2nd Civil No. ______________

COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ____

MAUREEN HIKIDA, *Petitioner*, v. WORKERS' COMPENSATION APPEALS BOARD; COSTCO WHOLESALE CORPORATION; HELMSMAN MANAGEMENT SERVICES, *Respondents*	WCAB Nos.: ADJ7721810, ADJ7721392 PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES THEREOF AND EXHIBITS

TO THE HONORABLE PRESIDING AND ASSOCIATE JUSTICES OF THE COURT OF APPEAL:

Petitioner MAUREEN HIKIDA (hereinafter "Petitioner") hereby petitions this Court for a writ of review on the Opinion and Order Denying Petition for Reconsideration issued by the Respondent WORKERS' COMPENSATION APPEALS BOARD (hereinafter "WCAB") on October 25, 2016. (**Exhibit 1**). In this case, the WCAB failed to follow binding

precedent and established law regarding apportionment of permanent disability, pursuant to Labor Code §4663(a) and the holding of Escobedo v. Marshalls (2005) 70 Cal.Comp.Cases 604. This was notwithstanding the fact that the dissenting opinion correctly articulated and applied the relevant law. (**Exhibit 1, p. 6**). Thus, Petitioner contends that judicial review is warranted based on the following grounds:

1. The Appeals Board acted without or in excess of its powers.
2. The order, decision, or award was unreasonable.
3. The order, decision, or award was not supported by substantial evidence.
4. The findings of fact do not support the order, decision, or award under review.

POINTS AND AUTHORITIES

I

ISSUES PRESENTED

1. Whether the WCAB incorrectly applied the law regarding apportionment of permanent disability as required by Labor Code §4663(a) and Escobedo v. Marshalls.
2. Whether the WCAB considered the medical and vocational evidence indicating that there was no legal basis for apportioning the Petitioner's total permanent disability relating to the consequential symptomatology of Petitioner's chronic regional pain syndrome, under the established law.
3. Whether the WCAB had a legal basis to apportion permanent total disability, as there was no prior award, diagnosis, impairment or

disability specifically relating to a chronic pain syndrome, that which rendered the Petitioner totally permanently disabled.

II

SUMMARY OF MATERIAL FACTS

Petitioner, while employed during the period of November 3, 1984 to May 17, 2010 as a Sales Auditor by Respondent COSTCO WHOLESALE CORPORATION, administered by Respondent HELMSMAN MANAGEMENT SERVICES (hereinafter "Helmsman"), sustained injuries to her cervical spine, thoracic spine, upper extremities, elbows, fingers, and psyche, causing catastrophic compensable consequential conditions involving the development of chronic regional pain syndrome (hereinafter "CRPS"), chronic pain, headaches, sleep disturbance, cognitive impairment, memory loss, deconditioning, hypertension, irritable bowel syndrome, and urological sequelae.

The Agreed Medical Examiner (hereinafter "AME") in orthopedics, Dr. Chester Hasday, determined that the applicant was 100% permanently totally disabled. (See **Exhibit 2, p. 17**). He found that Petitioner's total disability was entirely due to the effects of the CRPS that she had developed from a failed carpal tunnel surgery. (See **Exhibit 3, pp. 16-17**). The surgery was performed on an industrial basis. AME Dr. Hasday opined Petitioner's carpal tunnel injury, as opposed to the disability resulting from the CRPS, was 90% apportioned to the industrial injury and 10% to non-industrial causes. (See **Exhibit 3, pp. 16-17**).

The matter was heard at trial before the Workers' Compensation Judge (hereinafter "WCJ") on February 3, 2015 (**Exhibit 4**) and on April 1, 2015 (**Exhibit 5**). On June 22, 2015, the WCJ issued a Findings, Award and Order

finding the Petitioner was entitled to a 90% permanent disability award. (**Exhibit 6**). Petitioner filed her first Petition for Reconsideration on July 14, 2015, arguing that the WCJ incorrectly applied the apportionment of the carpal tunnel injury to the disability resulting from the CRPS, and did not follow binding precedential law. (**Exhibit** 7). The WCJ issued a Report and Recommendation on July 17, 2015. (**Exhibit** 8). Respondent filed an Answer on July 28, 2015. (**Exhibit 9**).

On February 8, 2016, the WCAB in a 2-1 decision rescinded the WCJ's Findings and Award and returned the case to the trial level for further proceedings. (**Exhibit 10**). In the decision, the dissenting opinion argued the WCJ should have found 100% permanent total disability, and that "[t]he WCJ's finding of compensable permanent disability is incorrect because he apportioned the permanent disability caused by applicant's CRPS based upon the causation of applicant's underlying carpal tunnel *injury* and not upon the cause of her permanent *disability*, contrary to the requirements of Labor Code Section 4663 and the decision of the Appeals Board in Escobedo." (**Exhibit 10, p. 6, lines 3-7**.)

Subsequently, post-trial briefs were submitted to the WCJ by both parties, primarily on the issue of permanent disability. (**Exhibits 11** [Petitioner's brief] **and 12** [Helmsman's brief]). On August 3, 2016, the WCJ issued a First Amended Findings, Award and Order finding Petitioner was entitled to a permanent disability award of 98%. (**Exhibit 13**). Petitioner filed her second Petition for Reconsideration on August 26, 2016, again arguing that the WCJ did not follow binding precedent in determining permanent disability. (**Exhibit 14**). The WCJ filed a Report and

Recommendation on Reconsideration on August 31, 2016 (**Exhibit 15**) and on September 6, 2016, Respondent filed an Answer (**Exhibit 16**).

On October 25, 2016, the WCAB panel, again in a 2-1 decision, issued an Opinion and Order Denying Petition for Reconsideration (hereinafter "Opinion and Order"). (**Exhibit 1**). The dissenting opinion again reiterated that applying the apportionment of the causation of the injury to the causation of the disability from the effects of the CRPS was improper. (**Exhibit 1, p. 4**).

As the October 25, 2016 Opinion and Order is a final WCAB decision with a final disposition of the case, it is upon this decision for which Petitioner seeks judicial review. *See*, *e.g.*, Munoz v. WCAB (1987) 52 Cal.Comp.Cases 402 (W/D); Klages v. WCAB (1986) 51 Cal.Comp.Cases 304 (W/D).

III

ARGUMENTS

1. THE WCAB INCORRECTLY APPLIED THE LAW REGARDING APPORTIONMENT OF PERMANENT DISABILITY AS REQUIRED BY LABOR CODE §4663(a) AND ESCOBEDO V. MARSHALLS.

Under Labor Code §4663(a), "[a]pportionment of permanent disability shall be based on causation." And, under the holding of the WCAB in its *en banc* decision of Escobedo v. Marshalls, supra at p. 607, "Section 4663(a)'s statement... refers to the *causation of the permanent disability*, *not causation of the injury*, and the analysis of the causal factors of permanent disability for purposes of apportionment may be different from the analysis of the causal factors of the injury itself." (Emphasis added). WCAB *en banc* decisions are binding precedent. *See* 8 CCR §10341; City of Long Beach v. WCAB *(Garcia)* (2005) 70 Cal.Comp.Cases 109.

The WCAB in Escobedo acknowledged that "the percentage to which an applicant's *injury* is causally related to his or her employment is not

necessarily the same as the percentage to which an applicant's *permanent disability* is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." *See* supra at p. 611. Thus, in order for there to be valid apportionment of permanent disability, there must be medical evidence indicating other causal factors are contributing to the injured worker's permanent disability. The causal factors of the industrial injury, on the other hand, are separate and distinct issues that are not necessarily the same as the causal factors of the permanent disability.

Here, it is undisputed that the Petitioner is *medically* 100% disabled, based on the medical evidence admitted at trial. The issue, then, becomes whether she is legally entitled to an unapportioned award of 100% permanent disability, not 98% as found by the WCAB. That is, by finding that "after apportionment the Petitioner has an impairment rating of ninety percent (90%)" specifically in relation to her CRPS, the WCAB erroneously applied apportionment based on the causation of *injury* (the Petitioner's underlying carpal tunnel syndrome) by the orthopedic, AME Dr. Hasday, to the causation of *disability* (the totally disabling effects of the Petitioner's chronic pain syndrome, which, separate and apart, developed as a result of failed carpal tunnel surgery). As the dissenting Commissioner properly identified, "the issue is not how the carpal tunnel injury was caused, but what caused applicant's permanent disability." (See **Exhibit 1, p. 7**).

As indicated by the doctors in this case, Petitioner suffers from frequent severe pain. She has almost no functional ability in her right hand, has extremely poor digital dexterity in her left hand, and suffers from stiffness in the joints, tingling and numbness in her hands, burning sensations, allodynia

(hypersensitivity of the skin), and high frequency tremors. (See **Exhibits 2, 3, and 17**). She takes a significant number of medications with debilitating side effects, has difficulty sleeping, and suffers from migraines and memory loss. (See **Exhibits 18 and 19**). As a result, she is severely limited in her ability to partake in daily activities of life, and requires assistance from her husband for almost all aspects of self-care. (See **Exhibit 20, p. 31**). These are the effects of the Petitioner's CRPS causing her to be 100% totally disabled, as indicated by AME Dr. Hasday and the Panel Qualified Medical Evaluator (hereinafter "PQME") in pain medicine, Dr. Ezekial Fink. (See **Exhibits 2-3, 17-22**).

The WCJ's interpretation of the law regarding apportionment, and the WCAB's subsequent affirming of the WCJ's reasoning, is contrary to the established current law according to Escobedo. The WCAB majority failed to distinguish between the causal factors of the industrial injury and the causal factors of the permanent disability, and instead applied apportionment applicable to the injury also to the injured workers' permanent disability without further analysis, nor legal basis. This was aptly stated in the WCAB's dissenting opinion, which found that the applicant should be entitled to an unapportioned award of total permanent disability. The dissenting Commissioner wrote:

> "As I stated in my previous opinion, Dr. Hasday impermissibly apportioned to the non-industrial cause of applicant's carpal tunnel injury, rather than to the cause of her permanent disability as required by Labor Code section 4663. Dr. Hasday was clear in his reporting and testimony that the entire cause of applicant's disabling CRPS was the medical treatment she received for her industrial injury, and not the industrial injury itself. Since the sole cause of applicant's CRPS and her total permanent disability was the medical treatment of the industrial carpal tunnel injury, her total permanent disability is fully compensable under the workers' compensation law." (See **Exhibit 1, p. 4**).

According to AME Dr. Hasday, although the causation of the Petitioner's *injury* was deemed to be 90% industrial, the causation of the Petitioner's total *disability* was 100% due to the chronic pain syndrome that developed as a result of the surgery for the carpal tunnel. It is evident, based on his testimony, that Dr. Hasday limited the 10% apportionment to non-industrial factors to a separate orthopedic injury only. Dr. Hasday acknowledged that it was the effects of the Petitioner's CRPS that rendered her 100% disabled and constituted the *sole* cause the Petitioner is unable to compete in the open labor market. (See **Exhibit 3, pp. 16-19**).

Moreover, Dr. Hasday was clear in his opinions that the *entire cause* of the disabling CRPS was the result of medical treatment causing total disability that would not have been present but for the intervening surgery. Yet, the WCJ inappropriately applied apportionment of an *orthopedic injury* and the "need for surgery" to the overall disability. This is directly contradictory to Escobedo's binding and precedential holding that apportionment is only applicable to factors with a causal relationship to disability, not injury. Thus, despite the evidence in front of him, the WCJ did not have a legal basis to apply orthopedic apportionment of injury to the Petitioner's chronic pain syndrome, the multi-factorial disabling condition which caused her to be 100% permanently disabled. The WCAB erred in affirming the WCJ's legal analysis of this issue.

More specifically, the WCAB also did not consider the fact that the Petitioner's totally disabling CRPS occurred as a result of medical treatment for an industrial injury, which, in accordance with the relevant law, is not subject to apportionment. It is established law that when a new or aggravated injury results from medical or surgical treatment of an industrial injury, the

employee is entitled to compensation directly relating to the consequential disability, without apportionment. *See* Fitzpatrick v. Fidelity & Casualty Co. (1936) 7 Cal.2d 230; Nation v. Certainteed Corp. (1978) 84 Cal.App.3d 813; Heaton v. Kerlan (1946) 27 Cal.2d 716. Here, the evidence demonstrates that the sole cause of the Petitioner's chronic pain syndrome, and her total permanent disability, was the failed surgery as part of the treatment of the industrially related carpal tunnel injury. It is a well established principle that treatment is not subject to apportionment. While disability is subject to apportionment, no doctor in this case has said that the disability from the effects of the chronic pain syndrome (e.g. sleep issues, tremors, burning, headaches) is apportionable, and those effects are precisely what has been deemed to be the exclusive reasons for the finding of permanent total disability.

The dissenting opinion in the WCAB's Opinion and Order provided this reasoning based on the relevant law, stating: "In that the CRPS causing applicant's total permanent disability resulted entirely from the surgery reasonably performed to treat applicant's industrial carpal tunnel injury, it is error to apportion the permanent disability resulting from that medical treatment based upon the causes of the injury that was being treated. Moreover, the entirety of the medical and vocational evidence establishes that applicant is totally permanently disabled as a result of her industrial injury." (**Exhibit 1, p. 6**).

By affirming a finding that the apportionment of the injury and treatment somehow translates into apportionment of the totally disabling effects of a chronic pain syndrome, the WCAB failed to follow binding

judicial precedent as required by the holding in Escobedo. The WCAB decision flies in the face of the evidence to the contrary.

2. THE WCAB DID NOT CONSIDER THE MEDICAL AND VOCATIONAL EVIDENCE INDICATING THAT THERE WAS NO LEGAL BASIS FOR APPORTIONING THE PETITIONER'S TOTAL PERMANENT DISABILITY RELATING TO THE CONSEQUENTIAL SYMPTOMATOLOGY OF PETITIONER'S CHRONIC REGIONAL PAIN SYNDROME, UNDER THE ESTABLISHED LAW.

The effects of the Petitioner's chronic regional pain syndrome which render her totally disabled have been well-documented by the medical evidence. AME Dr. Hasday indicated in his initial report dated June 20, 2012 that the Petitioner's right hand is a "helper hand" with almost no individual digital dexterity, "as her allodynia prevents her from using her right upper extremity in anything other than a minor help or a holding function." Her left hand also has very poor dexterity. Both hands suffer from tremors. Moreover, she cannot perform "even routine activities of daily living, as she requires the assistance of her husband in feeding, dressing, and self-care." She cannot drive. (See **Exhibit 20, p. 31**).

Moreover, the PQME in pain medicine, Dr. Fink, documents the Petitioner's frequent pain, tingling and burning sensations, numbness, tingling, and burning in hands, left arm pain, tremors, and headaches in his report dated August 6, 2014. (See **Exhibit 18**). He indicates that the her sleep disorder has a severe effect on her activities of daily living. (See **Exhibits 19 and 23**). In his deposition, when asked by Petitioner's attorney, "With respect to the disability, in your mind what is causing the disability that does not allow her at this point to compete in the open labor market," Dr. Fink stated, "CRPS." (See **Exhibit 19, p. 46, lines 5-9**).

The record supports a finding of unapportioned 100% permanent disability. In the October 14, 2014 deposition of Dr. Hasday, it became exceedingly clear that the causation of applicant's disability was 100 percent due to the chronic pain syndrome, and nothing else. He testified as follows:

"MR. GURVEY:
Q So here were go. I'm not going to ask you any questions on it if you haven't reviewed it. Again, I'll just close out to reiterate it is your understanding as you indicate in your deposition that the affects (sic) the disability caused by the complex regional pain syndrome, in and of itself, has created the total disability for Ms. Hikida; correct?

THE WITNESS:
A Correct.

MR. GURVEY:
Q I have nothing further.
[...]

BY MR. COHEN:
Q Just to follow-up on that though, the cause of the CRPS was the carpal tunnel surgery; Is that correct?
A Correct.
Q But the need for the carpal tunnel surgery was 90 percent work related and 10 percent not work related; correct?
A And those are the medical facts. You're going to need to have the trier of fact translate that into legal determinations as to obviously the issue is very plain. Defendant is contending that there is 10 percent apportionment of the whole thing to nonindustrial causation. And Applicant counsel is saying but for the carpal tunnel release there would be no CRPS. The CRPS is 100 percent from the carpal tunnel. So at what point do you get into the division of apportionment. So I divided the causation of the injury from the causation of disability. And I did that for you. And you can sit there and interpret for Escobedo however you would like to interpret.
[...]

MR. GURVEY:
Q So when you say you divide the causation of the disability -- when you say that, you're saying that the causation of the disability was a hundred percent due to the CRPS?
A Correct. And the causation of injury is 90 percent industrial.
Q Got it.
A The causation of disability is 100 percent CRPS.

BY MR. COHEN:

Q Okay. But just to clarify, I didn't quite get a "yes" or "no" answer there. The cause of the need for the carpal tunnel surgery is also 90 percent industrial, 10 percent nonindustrial, just to make sure?

A Yeah, sure. 90 percent industrial causation.

MR. GURVEY: For the injury.
THE WITNESS: For the injury.
MR. COHEN: And the need for surgery.
MR. GURVEY: And the need for surgery.
THE WITNESS: Correct.
MR. GURVEY: For the disability that is causing her
THE WITNESS: It's 100 percent due to CRPS.
MR. GURVEY: Got you. That's causing her to be out of the labor market?
THE WITNESS: That's correct.
MR. GURVEY: I have nothing else.
THE WITNESS: My position is pretty clear." (**Exhibit 3, pp. 16-18**).

In addition to AME Dr. Hasday, the medical opinions of PQME Dr. Fink must be considered. Dr. Fink, who is board-certified in neurology and in pain medicine, found no apportionment to non-industrial factors of the Petitioner's chronic pain syndrome. Although the WCAB included Dr. Fink's neurological and pain impairments, they did not substantially consider Dr. Fink's opinions of the lack of apportionment to a prior chronic pain syndrome in this case, leading to an unsubstantiated finding of 98% permanent disability.

Dr. Fink found no apportionment of the CRPS/chronic pain syndrome to non-industrial factors in his February 19, 2013 report, stating, "Regarding her CRPS/tremor, 100% is apportioned to the claimed industrial injuries. There appears to be no basis for apportionment to any pre-existing or concurrent causal factors." (**Exhibit 22, p. 17**).[1] Dr. Fink opined that the Petitioner's CRPS, which is a condition separate and apart from her carpal

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[1] The WCJ appears to be under the impression that PQME Dr. Fink found apportionment to a specific industrial injury on August 1, 2009. (See **Exhibit 13, Opinion on Decision, p. 5**). However, no specific injury was alleged by the Petitioner. The issue of whether a specific injury existed was clarified during Dr. Fink's deposition on August 12, 2013. (See **Exhibit 19, pp. 61-62**).

tunnel syndrome, was the sole cause for her inability to compete in the open labor market, thereby agreeing with the findings of Dr. Hasday. (**Exhibit 19, p. 46**).

Moreover, Dr. Fink's opinions do not contradict AME Dr. Hasday's apportionment finding because Dr. Hasday limited the 10% apportionment to a separate orthopedic condition, namely the underlying carpal tunnel injury and the resulting need for surgery, not to the Petitioner's totally disabling chronic pain syndrome, which, in its entirety, resulted from the surgery. At no time did any doctor indicate that the disability from the *carpal tunnel syndrome* was totally disabling, or caused any inability to compete in the open labor market. The WCAB appears to not have considered Dr. Fink's opinion that the Petitioner's chronic pain syndrome, separate from the carpal tunnel surgery, is not apportionable, in addition to incorrectly finding Dr. Hasday's orthopedic apportionment applicable to the Petitioner's totally disabling CRPS.

Finally, it should be noted that the unrebutted vocational expert in this case, Enrique Vega, indicated that the Petitioner was 100% permanently disabled, as a result of her total loss of earning capacity. He indicated in his Diminished Future Earning Capacity report dated May 26, 2014 that the Petitioner suffers from cognitive issues interfering with her ability to manage work of complexity for any length of time, her pain and anxiety cause distraction, she has little energy, and she tires easily. (See **Exhibit 24, p. 26**). She is very restricted in what she can do on her own and is dependent on the help of others. (See **Exhibit 24, p. 27**). She was unable to complete the majority of the testing due to her pain. (See **Exhibit 24, p. 29**). Mr. Vega notes that "Ms. Hikida could not last on a job for even one full day based on her performance during vocational testing (i.e. discontinuing tasks, taking

frequent breaks, weeping, exhibiting pain related symptoms, etc." (See **Exhibit 24, p. 21**). As such, she is unable to compete in the open labor market. (See **Exhibit 24, p. 19**).

The courts have agreed that an unapportioned total disability award is warranted in cases in which the disability resulting from chronic pain and the disability factors related to the medical treatment to relieve the pain, in and of themselves, are the cause of the total disability, despite a prior industrial injury or underlying condition. *See, e.g.,* County of Sacramento (Probation Department), PSI v. WCAB *(Chimeri)* (2010) 75 Cal.Comp.Cases 159, 162 (W/D) (panel decision holding Petitioner was totally disabled without apportionment as a result of prescription medication to relieve the effects of CRPS, notwithstanding low back disability to prior spine injuries); Nilsen v. Vista Ford, Pacific Compensation Insurance Company (2012) Cal.Wrk.Comp. P.D. LEXIS 528 (W/D) (panel decision holding Petitioner was totally disabled without apportionment as a result of narcotic use for chronic pain syndrome developed from industrial injury to spine, notwithstanding specific potentially apportionable factors to pre-existing orthopedic and/or psyche medical conditions); Moran v. Dept. of Youth Authority, Legally Uninsured State Compensation Insurance Fund (2011) Cal.Wrk.Comp. P.D. LEXIS 43 (panel decision holding Petitioner was totally disabled without apportionment as a result of narcotic dependence arising from chronic pain from shoulder injury and subsequent unsuccessful surgeries despite prior low back injury).

Here, as referenced herein, the Petitioner's evaluating physicians have provided substantial medical evidence indicating that, but for the chronic pain syndrome, Petitioner would not be suffering from the debilitating symptoms

that, *in and of themselves*, have rendered her totally disabled.[2] This medical fact is established separate and apart from causation of injury and need for carpal tunnel syndrome surgery, since the law is clear that the sole causation issue must be based on the causation of the *disability*, not injury. In this case, as Dr. Hasday and Dr. Fink both stated the total disability is due to the disabling effects of the CRPS and the effects of the treatment for the CRPS, in and of themselves, which is separate from the need for the carpal tunnel surgery. (**Exhibits 3 and 19**).

To reiterate, the dissenting Commissioner had stated, "[...] the entirety of the medical and vocational evidence establishes that applicant is totally permanently disabled as a result of her industrial injury." (**Exhibit 1, p. 6**). Accordingly, as the appropriate interpretation of the law and the substantial medical evidence indicates, the WCAB should have found that the *disability* caused by the CRPS is, in and of itself, 100% permanently and totally disabling, and that there is no basis for apportionment, in accordance with Chimeri and Nilsen.

3. THE WCAB DID NOT HAVE A LEGAL BASIS TO APPORTION PERMANENT TOTAL DISABILITY, AS THERE WAS NO PRIOR AWARD, DIAGNOSIS, IMPAIRMENT OR DISABILITY SPECIFICALLY RELATING TO A CHRONIC PAIN SYNDROME, THAT WHICH RENDERED THE PETITIONER TOTALLY PERMANENTLY DISABLED.

Apportionment is only valid when potentially apportionable factors are related to the same body part or condition of the permanent disability. Permanent disabilities do not overlap if they affect different abilities in the open labor market and ability to earn. Labor Code §4664, as well as the

[2] The other PQMEs in this case are Dr. Olga Popel (rheumatology) and Dr. Cheri Adrian (psychology), whose opinions did not address the relevant issues as indicated in this writ.

holding in Kopping v. WCAB (2006) 142 Cal.App.4th 1099, together make it clear that apportionment must be proven first, and there must be a synergistic approach to the condition or region of the body that is causing the disability. *See also* Sanchez v. County of Los Angeles (2005) 70 Cal.Comp.Cases 1440 (WCAB *en banc* Decision); Strong v. City and County of San Francisco (2005) 70 Cal.Comp.Cases 1460 (WCAB *en banc* Decision). It has now long been established that just because a Petitioner has a prior award or a prior disability, that percentage of disability, or potentially apportionable disability, should not be automatically subtracted from the disability, especially as it relates to a different condition or a different region of the body.

In this case, the Petitioner has no prior award or prior diagnosis relating to a chronic pain syndrome, as indicated by pain medicine PQME, Dr. Fink, who found no apportionment to pre-existing conditions in relation to the diagnosed chronic pain syndrome. Again, the AME in orthopedics Dr. Hasday's 10% apportionment to non-industrial factors was specifically in regards to the Petitioner's underlying carpal tunnel syndrome, an orthopedic-related injury, the symptoms of which that were not deemed to be the cause of the ultimate finding of total disability. There was never any mention of apportionment for a pre-existing chronic pain syndrome, the effects of which did cause the totally disabling condition. In the absence of any evidence that Labor Code §4664 applies, no presumption of prior permanent disability exists whatsoever.

Moreover, since there is no evidence that the Petitioner was diagnosed with a chronic pain syndrome prior to the industrial injury at issue, no proper apportionment applies per Labor Code §4663. In Nilsen, supra at p.17, the WCAB panel in the writ denied case specifically stated that the causation of

the chronic pain condition must be apportioned to other causes of chronic pain conditions: "Here, Petitioner sustained a specific injury to his spine, and then as a compensable consequence, sustained a separate injury in the form of a chronic pain syndrome which is treated by extensive narcotics. *Causation of the chronic pain syndrome and use of narcotics must be apportioned to other causation of chronic pain syndrome and use of narcotics, and there is no medical evidence that Petitioner had a chronic pain syndrome prior to the industrial injury* (citing Benson v. Permanente Medical Group (2007) 72 Cal.Comp.Cases 1620 (WCAB *en banc* Decision); Kopping, supra)." (Emphasis added).

This is analogous to the instant case, for Petitioner sustained a specific injury to her hands in the form of carpal tunnel, and then as a compensable consequence, sustained a separate injury in the form of a chronic regional pain syndrome, which is treated by medications and has severe effects on her activities of daily living. There is no medical evidence that the Petitioner had a prior diagnosis of chronic pain syndrome, and like in Nilsen, there is no evidence of overlap of that disability, which has caused total permanent disability rendering the Petitioner unemployable. By contrast, in Acme Steel v. WCAB *(Borman)* (2013), 218 Cal.App.4th 1137, the apportionable factor was the Petitioner's prior award of hearing loss, the same condition that caused the ultimate permanent total disability.

IV

CONCLUSION

Per Escobedo, causation of disability is the law. In this case, it is clear that there is no overlap of disability, nor any apportionable factors, from any other condition or injury specifically related to the chronic pain syndrome

which has rendered the Petitioner 100% permanently disabled. The *cause* of the applicant's total disability is the effects and symptoms related specifically to the chronic pain syndrome as a whole, including not only the pain and loss of function in her hands, but also the tremors, migraines, sleep disorder, and inability to partake in the daily activities of living in which she suffers. The totally disabling factors that make up the chronic pain syndrome occurred only as a result of the medical treatment for the applicant's underlying condition, which is not a legal basis for apportionment of disability. There was no medical evidence proffered that the Petitioner had suffered from a chronic pain syndrome before her diagnosis relative to this claim which had a disabling effect on her, nor suffered from the symptomatology that rendered her totally permanently disabled. As such, there should be no apportionment to the underlying "need for surgery." The case law provided hereinabove clearly supports this conclusion. A proper application of Escobedo warrants a finding of an unapportioned 100% permanent disability award for the applicant.

Here, by applying the apportionment applicable to the causation of injury to the causation of disability and ultimately affirming a permanent disability award of 98%, the WCAB has denied the Petitioner substantial justice, providing a legally incorrect decision with an apportionment analysis contrary to the established law and affirmed a finding that is not substantiated by the medical and vocational evidence on record. As there is no legal basis for apportionment in this case, the WCAB's Opinion and Order Denying Petition for Reconsideration is inconsistent with the law.

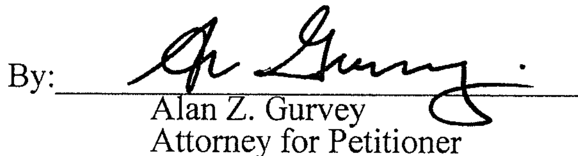
WHEREFORE, Petitioner respectfully prays for the following relief:

1. That this Court grant Petitioner's Petition for Writ of Review;

2. That this Court find that the WCAB did not follow binding judicial precedent pursuant to Labor Code §4663(a) and Escobedo v. Marshalls, and vacate the Opinion and Order Denying Petition for Reconsideration dated October 25, 2016 accordingly;
3. That this Court find that there is no valid legal basis for apportionment and the Petitioner is entitled to a permanent disability award of 100% due to the effects and symptomatology of her chronic regional pain syndrome;
4. Any and all other relief this Court deems just and proper.

Dated: December 9, 2016 Respectfully submitted,

LAW FIRM OF ROWEN, GURVEY & WIN
A Professional Corporation



By:____________________
Alan Z. Gurvey
Attorney for Petitioner

VERIFICATION

I, MAUREEN HIKIDA, am the Petitioner in the above-captioned matter. The foregoing *PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES THEREOF AND EXHIBITS* is true of my own knowledge except as to those matters stated in it on my information or belief, and as to those matters, I believe them to be true.

I declare, under penalty of perjury, pursuant to the laws of the State of California, that the foregoing is true and correct, and that this Verification was executed on December 9, 2016, in Castaic, California.

By:
Maureen Hikida
Petitioner