

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

JOHN ALARCON, *Applicant*

vs.

**CUSTOM BUILDING PRODUCTS; CIGA for FREMONT INDEMNITY COMPANY, in
liquidation, administered by SEDGWICK CMS, *Defendants***

**Adjudication Number: ADJ2235268 (MON 0213209)
Marina del Rey District Office**

**OPINION AND ORDERS
GRANTING PETITIONS
FOR RECONSIDERATION
AND DECISION
AFTER RECONSIDERATION**

Applicant and defendant each seek reconsideration of the “Findings and Award” (F&A) issued on March 9, 2026, by the workers’ compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained an industrial cumulative injury through the period ending on November 8, 1993, to his lower back, bilateral knees, and psyche. The WCJ found applicant’s internal injury in the form of internal non-industrial. The WCJ further found that applicant was entitled to temporary disability for the period of May 25, 2010 to present. The WCJ found that applicant’s injury caused permanent partial disability of 94.50%, without apportionment and awarded permanent disability accordingly.

Applicant contends that the WCJ erred because injury in the form of internal and in the form of incontinence were caused by his industrial injury and that the reporting of applicant’s vocational expert establishes permanent total disability.

Defendant contends that liability for payment of temporary disability benefits should have ceased when applicant was declared permanent and stationary in 2011. Defendant also argues that the apportionment opinions of the agreed medical evaluators (AMEs) constitute substantial medical evidence and should have been followed.

We have received Answers from both applicant and defendant. The WCJ filed two Report and Recommendations on Petition for Reconsideration (Reports), recommending that we grant both petitions for reconsideration and find that applicant's incontinence is industrial, issue an award of 100% permanent total disability, and award defendant a credit for overpayment of temporary disability benefits against permanent total disability due.

We have considered the allegations of the Petitions for Reconsideration, the Answers, and the contents of the WCJ's Reports. Based on our review of the record we will grant both applicant and defendant's Petitions for Reconsideration and as our Decision After Reconsideration, we will rescind the March 9, 2026 F&A, and return this matter to the trial level for further proceedings.

FACTS

Per the WCJ's Report:

Applicant was employed during the period of 11/8/1984 through 11/8/1993 as a forklift operator for Custom Building Products and sustained injury arising out of and in the course of employment to his lower back, bilateral knees, internal, and psyche. At the time of the injury, the employer's workers' compensation carrier was CIGA by its servicing facility Sedgwick for Fremont in liquidation.

In April 15, 1997, Judge Rentzer issued a Stipulation and Award for [34:3]% PD for the back. On January 31, 2025, Judge Goldstein issued a Finding and Award for temporary disability payable at the rate of \$370.29 per week payable beginning 12/2/98 to the present and continuing. Applicant timely filed a Petition to Reopen on October 21, 1998.

(WCJ's Report, May 12, 2026, p. 1-2.)

This matter proceeded to trial upon multiple issues, including new and further disability, permanent disability, and temporary disability with applicant claiming continued temporary disability due to defendant's failure to file a petition to terminate a prior award of temporary disability. (Minutes of Hearing and Summary of Evidence, March 6, 2025, p. 2, line 22, through p. 3, line 10.)

Although the WCJ made a finding of fact that applicant did not sustain industrial injury to internal systems, the parties stipulated at trial that internal injury was industrial. (*Id.* at p. 2, lines 4-7.)

DISCUSSION

I.

Former Labor Code section 5909¹ 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.

(§ 5909.)

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 transmitted to the Appeals Board on May 12, 2026, and 60 days from the date of transmission is Saturday, July 11, 2026, which by operation of law means this decision is due by Monday, July 13, 2026. (Cal. Code Regs., tit. 8, § 10600.) This decision is issued by or on July 13, 2026, so that we have timely acted on the Petitions 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

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

act on a petition. Section 5909(b)(2) provides that service of the Report and Recommendation shall be notice of transmission.

According to the proof of service, the Report was served on May 12, 2026. The case was transmitted to the Appeals Board on May 12, 2026. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Accordingly, the parties were provided with the notice of transmission date required by section 5909(b)(1) as to commencement of the 60-day period on May 12, 2026.

II.

A.

We first note that there are 20 days allowed within which to file a petition for reconsideration from a “final” decision that has been served by mail, which is extended by 10 days if one of the persons served is outside of the State of California. (§§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10605(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.) To be timely, however, a petition for reconsideration must be filed with (i.e., received by) the WCAB within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10940(a), 10615(b).)

This time limit is jurisdictional and, therefore, the Appeals Board has no authority to consider or act upon an untimely petition for reconsideration. (*Maranian v. Workers’ Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v. Workers’ Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008]; *U.S. Pipe & Foundry Co. v. I.A.C. (Hinojoza)* (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73].)

Here, the WCJ’s decision was served on March 9, 2026, and one person served is located in Las Vegas, Nevada, and one person served is located in Burgaw, North Carolina. Applicant’s Petition was filed on April 6, 2026, which is less than 30 days after the service of the WCJ’s March 9, 2026 decision. Consequently, applicant’s Petition for Reconsideration is timely filed.

We now turn to the contentions in applicant’s Petition for Reconsideration.

On April 15, 1997, a WCJ issued an Award pursuant to the parties’ Stipulations with Request for Award. They stipulated that applicant sustained 34.3% permanent disability. Thus, the 1997 Permanent Disability Rating Schedule applies. (See § 4658(b), (d)(4).)

On January 31, 2005, a WCJ issued a Findings, Award and Order that applicant sustained injury to his back, knees, psyche, and internal and that applicant was entitled to temporary disability from December 3, 1998 and continuing.

In applicant's Petition, he contends in pertinent part that his injury to his spine caused his injury in the form of incontinence, and the incontinence renders him 100% permanently and totally disabled. In her Report, the WCJ agrees.

Further, as stated in applicant's Petition:

Although formal work restrictions may rate less than 100% disability, the California Supreme Court held that the inability to compete in an open labor market may result in Permanent Total Disability. *LeBoeuf vs. WCAB*, 34 CA 3rd 234, 4 CCC 587 (1983). In *LeBoeuf*, the Supreme Court recognized that a Permanent Disability rating should reflect the employee's diminished ability to compete in the open labor market. The court held that an injured worker's inability to retrain for any type of work rendered the worker 100% permanently and totally disabled, despite the formal rating being 60%.

Thus, applicant contends that:

Under this reasoning, even though neither AME specifically stated in their reports that the applicant was Permanently and Totally Disabled, by itself, is not dispositive of the possibility that the applicant is Permanently and Totally Disabled. Applicant's Vocational Expert Report clearly demonstrates that the applicant is Permanently Totally Disabled. As discussed above, Mr. Corso opined in his October 26, 2018, report that the applicant was incapable of performing part-time work, let alone full-time work in the open labor market.

In her Report, the WCJ agrees with applicant's contention that the medical and vocational evidence support that applicant is 100% totally and permanently disabled.

Decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) An adequate and complete record is necessary to understand the basis for the WCJ's decision. (Lab. Code, § 5313; see also Cal. Code Regs., tit. 8, § 10787.) The WCJ's decision must "set[] forth clearly and concisely the reasons for the decision made on each issue, and the evidence relied on," so that "the parties, and the Board if reconsideration is sought, [can] ascertain the basis for the decision[.] . . . For the opinion on decision to be meaningful, the WCJ

must refer with specificity to an adequate and completely developed record.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal. 2d 753, 755 [33 Cal.Comp.Cases 350]).)

It appears that the WCJ’s conclusion that applicant is 100% totally and permanently disabled is likely correct. However, the WCJ’s discussion in her Report is cursory, and her opinion does not comply with *Hamilton*. Thus, we will rescind the F&A and return the matter to her for a complete opinion.

B.

In its Petition, defendant contends that the WCJ’s conclusion that it had not met its burden on apportionment is incorrect because the AMEs’ conclusions as to apportionment are based on substantial evidence and that applicant’s vocational expert improperly disregarded the apportionment opinions of the AMEs.

It has long been established the burden of proving apportionment of permanent disability falls on the employer because it is the employer that benefits from apportionment. (*Kopping v. Workers’ Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc).)

The law of apportionment was explained in the en banc decision *Nunes I*:

The California worker’s compensation system requires that, “[e]mployers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. ‘Apportionment is the process employed by the Board to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.’” (*Brodie v. Workers’ Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 Cal.Comp.Cases 565], quoting *Ashley v. Workers’ Comp. Appeals Bd.* (1995) 37 Cal.App.4th 320, 326 [43 Cal. Rptr. 2d 589, 60 Cal.Comp.Cases 683].)

Section 4663(c) provides, in relevant part:

(c) In order for a physician’s report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and

occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.

(Lab. Code, § 4663(c).)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*), we explained:

Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting physician and the WCAB must make determinations of what percentage of the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.

(*Id.* at p. 607.)

Accordingly, section 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use. (Lab. Code, § 4663(c); *Escobedo, supra*, at pp. 607, 611–612.) Apportionment must account for “other factors both before and subsequent to the industrial injury,” and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions. (*Ibid.*)

(*Nunes v. State of California, Dept. of Motor Vehicles (Nunes I)*, (2023) 88 Cal.Comp.Cases 741, 748-749 (Appeals Board en banc).)

Nunes I further held that section 4663 requires a **reporting physician** to make medical determinations in a case, including determinations on the issue of apportionment. The Appeals Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but that a vocational evaluator may not opine on issues that require expert medical evidence. The Appeals Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] (“*Nunes II*”). In sum, a vocational expert is not a medical expert and cannot opine on matters outside their expertise.

In the WCJ's Report, she concludes that defendant did not meet its burden to show that apportionment was appropriate.

AME Berman and AME Gilberg discuss apportionment, but it is not proper apportionment. Apportionment must discuss the nature of any non-industrial condition, nature of how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for the percentage given. (Emphasis added). AME Berman's and AME apportionment are not substantial medical evidence.

...

AME Dr. Berman fails to discuss the cause of applicant's obesity. He does not provide the **reasoning** behind his conclusions on apportionment. AME Dr. Gilberg opinion on apportionment is based both on Dr. Berman's opinions on apportionment as well as applicant's so-called personal stressors. Dr. Berman and Dr. Gilberg do not focus on the **reasoning behind their conclusions**. Dr. Berman and Dr. Gilbert come to conclusions on applicant without explaining **how and why**. Defendants have not met their burden to prove apportionment as required under **Escobedo**.

We agree with the WCJ that defendant likely did not meet its burden. However, again the WCJ has not provided a sufficient explanation. Moreover, she fails to address defendant's contention that applicant's vocational expert did not sufficiently consider the apportionment determinations by the AMEs. Thus, upon return, the WCJ's opinion should follow the guidance provided in *Hamilton* and its progeny.

Finally, defendant contends that it is entitled to a credit as applicant's temporary disability indemnity benefits should have ended no later than the date the WCJ found applicant permanent and stationary in 2011, "if not sooner." As we are rescinding the decision, once the WCJ makes a determination as to applicant's permanent disability, she may consider the issue of a credit in the first instance.

Accordingly, we grant both applicant's and defendant's Petitions for Reconsideration and as our Decision After Reconsideration, we rescind the March 9, 2026 F&A and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings and Award issued on March 9, 2026, by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED that defendant's Petition for Reconsideration of the Findings and Award issued on March 9, 2026, by the WCJ is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings and Award issued on March 9, 2026, by the WCJ is **RESCINDED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 13, 2026

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

**JOHN ALARCON
ROSE, KLEIN & MARIAS
KEYES KIRKORIAN
GUILFORD SARVAS
DAVID SUTOR**

EDL/mt

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