy. With respect to causation, Dr.
7 Kaye said:

8 The mechanism is complex and this is my understanding:

- 9 • He has chronic migraine that I believe is on a vasospastic basis.
10 • He has a hyper-reactive type personality
11 • His work places him in an environment that is associated with bouts of acute
 stress.
12 • This stress precipitated an acute systemic hypertension and vasospasm that
 affected his left optic nerve vessels.
13 • These vessels were predisposed to closure based on years of migraine.
14 • My research of the literature supports this mechanism
15 • As such, I apportion at least 90% to this underlying migraine condition,
16 recognizing that the exact mechanism is quite difficult to ascertain. It should be
17 noted that some young people develop a condition called a branch or central vein
18 vasculitis that presents like an adult version of central vein occlusion. It is my
19 opinion that the muzzled dog assault to the left side of his head aggravated his
 underlying condition. Bear in mind that it is possible that this patient had lost
 some vision prior to this time and was injured by the dog on the left side because
 he could not see. For this reason, I believe that 90% is due to underlying
 condition and 10% due to the stress of the injuries.

20 (Joint Exhibit 4, at pp. 10-11 [bolding in original].)

21 Later in his report, Dr. Kaye similarly stated: "1. The patient has left ischemic optic neuropathy - it is my
22 opinion that the work environment may have precipitated an underlying vasculopathy resulting in
23 ischemic optic neuropathy of the left eye" (underlining in original); and "8. Apportionment is indicated
24 in this case - 90% to underlying stress and migraine conditions and 10% to the work environment." (Joint
25 Exhibit 4, at pp. 12, 13.) With respect to permanent disability, Dr. Kaye applied the American Medical
26

27 ³ The August 17, 2015 medical report of a UCSF physician, Robert Bhisitkul, M.D., stated among other things that "I do not believe [applicant's left eye problem] could be related to his history of head trauma, nor to his work as a policeman."

1 Association's *Guides to the Evaluation of Permanent Impairment*, Fifth Edition (AMA Guides), to find a
2 23% whole person impairment rating.

3 Dr. Kaye was deposed on June 17, 2016 (Joint Exhibit 5), from which we will take substantial
4 excerpts:

5 ... A. This patient is, in essence, blind in his left eye with his vision reduced to
6 counting fingers from normal 20/20, which everybody knows. He has lost the central
7 vision and part of his peripheral vision.

8 [Joint Exhibit 5, at 7:6-7:9.]

9 ***

10 Q. Okay. What would cause someone to lose eyesight in one eye and not the other?

11 A. Extreme trauma. The common causes are inflammation of the optic nerve such as
12 multiple sclerosis, hepatic infections and then altered blood circulation.

13 Q. Did you find any of those conditions present with Mr. Lindh?

14 A. I did.

15 Q. Which of those?

16 A. His blood circulation to his left eye was defective.

17 [Joint Exhibit 5, at 7:16-8:1.]

18 ***

19 Q. Do you know whether the blood circulation was defective prior to the time he
20 reported the trauma that occurred in March of 2015⁴ with the canine dogs? Is there
21 any way to determine whether that blood circulation was defective at that time?

22 A. No, unless there is some innervation at that time or prior to that time.

23 [Joint Exhibit 5, at 8:8-8:14.]

24 ***

25 Q. ... So would trauma cause someone to lose eyesight in one eye and not the other?

26 A. Sure. If you stick a knife in the eye and cut it, you lose your vision.

27 Q. In this instance, Mr. Lindh reported blows to the head on the left side of his head.
28 Could ... that be sufficient trauma to cause the loss of eyesight in the left eye and not
29 the right?

30 ⁴ Throughout Dr. Kaye's deposition, there are indications that applicant's agitator K-9 training occurred in March
31 2015. As noted above (fn. 2, *supra*), the WCJ apparently understood applicant's testimony to mean that the training occurred
32 in May 2015. Once again, though, the actual date of the training does not appear to be relevant to our analysis.

1 A. Yes, in this case.

2 Q. Without the blows that he took to the left side of the head in March of 2015, could
3 Mr. Lindh have gone his whole life without losing his eyesight?

4 A. I can't answer the question. It's too overwhelming. I don't know that.

5 [Joint Exhibit 5, at 9:4-9:18.]

6 ***

7 Q. ... Would you agree that Mr. Lindh's migraine headaches in this case are nothing
8 more than a risk factor for losing his eyesight?

9 A. Yes.

10 [Joint Exhibit 5, at 9:21-9:24.]

11 ***

12 Q. ... [W]hat is your analysis of the apportionment of his actual disability?

13 A. So when I think about apportionment, I'm thinking about non-industrial causes.
14 It's my opinion that his underlying vasospastic personality and vasculature placed
15 him at high risk for damage to different parts of his body.

16 I believe that the trauma that he sustained as a dog aggravated [sic] in March
17 of that year was sufficient to break his system down and I had great difficulty in
18 deciding what apportionment meant. As I thought about it last night and again this
19 morning, more than 10 percent, I believe is a variation, as high as 20 percent.

20 [Joint Exhibit 5, at 10:15-11:1.]

21 ***

22 Q. Okay. But you'll agree that he did not have any disability prior to receiving the
23 blows to the head?

24 A. Yes.

25 [Joint Exhibit 5, at 11:10-11:12.]

26 ***

27 Q. Okay. So let me perhaps analogize it this way when I'm talking about cause of
injury versus cause of disability.

A. ... Okay. So when you ask the question for the cause of injury, causation, I'm
required to tell you that he does have an underlying condition, vasospastic type, body
type.

I'm also required to tell you that the injury contributed to his condition. If you
want to put that in legal terms, rely on your experience, I would just suppose this.

With regard to the cause of the disability, the same analysis applies.

Q. And what is that analysis?

1 A. Absent the injury of March of that year, it's my position that he most likely would
2 have retained a lot of his vision in that eye.

3 Q. Are you able to determine how much of his vision he would have retained?

4 A. No. I can't guess.

5 Q. Is there any way to determine when he would have begun losing vision without the
6 blows to the head?

7 A. No.

8 Q. Is it possible that he could have gone his entire life without losing vision?

9 A. Yes.

10 Q. Okay. ... I just want to make sure I'm understanding you correctly and make sure
11 we're on the same page.

12 Do you agree that the cause of the disability, which is the ... defective [sic]⁵
13 total vision loss in his left eye is due to the blows to the head on March 2015?

14 A. Partially, yes. ...

15 Q. Partially. Okay. Can you explain why partially?

16 A. I think I did, but I'll repeat it.

17 What I recall about this particular patient is that his environment is very
18 stressful. Now, in a patient who is at risk with vasospastic-type migraine, any time
19 you're in a stressed environment you're likely to get -- you could receive a migraine
20 and obviously an ocular migraine, which is what happened to this particular patient.

21 Your question is, well, doctor, the dog banged him in the head. Did that
22 trigger the whole thing?

23 And I say in part. You are really asking me more to do than I can answer. I
24 can't be more specific than that.

25 Q. So are you saying that it is in part the blow to the head and in part due to work
26 stress?

27 A. You left out the whole other part. I've pointed out to both of you that he has a
vasospastic-type personality with a long history of migraine that's associated with
this, and the majority of that is from his underlying condition and, yes, at the time of a
stress in his life such as at work or being smacked in the head with some dogs, that
places him at a much higher risk category and I'm comfortable in my own mind
attributing that to the severe loss of vision.

[Joint Exhibit 5, at 11:13-14:8.]

Q. ... So the stress at work that he experiences, that is also a risk factor?

A. It's like any policeman or fireman. They're all under stress. That's a known
problem in this work lifestyle.

Q. ... Okay. But that work stress did not cause his loss of eyesight?

A. No, up until the time he got bumped in the head by the dogs.

Q. So he was just more susceptible to losing his eyesight?

A. Yes.

⁵ Presumably, Dr. Kaye meant to refer to applicant's *effective* total vision loss in his left eye.

1 Q. And so your -- then your final accounting of the apportionment then is what, if you
could reiterate?

2 A. Yes. I arrived at the figure of ... 90 percent due to the underlying condition and 10
percent due to the stress of the injuries.

3 Q. So 90 percent is -- when you say underlying condition, you're referring to the risk
4 factor of being a -- sorry if I get the term wrong. Vascular?

A. Vasospastic-migraine body type.

5 Q. Okay. So 90 percent to that risk factor and 10 percent to what?

A. To the results of the trauma. And again, there is a range as high as 20 percent.

6 Q. Okay. And is that within reasonable medical probability? ...

7 A. Yes.

8 [Joint Exhibit 5, at 14:14-15:24.]

9 ***

10 Q. Would Mr. Lindh have had his vision loss due to the blows to the head if he hadn't
11 had that vasovascular spasticity?

A. Unlikely.

12 Q. Is it possible that at some point in the future if he had not had the blows to the
13 head that he still could have lost his vision due to this underlying condition?

A. Yes.

14 [Joint Exhibit 5, at 16:9-16:16.]

15 ***

16 Q. ... So when you talk about the underlying condition that was aggravated in your
17 apportionment section here, that underlying condition was the vasovascular
spasticity?

18 A. Yes.

19 Q. Would the blows of the head alone have been enough to cause the vision loss if he
had not had this underlying condition?

20 A. I can't answer the question because I did not evaluate him [at the time]. And from
21 the records of the doctors, it wasn't sufficient to explain that. For example, I would
22 look at bruising around the head, bruising around the eye, also loss of consciousness,
blood pressure at the time, et cetera. I did look at those notes, and I was not able to
understand them completely.

23 [Joint Exhibit 5, at 17:1-17:14.]

24 ***

25 Q. ... You did change that the apportionment was up to 20 percent.

26 A. Yes, I did.

27 Q. For the stress of the injuries?

A. That is the variation range, yes.

1 Q: Well, actually, when it comes time to settle the case, the board is going to require a
2 number and not a range.

3 You gave us 10 to 20. What should we use?

4 A: 15 percent, Does that help you?

5 [Joint Exhibit 5, at 18:8-18:17.]

6 After Dr. Kaye's deposition, the parties wrote him a series of letters to which he responded in a
7 series of short reports.

8 In his September 30, 2016 report, Dr. Kaye reviewed his deposition and said that "I originally
9 apportioned 20% [of applicant's permanent disability] to this patient's vasospastic personality," but that
10 later "I pointed out to the parties that because of his 'macho' type personality and the environment he
11 worked in, the degree of injury from the dog handling may have been sufficient to push him beyond his
12 ability to cope. Therefore I concluded 15% should be appointed to his underlying condition." (Joint
13 Exhibit 3, at p. 1 [bolding in original].)

14 In his November 2, 2016 report, Dr. Kaye again referred to his deposition and stated:

15 Your question refers to the relationship between the underlying condition this patient
16 has and that apportioned to the stress of the injuries. I again refer you to my
17 deposition You asked me whether the risk factor was 90% to his underlying
18 condition and 10% to the trauma. However, ... I explained that there is a range
19 between 10% and 20%. We then discussed the medical probabilities. I direct you to
20 [citation to deposition] where the range of 10% to 20% is discussed and I concluded
21 that 15% would be a more refined number.

22 Therefore in my letter dated September 9, 2016, I apportioned 15% to the underlying
23 condition in line with my deposition I hope this is helpful to the applicant. This is
24 my final position on the case.

25 (Joint Exhibit 2, at p. 1.)

26 In his December 7, 2016 report, Dr. Kaye stated: "I reviewed all the previous data again. ... [I]t is
27 my professional opinion that 85% of the patient's permanent disability is due to his old condition and
15% of the applicant's permanent disability is due to his industrial injury." (Joint Exhibit 1, at p. 1
[underlining in original].)

At the May 18, 2017 trial, the parties stipulated that, on June 16, 2015, applicant sustained
industrial left eye injury. (Minutes of Hearing and Summary of Evidence, at 2:5-2:7 [Stipulation No. 1].)

1 They further stipulated that applicant's permanent disability rates 40% if there is no apportionment and
2 6% if there is apportionment. (*Id.*, at 2:18-2:20 [Stipulation No. 8].) The issues submitted for
3 determination were permanent disability and apportionment. (*Id.*, at 2:23-2:24 [Issues Nos. 1 & 2].)

4 II. DISCUSSION

5 It is settled law that the defendant has the burden of proof on apportionment. (*Pullman Kellogg v.*
6 *Workers' Comp. Appeals Bd. (Normand)* (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping*
7 *v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229];
8 *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc).) It is also settled
9 law that a medical opinion does not constitute substantial evidence if it is based on an incorrect legal
10 principle. (*Escobedo, supra*, 70 Cal.Comp.Cases at pp. 620-621; see also, e.g., *Hegglin v. Workmen's*
11 *Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93] ("Medical reports and opinions are
12 not substantial evidence ... if they are based ... on incorrect legal theories"); *Zemke v. Workmen's Comp.*
13 *Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358] ("an expert's opinion ... which
14 assumes an incorrect legal theory cannot constitute substantial evidence upon which the board may base
15 an apportionment finding").)

16 Defendant's petition for reconsideration correctly states the principle that, under sections 4663
17 and 4664(a), the apportionment of permanent disability is based on causation and the employer is liable
18 only for the percentage of permanent disability directly caused by the industrial injury. Accordingly, as
19 defendant asserts, it is now permissible to apportion permanent disability where that disability is actually
20 caused, at least in part, by a preexisting, asymptomatic, non-industrial condition or disease. (*City of*
21 *Jackson v. Workers' Comp. Appeals Bd. (Rice)* (2017) 11 Cal.App.5th 109 [82 Cal.Comp.Cases 437]
22 (allowing apportionment of permanent disability caused by genetic or congenital cervical spine
23 pathology); *Acme Steel v. Workers' Comp. Appeals Bd. (Borman)* (2013) 218 Cal.App.4th 1137 [78
24 Cal.Comp.Cases 751] (allowing applicant's hearing disability to be apportioned to congenital
25 degeneration of the cochlea); *E.L. Yeager Construction v. Workers' Comp. Appeals Bd. (Gatten)* (2006)
26 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687] (allowing apportionment of permanent disability caused
27 by preexisting degenerative disc disease); *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604

1 (Appeals Board en banc) (allowing apportionment of permanent disability caused by preexisting
2 degenerative arthritis in both knees).)

3 Yet, the mere fact that a physician opines that some portion of an injured worker's permanent
4 disability is attributable to non-industrial causation does not mean that the physician's opinion
5 necessarily rests on correct legal principles.

6 In our en banc decision in *Escobedo*, the Appeals Board emphasized that the language of sections
7 4663 and 4664(a) that permanent disability shall be based on "causation" refers to the causation of the
8 injured employee's permanent disability, not causation of his or her injury. (70 Cal.Comp.Cases at pp.
9 607, 611.) "[T]he percentage to which an applicant's *injury* is causally related to his or her employment
10 is not necessarily the same as the percentage to which an applicant's *permanent disability* is causally
11 related to his or her injury. The analyses of these issues are different and the medical evidence for any
12 percentage conclusions might be different." (70 Cal.Comp.Cases at p. 611 (*italics in original*).)

13 *Escobedo* is consistent with the Supreme Court's subsequent decision in *Brodie v. Workers'*
14 *Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1327-1328 [72 Cal.Comp.Cases 565]. In *Brodie*, the
15 Supreme Court declared that "the new approach to apportionment is to look at the current disability and
16 parcel out its causative sources—nonindustrial, prior industrial, current industrial—and decide the
17 amount *directly caused by the current industrial source*." (40 Cal.4th at p. 1328 (*bolding and italics*
18 *added*).) Accordingly, under *Brodie*, if an employee's industrial *injury* is the sole cause of his or her
19 permanent disability, there can be no legally valid apportionment of the employee's *permanent*
20 *disability*.⁶

21 Therefore, under *Escobedo* and *Brodie*, an opinion that bases apportionment upon the percentage
22 to which non-industrial risk factors contributed to *causing the injury* is not substantial evidence that
23 legally justifies apportionment. (E.g., *American Airlines v. Workers' Comp. Appeals Bd. (Milivojevich)*
24 (2007) 72 Cal.Comp.Cases 1415 (writ den.) [high cholesterol is merely a risk factor for stroke and heart
25

26 ⁶ Indeed, in the Court of Appeal's recent decision in *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th
27 1249 [82 Cal.Comp.Cases 679], the appellate court cited to this just-quoted language of *Brodie* (12 Cal.App.5th at pp. 1259-
1260) and concluded that non-industrial apportionment was *not* justified where the injured employee's complex regional pain
syndrome (CRPS) permanent disability solely resulted from an unsuccessful surgical intervention for her industrial carpal
tunnel syndrome.

1 disease; therefore, apportionment to high cholesterol in a stroke case was not valid apportionment under
2 *Escobedo*].)

3 As we will discuss in greater detail below, however, this is exactly what Dr. Kaye, the PQME in
4 ophthalmology, did in this case. In substance, Dr. Kaye's reports and deposition opined: (1) that
5 applicant had a preexisting hyperreactive type personality and preexisting (congenital) systemic
6 hypertension and vasospasm; (2) that, prior to applicant's stipulated industrial injury, none of these
7 conditions had resulted in any preexisting disability; and (3) that the combination of applicant's stress of
8 working as a police officer and his assaults during training by the K-9 dogs caused his non-industrial
9 conditions to trigger the vascular event that resulted in his left eye blindness. Therefore, under *Escobedo*,
10 Dr. Kaye's opinion establishes that applicant's preexisting hyperreactive type personality and his
11 asymptomatic and his preexisting systemic hypertension and vasospasm were mere *risk factors* that
12 predisposed him to having a left eye injury, but the actual injury and its resultant disability (i.e., the left
13 eye blindness) were entirely caused by industrial factors. Similarly, under *Brodie*, all of applicant's
14 current left eye disability is attributable to the work injury because there are no non-industrial causative
15 factors to parcel out.

16 Turning now in greater detail to Dr. Kaye's December 21, 2015 report, it essentially highlights
17 only the facts that: (1) applicant "has chronic migraine that I believe is on a vasospastic basis";
18 (2) applicant "has a hyper-reactive type personality"; (3) applicant's "work place[d] him in an
19 environment that is associated with bouts of acute stress"; (4) "[t]his stress precipitated an acute systemic
20 hypertension and vasospasm that affected his left optic nerve vessels"; (5) "[t]hese vessels were
21 predisposed to closure based on years of migraine"; and (6) "the work environment may have
22 precipitated an underlying vasculopathy resulting in ischemic optic neuropathy of the left eye"
23 (underlining in original).⁷ The most these statements establish is that applicant's hyperreactive
24 personality and his systemic hypertension and vasospasm predisposed him to have a vascular event in his
25

26 ⁷ We recognize that, in his December 21, 2015 report, Dr. Kaye stated "it is *possible* that this patient had lost some
27 vision prior to [being assaulted by the K-9 dogs] (*italics added*). However, a physician's assessment regarding causation of
permanent disability must be based on reasonable medical probability. (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170
Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113]; *Escobedo, supra*, 70 Cal.Comp.Cases at p. 620.)

1 eye, i.e., they were *risk factors* for industrial causation of an injury. Again, however, *Escobedo* and
2 *Brodie* establish that apportionment must be based on causation of permanent disability, not causation of
3 injury.

4 Moreover, Dr. Kaye's December 21, 2015 statements that applicant has "a hyper-reactive type
5 personality," that his work as a police officer placed him in an environment associated with "acute
6 stress," and that "[t]his stress precipitated an acute systemic hypertension and vasospasm that affected his
7 left optic nerve vessels" merely establish that the stress of applicant's work interacted with his
8 hyperreactive personality and his systemic hypertension and vasospasm to cause the injury that resulted
9 in his left eye blindness. Therefore, it was solely applicant's workplace stress, together with the K-9
10 attacks during training, that caused his permanent left eye disability.

11 Accordingly, Dr. Kaye's December 21, 2015 report appears to have confused causation of injury
12 with causation of disability and to have impermissibly applied apportionment principles that are
13 proscribed under *Escobedo* and *Brodie*.

14 Similarly, in his June 17, 2016 deposition, Dr. Kaye made it clear that applicant's systemic
15 hypertension and vasospasm were but risk factors that could potentially cause an injury and that it was
16 the workplace stress combined with physical trauma of the K-9 dog attacks that actually caused
17 applicant's permanent disability. Among other things, at his deposition Dr. Kaye:

18 • answered "yes" to the question, "Would you agree that Mr. Lindh's migraine
19 headaches in this case are nothing more than a risk factor for losing his eyesight"?
(Joint Exhibit 5, at 9:21-9:24);

20 • stated, "So when I think about apportionment, I'm thinking about non-industrial
21 causes. It's my opinion that his underlying vasospastic personality and
22 vasculature placed him at high risk for damage to different parts of his body. I
23 believe that the trauma that he sustained as a dog aggravated [*sic*] in March of that
year was sufficient to break his system down" (Joint Exhibit 5, at 10:15-
11:1); and

24 • had the following interchange with applicant's counsel:

25 Q. ... Do you agree that the cause of the disability, which is the ...
26 defective [*sic*] total vision loss in his left eye is due to the blows to the
head on March 2015?

27 A. Partially, yes. ...

1 Q. Partially. Okay. Can you explain why partially?

2 A. I think I did, but I'll repeat it.

3 What I recall about this particular patient is that his environment is
4 very stressful. Now, in a patient who is at risk with vasospastic-type
5 migraine, any time you're in a stressed environment you're likely to
6 get -- you could receive a migraine and obviously an ocular migraine,
7 which is what happened to this particular patient.

8 Your question is, well, doctor, the dog banged him in the head. Did
9 that trigger the whole thing?

10 And I say in part. You are really asking me more to do than I can
11 answer. I can't be more specific than that.

12 Q. So are you saying that it is in part the blow to the head and in part
13 due to work stress?

14 A. You left out the whole other part. I've pointed out to both of you
15 that he has a vasospastic-type personality with a long history of
16 migraine that's associated with this, and the majority of that is from
17 his underlying condition and, yes, at the time of a stress in his life such
18 as at work or being smacked in the head with some dogs, that places
19 him at a much higher risk category and I'm comfortable in my own
20 mind attributing that to the severe loss of vision.

21 ... Q. ... So the stress at work that he experiences, that is also a risk
22 factor?

23 A. It's like any policeman or fireman. They're all under stress. That's
24 a known problem in this work lifestyle.

25 ... Q. Okay. But that work stress did not cause his loss of eyesight?

26 A. No, up until the time he got bumped in the head by the dogs.

27 Q. So he was just more susceptible to losing his eyesight?

A. Yes.

(Joint Exhibit 5, at 11:13-15:1.)

19 Therefore, at his June 17, 2016 deposition Dr. Kaye again appears to have confused causation of
20 injury with causation of disability and to have impermissibly apportioned applicant's disability merely
21 because his preexisting conditions placed him at *risk* for suffering an industrial injury. As discussed
22 above, apportioning applicant's permanent disability based on risk factors that made him more
23 susceptible to losing his eyesight as the result of an industrial injury is proscribed under *Escobedo* and
24 *Brodie*. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 611 [causation under sections 4663 and 4664(a)
25 refers to the causation of the disability, not causation of the injury]; *Brodie, supra*, 40 Cal.4th at p. 1328
26 ["the new approach to apportionment is to look at the current disability and parcel out its causative
27

1 sources—nonindustrial, prior industrial, current industrial—and decide the amount *directly caused by the*
2 *current industrial source.*” (bolding and italics added)].)

3 Accordingly, because applicant’s preexisting hyperreactive type personality and preexisting
4 systemic hypertension/vasospasm were merely risk factors for causation of *injury*, rather than causation
5 of permanent disability, we affirm the WCJ’s conclusion that there is no legally valid basis for
6 apportionment in this case.

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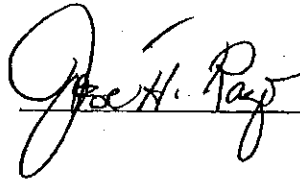
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1 For the foregoing reasons,

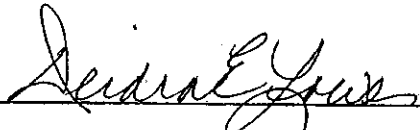
2 **IT IS ORDERED** that, as our Decision After Reconsideration, that the Amended Findings and
3 Award issued by the workers' compensation administrative law judge on September 11, 2017 is
4 **AFFIRMED.**

5 **WORKERS' COMPENSATION APPEALS BOARD**

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10 **JOSÉ H. RAZO**

11 **I CONCUR,**

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14 **DEIDRA E. LOWE**

15 **CONCURRING, BUT NOT SIGNING**
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18 **FRANK M. BRASS**

19 **DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

20 **JAN 25 2018**

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

23 **AARON LINDH**
24 **LAW OFFICES OF LINDA JOANNE BROWN**
25 **MULLEN & FILIPPI**

26 **NPS/bea**
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