WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

NIDYA GONZALEZ, *Applicant*

vs.

SIZZLER USA ACQUISITION, INC., insured by PREFERED EMPLOYERS INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ16913929
Van Nuys District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant and defendant both seek reconsideration of the Findings of Fact and Award (F&A) issued by a workers' compensation administrative law judge (WCJ) on February 27, 2025, wherein the WCJ found that applicant, while employed as a server, waitress, manager, and kitchen worker during the period of January 1, 1986 to June 19, 2020, sustained injury arising out of and during the course of employment to her thoracic spine, lumbar spine, shoulders, elbows, wrists, knees, ankles, and feet, causing permanent disability of 95 percent. The decision also found that applicant's claim is not barred by the statute of limitations because the date of injury of the cumulative injury is June 7, 2023, based on Labor Code section 5412[1] (Finding of Fact #11), and because this date is after the date of applicant's termination, her claim is not barred by the post-termination defense (Finding of Fact #12). The F&A further found that the reports of Gabriel Rubanenko, M.D., constitute substantial medical evidence on the issues of injury, temporary disability, date of maximal medical improvement, permanent disability based on whole person

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

impairment using the *AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition* (AMA Guides), apportionment, and need for further medical treatment (Finding of Fact #13).

Defendant contends that: (1) the application was barred by the statute of limitations as defined by sections 5405 and 5412; (2) the claim was barred by a post-termination defense; and (3) the report[s] of primary treating physician (PTP) Dr. Rubanenko do not constitute substantial medical evidence.

Applicant contends in the March 19, 2025 "Request for Amended Award," which we treat as a timely filed Petition for Reconsideration, that there was a miscalculation of permanent disability based on the incorrect age adjustment, and requests that the decision be amended to correct this error.

Applicant contends in her Answer to defendant's Petition that: (1) the WCJ did not err in finding June 7, 2023 to be the date of injury under section 5412; (2) the WCJ was within his powers in finding that based on this date of injury, the post-termination defense does not apply; (3) the WCJ did not err in relying on Dr. Rubanenko's reports; and (4) the WCJ did err with respect to age in the rating strings, based on an incorrect adjustment for date of birth, and this clerical error should be corrected, bringing applicant's permanent disability rating to 100 percent.

Due to the unavailability of the WCJ after the decision, a Report and Recommendation with respect to defendant's Petition was prepared by the PWCJ, which recommends that we deny defendant's Petition. (See Cal. Code Regs., tit. 8, § 10962.)

We have considered the allegations of the Petitions for Reconsideration and the Answer and the contents of the Report of the WCJ. Based on our review of the record, and for the reasons stated herein, we will deny defendant's Petition for Reconsideration, grant applicant's Petition for Reconsideration and amend the WCJ's F&A to find applicant's rate of earnings for temporary and permanent disability to be based upon an average weekly wage of $1,272.04 per week, and find that applicant is 100% permanently and totally disabled and award 100% permanent disability.

FACTS

This case proceeded to trial on February 13, 2025, and was continued and completed on February 18, 2025. The parties stipulated at trial that applicant, while employed during the period of January 1, 1986 to June 19, 2020, as a server/waitress/manager/kitchen, Occupational Group Number 322, by defendant Sizzler, claims to have sustained injury arising out of and in the course

of employment to cervical, thoracic, lumbar, shoulders, elbows, wrists, knees, ankles, and feet. Based on the stipulated date of birth, applicant was 59 years of age at the end of this period of industrial exposure. The parties further stipulated that at the time of injury, the employer's workers' compensation carrier was Preferred Employers San Diego. The parties agreed that at the time of injury, the earnings were sufficient to produce a partial temporary disability rate of $290.00 per week, the employer has furnished no medical treatment, and no attorney fees have been paid and no attorney fee arrangements have been made. (Minutes of Hearing and Summary of Evidence (MOH) dated February 13, 2025, page 2, lines 2-12).

The issues submitted for decision at trial were (1) injury arising out of and in the course of employment; (2) earnings, with applicant claiming $1,272.03 per week, based on a settlement document for the June 28, 2020 date of injury and defendant claiming $1,000 per week, based on wages and testimony; (3) temporary disability, with applicant claiming the following periods: June 7, 2023 through November 15, 2023; (4) permanent and stationary date, with applicant claiming November 15, 2023, based on Dr. Rubanenko's medical report dated December 8, 2023, and defendant claiming the permanent and stationary date is December 8, 2023, based on Dr. Hekmat; (5) permanent disability; (6) apportionment; (7) need for further medical treatment; (8) liability for self-procured medical treatment; (9) attorney fees; (10) whether parties' respective *Vigil* reports are adequate and constitute substantial medical evidence; (11) the statute of limitations; (12) the post-termination defense; (13) lack of substantial medical evidence; (14) whether date of injury should be determined by sections 5412 and 5500.5, thus within the statute of limitations per applicant; (15) whether applicant's PTP Dr. Rubanenko's report is the sole medical evidence establishing compensable disability as of November 15, 2023, as contended by applicant; and (16) the cases of *Western Growers*[2] and *Konstantin*[3] (*Id*. pages 2-3).

Exhibits identified as Applicant's 1 through 3 and Defendant's A through H were admitted into evidence without objection. Admitted as Applicant's 1 was the medical report of PTP Dr. Rubanenko, dated October 14, 2024. Admitted as Applicant's 2 were the medical reports of PTP Dr. Rubanenko, dated June 7, 2023 to October 17, 2023. Admitted as Applicant's 3 was the medical report of Dr. Rubanenko, dated December 8, 2023. A denial notice, dated January 4, 2023, was admitted as Defendant's A. An August 30, 2021 report from Healthpointe was admitted as

[2] *Western Growers v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227 [58 Cal.Comp.Cases 323].
[3] *Konstantin v Employers Ins. of Wausau* (1987) 15 CWCR 247.

Defendant's B. The QME reports of Dr. Hekmat, dated May 18, 2023, March 21, 2024, and January 16, 2025 were admitted as Defendant's C, D and E, respectively. An accident report, dated June 28, 2020, was admitted as Defendant's F. Applicant's e-mail, dated June 28, 2020, was admitted as Defendant's G. (*Id*. pages 3-4).

A Compromise and Release and Order Approving Compromise and Release dated May 6, 2021 resolved a specific date of injury of June 28, 2020 to the head, neck, upper extremities, stress, and psyche, and its terms include a stipulation that the specific injury caused eight percent permanent disability of the neck and 32 percent permanent disability of the psyche. The parties also stipulated that at the time of the specific injury of June 28, 2020, applicant's earnings were $1,272.03 per week, based on which defendants Sizzler USA Acquisition and Preferred Employers Insurance paid temporary disability indemnity at the rate of $848.02. The Compromise and Release purports to resolve any injuries sustained by applicant while working for Sizzler but also includes the following standard language in numbered paragraph 3 of DWC-CA Form 10214:

> 3. This agreement is limited to settlement of the body parts, conditions, or systems and for the dates of injury set forth in Paragraph No. 1 and further explained in Paragraph No. 9 despite any language to the contrary elsewhere in this document or any addendum.

(Compromise and Release, page 6 of 13, paragraph 3.)

Applicant testified at trial that she was hired on October 26, 1986 by Sizzler and worked there until June of 2020. She worked there for about 34 years. Applicant's last job title at Sizzler was general manager, but she was previously a cashier, salad bar person, waitress, a "QCS," and an assistant manager, all before becoming a manager. (MOH dated February 13, 2025, page 5, lines 2-6).

On average, applicant worked 10 hours per day at Sizzler, depending on how the business went. Sometimes she had to open and close the restaurant. She worked five days per week. She never worked anywhere else while she was working at Sizzler. The last location where she worked for Sizzler was in the restaurant at Seventh and Western. Before that, she worked at the Van Nuys location. (*Id*. page 5, lines 7-10.)

Applicant testified that she doesn't know what kind of injury she sustained at Sizzler. She didn't know what a cumulative trauma was until she saw Dr. Rubanenko. She agreed that this was approximately June 7, 2023, but she didn't recall the exact date. Dr. Rubanenko was the primary treating physician for her workers' compensation case. He explained to applicant that there are

several injuries to her body, which formed through years of working and doing the kind of job she was doing for Sizzler. (*Id*. page 5, lines 15-19.)

Applicant did the work of a manager but would also work as a server if her help was needed at any point throughout the day. She oversaw other employees. Every day she had to help them. She had to help carry trays and take orders. She oversaw 22 to 25 employees, with about ten working per shift. Sometimes they didn't show up to work. She would have three servers for lunch if she was busy, or only one or two if it was slow. A server is the same thing as a waitress. Sometimes, several people would call in sick. If applicant couldn't find anyone to cover the shift, she had to do the work herself. (*Id*. page 5, lines 21-25, and page 6, lines 1-4.)

Applicant agrees with the part of Dr. Rubanenko's report of December 8, 2023 where it says that she did cleaning and janitorial duties, and moved chairs and tables as part of her job. She estimates that the things she lifted weighed 10 to 15 pounds, but the exact weight depended on what it was. Sometimes a case of meat weighed 7 to 15 pounds. There was always someone there to help, such as a busboy or a cook. (*Id*. page 6, lines 4-8.)

The kitchen in the Sizzler restaurant where applicant worked was not next to the tables. She estimates that it was about 50 feet away. This distance depended on the location, because each was different. Applicant estimates that for about 90% of each day, she was both standing or walking, depending on the position she was doing. She had to bend and squat, sometimes to the floor, such as when she stacked plates on racks. She doesn't recall how many racks there were. She had to help put dishes away, and sometimes she did this herself. She had to bend every day at some point during the day. She does not recall there being any stairs at work. She reached overhead to grab things such as paper, napkins, towels, and straws in boxes. She used a ladder with three or four steps on it to do this. She used the ladder pretty much every day. (*Id*. page 6, lines 9-16.)

Applicant is right-handed. She used two hands to sweep. She had pain in one hand so she used the other one more. She used the computer as well. She sent emails and prepared orders on the computer. She wrote notes in a book. She spent about two hours sitting each day at most. She would spend a little more time seated if she had to do orders or schedules. If she only checked email, she would be seated for about one hour at most. (*Id*. page 6, lines 17-21.)

Applicant agreed that her job duties caused pain, and were difficult, but she did them anyway with pain. Applicant also agreed with the statement in Dr. Rubanenko's report dated October 14, 2024 that she noticed most of the knee symptoms about 20 years ago and the other

symptoms about 12 years ago. Despite the symptoms, she kept her job and continued working. She was bending over to deliver food to the guests, who were seated at a table while she was standing. There were about five items on a tray that she would carry, depending on the orders. The heaviest might have been 15 pounds. She held it with her left hand while using the right hand underneath for support. Her whole body was hurting all the time. It was hard to walk around to deliver food and lift trays with food and glasses on them. It was also hard to stock items from freezers. The freezers were inside the restaurant, not outside. She was stocking items every day. Stocking items bothered applicant, because this activity involved doing the same movement over and over, all the time, constantly. (*Id*. page 6, lines 23-25, and page 7, lines 1-8.)

Applicant's knees bothered her first, from walking a lot. She had already sought treatment for her knees. She had a knee replacement in 2017, and a second knee surgery in 2022. She doesn't recall the exact date of her second surgery but agrees that it may have been August 12, 2022. She didn't know it was causing her need for surgery. Dr. Ganjianpour did her first knee surgery, using health insurance from her work at Sizzler. She doesn't remember who did her second knee surgery. (*Id*. page 7, lines 8-13.)

For at least her last year at work, applicant had pain all day long. She paid copayments for treatment through her health insurance. Before seeing Dr. Rubanenko, other doctors did not explain to applicant what was causing her pain. She saw doctors through her Sizzler health insurance for pain. She told the doctors what was hurting at the time. Her knee hurt. They didn't ask her what else hurt. Dr. Rubanenko was the first doctor to ask about all of her complaints. (*Id*. page 7, lines 13-17.)

Mrs. Gonzalez doesn't remember whether any doctors before Dr. Rubanenko asked her about her activities of daily living. She thinks that Dr. Rubanenko did ask her about them, but she's not 100 percent sure. (*Id*. page 7, lines 18-20.)

Applicant testified that as part of her job as a manger, she reported employees' injuries to Sizzler. She doesn't remember exactly how many injuries she reported, but agrees that maybe it was more than five. Sometimes the shift manager would fill out an incident report for her. However, she was aware of other employees' injuries at her place of work. When Medcor saw an injured employee for treatment, they sent a fax or email to the corporate office of Sizzler, and also to applicant. Applicant agreed that she is aware of the importance of reporting work injuries. Applicant was aware of different types of injuries, such as a cut finger, or a fall, but she does not

recall any repetitive injuries being reported to her while she was working as a general manager for Sizzler. (*Id*. page 9, lines 10-16.)

Applicant did not recall telling Dr. Hekmat about a gradual onset of pain in 2010 or 2011. She told Dr. Hekmat about a knee surgery in 2017, but she did not tell him that it was because of her employment at Sizzler, because she didn't know that. She saw Dr. Hekmat a second time, but she doesn't remember the date. She does not recall seeing a nurse practitioner named Orah Matov. She doesn't recall discussing with a nurse practitioner referred by Dr. Ganjianpour that there was no indication of a cumulative trauma. She doesn't recall telling either Dr. Ganjianpour or a nurse practitioner that her pain was not related to her employment at Sizzler. She does not recall filing a lawsuit against Sizzler for civil damages. She only recalls having two workers' compensation claims, one for her June 2020 injury to her head, which was filed by her employer, for her, and the current case, which was filed by her workers' compensation attorneys. (*Id*. page 10, lines 5-13.)

Applicant admitted that she started treatment for her knees with Dr. Ganjianpour before 2017. Dr. Ganjianpour did not tell her why she had knee pain. She never told Dr. Ganjianpour that it was from her work, and she didn't think it was from work. She went to Dr. Ganjianpour because she had pain in both knees. She has seen Dr. Ganjianpour for many years through the health insurance provided by her employment with Sizzler. (*Id*. page 10, lines 15-18.)

Applicant was shown the Compromise and Release and the Order Approving Compromise and Release dated May 6, 2021. She recognizes some of these papers. She did not have an attorney for this prior claim of injury. She was not planning to sue Sizzler for that. An adjuster called her and told her to settle the case because they could not do anything more for her about her pains and issues. The adjuster didn't say that applicant could continue to seek treatment, or what exactly was being settled. Applicant has completed one grade of high school. That is her highest education level. She did receive a copy of the settlement. She doesn't remember if the adjuster told her to sign it but thinks that she did. They did not tell her to get the advice of an attorney. When asked whether the settlement included the psyche, applicant asked," What is psyche?" When shown the rating strings in the Compromise and Release, applicant testified that she did not recall these or know what they are. (*Id*. page 10, lines 19-25, and page 11, lines 1-3.)

On the second day of trial, Lisa Perez was called as a witness on behalf of defendant and testified that she is employed as the Vice President of Legal and People Support. She has held this position since April of 2020. She was previously a general manager for Sizzler from 1988 to 1996.

In 2011, she returned to Sizzler as a vice president. (MOH dated February 18, 2025, page 2, lines 10-12.)

Ms. Perez previously had contact with applicant, who started working for Sizzler on November 24, 1986, according to company records. In 1986, Ms. Perez was also working for Sizzler, as a server. (*Id*. page 2, lines 13-15.)

Ms. Perez believes that applicant, as the general manager, would have overseen all operations at a Sizzler restaurant, including such things as training, procuring, counting sales, handling guest relations, and safety. Ms. Perez believes applicant was present at safety committee meetings where they reviewed types of claims and what was causing them, as well as loss runs and trends. Ms. Perez believes these meetings included a discussion of cumulative trauma. Safety inspections were also discussed at the safety committee meetings. Applicant was part of the safety committee for at least a few years since Ms. Perez started working as a vice president for Sizzler in 2011. (*Id*. page 2, lines 15-19.)

Applicant worked at multiple locations for Sizzler, but mostly in North Hollywood. A general manager at Sizzler had to do paperwork, count money, prepare lists, and might assist with busing tables in the middle of the day, or assist the cashier. The general manager had to do what were called "figure eights." This is where the manager would walk in a figure-eight pattern around the restaurant, checking everything. In the afternoon, the general manager also did schedules and orientations and would perhaps give a break to the cashier. At around 4:30 p.m., the general manager would cash out the cash register and then do more figure-eights. Figure-eights covered both the back of the house [kitchen] as well as the front of the house [dining area]. Ms. Perez testified that although waitressing and stocking are not part of the general manager's duties, the general manager could do these things to help while doing figure-eights. (*Id*. page 2, lines 23-25, and page 3, lines 1-7.)

Ms. Perez first learned that applicant had filed a cumulative trauma claim from Sizzler's insurance company, Preferred Employers, in November 2022. Before that, applicant did not report a cumulative injury to Sizzler, including any cumulative trauma to her wrist, hands, upper extremities, shoulders, back, or psyche. (*Id*. page 4, lines 4-6.)

Ms. Perez admitted that she did not work in the same location as applicant. She admits that she had only intermittent observation of applicant working. For eight years, Ms. Perez was vice president over applicant's work locations in North Hollywood, Van Nuys, and Western. Ms. Perez

oversaw a total of 13 Sizzler locations. As part of her job duties, Ms. Perez went to Sizzler restaurants, where she did people visits, interviewed employees, and audited files for everybody in the restaurant. Ms. Perez did not do this every day, but about two times per month, sometimes more. There's no log of Ms. Perez's visits to the restaurant where applicant was working. There's nothing to show how many times she visited Mrs. Gonzalez's location. Ms. Perez did not audit applicant but did speak to her supervisor. (*Id*. page 4, lines 17-24.)

After completion of trial, the WCJ issued an F&A dated February 27, 2025, which found that: (1) applicant, while employed during the period of January 1, 1986 to June 19, 2020, as a server/waitress/manager/kitchen, Occupational Group Number 322, by defendant, sustained injury arising out of and in the course of employment to her thoracic spine, lumbar spine, shoulders, elbows, wrists, knees, ankles, and feet; (2) at the time of injury, the employer's workers' compensation carrier was Preferred Employers San Diego; (3) at the time of injury, the earnings were sufficient to produce a permanent partial disability rate of $290.00 per week; (4) the employer has furnished no medical treatment, and no attorney fees have been paid and no attorney fee arrangements have been made; (5) the employer has furnished no medical treatment; (6) no attorney fees have been paid and no attorney fee arrangements have been made; (7) the injury caused temporary disability from June 7, 2023 through November 15, 2023, for which indemnity is payable at a rate subject to proof, to be adjusted by and between the parties, with the Board reserving jurisdiction in the event of a dispute; (8) the injury caused permanent disability of 95%, warranting indemnity of 833.25 weeks at the rate of $290.00 per week, in the total sum of $241,642.50, followed by a life pension, less credit for sums paid if any, with permanent disability awarded less credit for any sums paid, and an attorney fee equal to 15% of the gross permanent disability plus 15% of the present value of the life pension is to be calculated by the Disability Evaluation Unit (DEU) and commuted from the side of the award of both permanent disability and life pension benefits; (9) the injury will require further medical treatment; (10) applicant may be entitled to reimbursement for self-procured medical treatment, in an amount subject to proof; (11) applicant's claim is not barred by the statute of limitations; the date of injury of the cumulative injury is June 7, 2023, based on section 5412; (12) applicant's claim is not barred by the post-termination defense, also based on the date of injury of the cumulative injury of June 7, 2023, which is after the date of applicant's termination; (13) the reports of Gabriel Rubanenko, M.D., are found to constitute substantial medical evidence on the issues of injury, temporary disability,

date of maximal medical improvement, permanent disability based on whole person impairment using the AMA Guides, apportionment, and need for further medical treatment; and (14) the cases of *Western Growers* and *Konstantin* are inapplicable to this case.

DISCUSSION

I.

Former section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b) (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
>
> (2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was not transmitted to the Appeals Board until August 25, 2025 following the Petition for Reconsideration, and 60 days from the date of transmission is Friday, October 24, 2025. This decision is issued by or on Friday, October 24, 2025, so that we have timely acted on the Petition for Reconsideration as required by section 5909(a).

Section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report and Recommendation of Workers' Compensation Administrative Law Judge on Petition for Reconsideration, the Report was served on August 25, 2025, and the case was transmitted to the Appeals Board on August 25, 2025. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by section 5909(b)(1) because service of the Report in compliance with section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 25, 2025.

II.

Next, we turn to the merits of the Petition for Reconsideration, addressing each in turn.

(1) The petition contends that the application was precluded by the Statute of Limitations as defined by sections 5405 and 5412.

Section 5405 provides a one-year statute of limitations for filing an application for adjudication of claim with the Workers' Compensation Appeals Board, as follows:

> The period within which proceedings may be commenced for the collection of the benefits provided by Article 2 (commencing with Section 4600) or Article 3 (commencing with Section 4650), or both, of Chapter 2 of Part 2 is one year from any of the following:
>
> (a) The date of injury.
>
> (b) The expiration of any period covered by payment under Article 3 (commencing with Section 4650) of Chapter 2 of Part 2.
>
> (c) The last date on which any benefits provided for in Article 2 (commencing with Section 4600) of Chapter 2 of Part 2 were furnished.

(Lab. Code, § 5405.)

The present case is not barred by the statute of limitations in section 5405, because the application was filed within one year of the date of injury, as defined by section 5412.

Under section 5412, the date of injury in a cumulative trauma case is "that date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment." (Lab. Code, § 5412.)

As held by the Second District Court of Appeal in the case of *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.* (*Rodarte*) (2004) 119 Cal.App.4th 998 [69 Cal.Comp.Cases 579],

only compensable temporary disability or permanent disability can satisfy the requirements of section 5412. Medical treatment alone is not disability, although it may be evidence of compensable permanent disability, which may require expert medical opinion to establish (*Rodarte*, *supra*, 119 Cal.App.4th at pp. 1005-1006). In the present case, there was no proof that applicant had actual knowledge of compensable temporary or permanent disability that was caused by a cumulative work injury before this was alleged in her claim form and application for adjudication after being advised by her attorneys and further explained to her by Dr. Rubanenko. Even though the trial testimony of defense witness Ms. Perez suggested that applicant ought to know what a cumulative injury is, that alone is not sufficient proof that applicant had either actual or constructive knowledge that she had sustained a cumulative injury, and that it was causing compensable disability as required under *Rodarte*. To know this, even constructively, requires legal and medical expertise beyond the skills imparted by applicant's restaurant management training and safety committee meetings at Sizzler, and beyond that suggested by applicant's testimony at trial.

Applicant confirmed this in her testimony, which the WCJ summarized as follows:

> Applicant doesn't know what kind of injury she sustained at Sizzler. She didn't know what a cumulative trauma was until she saw Dr. Rubanenko. This agrees that this was maybe around June 7, 2023. She doesn't recall the exact date. Dr. Rubanenko was the primary treating physician for a workers' compensation case.
>
> Dr. Rubanenko explained to Applicant that there are several injuries to her body, which formed through years of working and doing the kind of job she was doing for Sizzler.

(MOH dated February 13, 2025, page 5, lines 15-19.)

The mere experience of symptoms, or experience with a prior specific injury, does not rise to the level of knowledge, actual or constructive, required under section 5412 as explained in *Rodarte*, *supra*. Medical, or at least legal, expert assistance is required.

Thus, the date of injury under section 5412 was correctly found by the WCJ to be June 7, 2023, the date when Dr. Rubanenko first explained to applicant that she had sustained a cumulative injury in addition to her specific injury of June 2020. The application herein is dated November 6, 2022, which is in fact *before* the date of injury under section 5412.

(2) The petition contends that the claim was barred by a post-termination defense.

The post-termination defense is set forth in section 3600(a)(10):

> Except for psychiatric injuries governed by subdivision (e) of Section 3208.3, where the claim for compensation is filed after notice of termination or layoff, including voluntary layoff, and the claim is for an injury occurring prior to the time of notice of termination or layoff, no compensation shall be paid unless the employee demonstrates by a preponderance of the evidence that one or more of the following conditions apply:
>
> (A) The employer has notice of the injury, as provided under Chapter 2 (commencing with Section 5400), prior to the notice of termination or layoff.
>
> (B) The employee's medical records, existing prior to the notice of termination or layoff, contain evidence of the injury.
>
> (C) The date of injury, as specified in Section 5411, is subsequent to the date of the notice of termination or layoff, but prior to the effective date of the termination or layoff.
>
> (D) The date of injury, as specified in Section 5412, is subsequent to the date of the notice of termination or layoff.

As explained above, the date of injury under section 5412 in this case is June 7, 2023. The date of termination is not clearly established by the evidence herein, but Lisa Perez testified that applicant was "let go when Sizzler closed the restaurant where she was working" and that applicant was no longer an employee of Sizzler by May, 2021. (MOH dated February 18, 2025, page 3, line 25, and page 4, lines 1-2.) Because the date of injury under section 5412 is after May, 2021, the date of termination, the post-termination defense does not apply to bar the claim under section 3600(a)(10)(D).

(3) The petition contends that the reports of Dr. Rubanenko do not constitute substantial medical evidence

As explained by the WCJ in his February 27, 2025 Opinion on Decision:

> The Workers' Compensation Appeals Board (WCAB) has held, en banc, that "it is well established that any decision of the WCAB must be supported by substantial evidence." (*Escobedo v. Marshalls* (2007) 70 Cal. Comp. Cases 604, 620, citing Labor Code §5952(d), *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal. Comp. Cases 310], *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal. Comp. Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal. Comp. Cases 16].) "In this regard, it has been long established that, in order to constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability." (*Escobedo*, cited above, 70 Cal. Comp. Cases

604, 620, citing *McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413, 416-417, 419 [33 Cal. Comp. Cases 660], *Travelers Ins. Co. v. Industrial Acc. Com. (Odello)* (1949) 33 Cal.2d 685, 687-688 [14 Cal. Comp. Cases 54], *Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal. App.4th 1692, 1700-1702, 1705 [58 Cal. Comp. Cases 313].) "Also, a medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls*, cited above, 70 Cal. Comp. Cases 604, 620, citing *Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal. Comp. Cases 93]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal. Comp. Cases 525]; *Zemke v. Workmen's Comp. Appeals Bd.*, supra, 68 Cal.2d at p. 798.) "Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (Escobedo, cited above, 70 Cal. Comp. Cases 604, 621, citing *Granado v. Workers' Comp. Appeals Bd*. (1970) 69 Cal. 2d 399, 407 (a mere legal conclusion does not furnish a basis for a finding), *Zemke v. Workmen's Comp. Appeals Bd*., supra, 68 Cal.2d at pp. 799, 800- 801 (an opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence), and *People v. Bassett* (1968) 69 Cal.2d 122, 141, 144 (the chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion, and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based).)

So, *Escobedo* summarizes a half-century of jurisprudence on the issue of what constitutes substantial medical evidence as follows: a doctor's report must provide reasoning, not merely conclusions, that are based on relevant facts, an adequate history and examination, correct legal theories, and based on reasonable medical probability, not guesswork. Under Article XIV, Section 4 of the California State Constitution, the workers' compensation system is intended to operate 23 "without incumbrance," so the requirements of substantial evidence are not intended to create insurmountable hurdles, nor is the standard of reasonable medical probability intended to be misconstrued as requiring certitude.

In this case, Dr. Rubanenko did provide reasons for his conclusions, including a discussion of each percentage of whole person impairment that he assigned using the AMA Guides to the Evaluation of Permanent Impairment Fifth Edition. He supported his finding of injury and body parts affected with clinical data from what appears to be an adequate examination and history of job duties. Dr. Rubanenko's findings make more sense than those of Dr. Hekmat in light of the job duties and symptoms credibly described by applicant a trial. Dr. Rubananko provides more than a mere scintilla of support in facts and reasoning for his conclusions, and his reports provide "relevant evidence as a reasonable mind might accept as adequate to support a conclusion" because

> they appear to be reasonable in nature, credible, and of solid value (*Braewood Convalescent Hospital v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 159, 164, citing *Ins. Co. of North America v. Workers' Comp. Appeals Bd.* (1981) 122 Cal. App. 3d 905, 910).

As explained by the WCJ, Dr. Rubanenko provided sufficiently substantial medical evidence to form the basis for a decision, and his reporting was more persuasive than the opinions of Dr. Hekmat.

While defendant's Petition specifically takes issue with the fact that Dr. Rubanenko did not evaluate applicant until nearly three years after her injurious exposure at work, there is simply no legal authority for the proposition that a valid forensic medical-legal analysis cannot be conducted 35 months or more after the mechanism of injury, as it was in this case. It appears that the Dr. Rubanenko's understanding about applicant's job duties was correct, as confirmed by applicant's testimony. The WCJ's reliance upon applicant's testimony as a credible source of evidence is entitled to great weight because he had the opportunity to observe the demeanor of the witnesses at trial. (*Garza, supra*, 3 Cal.3d at pp. 318-319.) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's determinations. (*Id*.)

With respect to the argument that Dr. Rubanenko's opinions lack substantiality because he failed to find overlap between applicant's present disability and her prior injury, we note that a compromise and release is not an award, and even if it were, defendants have the burden of proof to show overlap. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In this case, defendant failed to produce any substantial evidence of overlap, and non-overlapping body parts, specifically the knees, that was sufficient to overcome the finding of permanent, total disability.

III.

Turning to applicant's contentions, we agree that there is a clerical error in the decision, as pointed out in applicant's Petition for an amended decision, which as noted above, we treat as a timely filed Petition for Reconsideration. In addition to a request for correction of a mathematical error in calculation, applicant's Answer supplements the Petition for Reconsideration of the F&A, and we grant the relief requested for the reasons explained herein.

We also remind the parties 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 reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. [Citations.]" (*Pasquotto v. Hayward Lumber* (2006) 71 Cal.Comp.Cases 223, 229, fn. 7 [App. Bd. en banc].)

In this case, the WCJ adjusted Dr. Rubanenko's impairment percentages under the current rating schedule using an incorrect age. Based on applicant's stipulated date of birth, she was 59 years of age on her last day of work, or 61 years of age on the date of injury that was found under section 5412. Either of these warrants the same increase under the age adjustment table at pages 6-1 ff. in the 2005 Permanent Disability Rating Schedule (PDRS). The rating strings in the WCJ's February 27, 2025 Opinion on Decision assumed an age of 37 to 41 instead of the correct age range of 57 to 61. The result was a miscalculation of the permanent disability rating based on the evidence and reasoning otherwise set forth in the decision. Corrected rating strings, showing adjustments of impairment percentages under both section 4660.1 and the schedule, are as follows:

15.02.01.00-6-[x1.4]8-322F-8-20% PD, thoracic spine
15.03.01.00-11-[x 1.4]15-322F-25-31% PD, lumbar spine
16.02.01.00-4-[x.1.4]6-322F-6-8% PD, right shoulder
16.02.01.00-4-[x.1.4]6-322F-6-8% PD, left shoulder
16.03.02.00-6-[x1.4]8-322G-9-12% PD, right elbow
16.03.02.00-7-[x1.4]10-322G-12-15% PD, left elbow
16.04.02.00-6-[x1.4]8-322G-9-12% PD, right wrist
16.04.02.00-6-[x1.4]8-322G-9-12% PD, left wrist
17.05.10.08-30-[x1.4]42-322F-42-50% PD, right knee
17.05.10.08-30-[x1.4]42-322F-42-50% PD, left knee
17.07.04.00-4-[x1.4]6-322F-6-8% PD, right ankle
17.07.04.00-4-[x1.4]6-322F-6-8% PD, left ankle
17.01.04.00-5-[x1.4]7-322F-7-9% PD, right foot

17.01.04.00-5-[x1.4]7-322F-7-9% PD, left foot

As already explained in the Opinion, a 3% Whole Person Impairment (WPI) pain add-on under Chapter 18 of the AMA Guides was added to 8% WPI for Lumbar DRE Class 2 under Table 15-3, for a total of 11% WPI total of the lumbar spine. Also, 2% WPI for the right foot (medial plantar nerve) was added under Table 17-37 (i.e., 5% WPI total of the right foot), and 2% WPI for the left foot (medial plantar nerve) under Table 17-37 (i.e., 5% WPI total of the left foot). All of the other WPI percentages are the same as those set forth in Dr. Rubanenko's reports.

The Appeals Board's en banc decision in *Vigil v. County of Kern*, 89 Cal.Comp.Cases 686, 688-689, held that the Combined Values Chart (CVC) in the current PDRS may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either (a) there is no overlap between the effects on ADLs as between the body parts rated, or (b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs. Both PTP Dr. Rubanenko and PQME Dr. Hekmat issued supplemental reports addressing how the holding in *Vigil* might apply to the present case. (Exhibit 1, Report of Dr. Rubanenko dated October 14, 2024, pages 13-15; Exhibit E, Report of Dr. Hekmat dated January 16, 2025, pages 11-12). Surprisingly, while the PTP and PQME have markedly different opinions about which parts of the body were cumulatively injured on an industrial basis, they agree that body parts have overlapping effects on ADLs, but opposite and corresponding members amplify each other's ADL impact, and accordingly the impairments—or, more precisely, the permanent disability derived from these impairments after adjustment under the PDRS—should be added instead of being combined on the CVC. Dr. Hekmat found this to be true with respect to the left and right wrists; Dr. Rubanenko applied this reasoning to the left and right shoulders, elbows, wrists, knees, and ankles.

Accordingly, adding opposite and corresponding shoulders, elbows, wrists, knees, ankles, and feet per *Vigil*, then combining upper extremities and lower extremities, yields 100 percent permanent disability. All rating strings need not be combined, as addition of 50 percent for each knee already yields 100 percent. Absent any substantial evidence of causation of permanent disability of the knees other than by industrial cumulative trauma, applicant is entitled to an unapportioned award of permanent, total disability.

We also note that the WCJ failed to fully address the submitted issue of earnings, with applicant claiming $1,272.03 per week based on the Compromise and Release for the June 28,

2020 date of injury. There, the same parties agreed that applicant's earnings were $1,272.03 as of June 28, 2020. That amount should have been applied to the F&A herein, and defendants, who are the same in the prior and present case, should be estopped from asserting otherwise. Two-thirds of this amount produces a temporary or permanent disability rate of $848.20 per week, in accordance with section 4653. This same amount is also the initial rate payable for permanent total disability indemnity, subject to annual increases every January 1 by a percentage commensurate with any increase in the State Average Weekly Wage (SAWW) during the previous year, as directed by section 4659(b).

Accordingly, we deny defendant's Petition for Reconsideration, we grant applicant's Petition for Reconsideration, and we affirm the F&A, except that we amend Finding of Fact #3 to find that applicant's earnings were $1,272.03 per week, producing a rate of $848.20 per week; amend Finding of Fact #7 and paragraph a of the Award to find that applicant's injury caused temporary disability from June 7, 2023 through November 15, 2023, for which indemnity is payable at the rate of $848.02; and Finding of Fact #8 and paragraph b of the Award to reflect that the correct percentage of permanent disability is 100 percent, not 95 percent, based upon the record submitted at trial.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the F&A issued on February 27, 2025 is **DENIED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the F&A issued on February 27, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of February 27, 2025 are **AFFIRMED, EXCEPT** that Findings of Fact #3, #7, and #8 and Award, paragraphs a and b are **AMENDED** to read as follows:

* * *

3. At the time of injury, the earnings were $1,272.03 per week, yielding a temporary and permanent total disability rate of $848.20 per week.

* * *

7. The injury caused temporary disability from June 7, 2023 through November 15, 2023, for which indemnity is payable at the rate of $848.02 to be

adjusted by and between the parties, with the Board reserving jurisdiction in the event of a dispute.

8. The injury caused permanent disability of 100%, with indemnity commencing November 15, 2023 at the initial rate of $848.02 per week, to be increased every January 1 by a percentage commensurate with any increase in the State Average Weekly Wage during the year prior, in accordance with Labor Code section 4659(b), less credit for any sums paid, and less reasonable attorney fees in the amount of 15% of the present value of accrued and future permanent disability indemnity, with the amount of the fee to be calculated and commuted from the side of the award of permanent disability by the Disability Evaluation Unit and paid to applicant's counsel of record, Glauber Berenson Vego, LLP.

* * *

AWARD

AWARD IS MADE in favor of **NIDYA GONZALEZ** against **SIZZLER USA ACQUISITION, INC.** and **PREFERRED EMPLOYERS INSURANCE COMPANY** of:

a. temporary disability from June 7, 2023 through November 15, 2023, for which indemnity is payable at a rate of $848.20 per week, less credit for any sums paid, and less an attorney fee equal to 15% of net retroactive temporary disability indemnity due, payable to applicant's counsel of record, Glauber Berenson Vego, LLP;

b. permanent disability of 100%, warranting indemnity commencing November 15, 2023, payable in accordance with Labor Code section 4659(b) at a rate subject to proof, to be adjusted by and between the parties, with the Board reserving jurisdiction in the event of a dispute, less credit for any sums paid, and less reasonable attorney fees in the amount of 15% of the present value of accrued and future permanent disability indemnity, with fees to be commuted from the side of the award of permanent disability and paid to applicant's counsel of record, Glauber Berenson Vego, LLP;

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 24, 2025

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

NIDYA GONZALEZ
GLAUBER BERENSON VEGO, LLP
CW LAW, LLP

CWF/*cs*

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