WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

WILLK MARILAO, *Applicant*

vs.

CITY OF SHAFTER, permissibly self-insured, *Defendant*

Adjudication Numbers: ADJ10798774 (Master File); ADJ10798775
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the Joint Findings of Fact and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found in pertinent part in ADJ10798775 that applicant sustained industrial injury to his bilateral upper extremities, bilateral wrists in the form of a carpal tunnel syndrome, right elbow, and bilateral hands and fingers while employed by defendant on August 27, 2015; and that applicant sustained 64% permanent partial disability after apportionment. The WCJ found in pertinent part in ADJ10798774 that applicant sustained industrial injury to his bilateral lower extremities, knees, ankles and feet, while employed by defendant on March 5, 2017; and that applicant sustained 23% permanent partial disability after apportionment.

Applicant contends that in ADJ10798775, the reporting of the vocational expert is substantial evidence to rebut the scheduled rating and that he is 100% permanently and totally disabled; and that in ADJ10798774, defendant did not meet its burden on apportionment.

We have received an Answer from defendant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

Subsequently, applicant requested permission to file and filed a Supplemental Brief, and we accept and consider the Supplemental Brief. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the allegations of the Petition for Reconsideration, the Answer and the Supplemental Brief, and the contents of the Report. Based on our review of the record, and for the reasons discussed below, we will grant the Petition, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this opinion. This is not a final decision on the merits of any issues raised in the Petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

FACTS

At trial, case numbers ADJ10798774 and ADJ10798775 were consolidated, with case number ADJ10798774 designated as the Master File. (Minutes of Hearing and Summary of Evidence of January 16, 2025, page 2, lines 3-10.)

The parties stipulated that in case number ADJ10798774, applicant, then 51 years of age, sustained a specific industrial injury to his bilateral wrists, in the form of carpal tunnel syndrome, and to his right elbow, and claims to have sustained injury to his bilateral hands and fingers on August 27, 2015, while employed as a police officer (Occupation Group 490) by defendant City of Shafter. (*Id.* at page 2, lines 24-28 and 38-40.)

The parties stipulated that in case number ADJ10798775, applicant, then 53 years of age, sustained a specific industrial injury to his bilateral lower extremities, particularly ankles, heels, and feet, on March 5, 2017, also while employed as a police officer by defendant. (*Id*. at page 2, lines 30-40.)

The issues that were ultimately submitted for decision were the extent of permanent disability "including claims for permanent total disability"; apportionment "including the issue of addition or combination of multiple impairments"; liability for self-procured medical treatment; the need for further medical treatment; attorney fees; and whether applicant's bilateral hands and fingers were injured on an industrial basis in case number ADJ10798774. (*Id*. at page 3, line 38 through page 4, line 11.)

To decide these issues, the WCJ was provided with medical reports and deposition testimony from two Qualified Medical Evaluators (QMEs): Steven Brourman, M.D., an orthopedic surgeon specializing in hand surgery, who addressed applicant's upper extremity injury in case number ADJ10798774, and Leslie Levy, D.P.M., a podiatrist, who addressed applicant's lower extremity injury in case number ADJ10798775.

Dr. Levy first examined applicant on November 3, 2017. In that report, Dr. Levy provides no meaningful analysis regarding causation of applicant's alleged specific injury to the bilateral lower extremities, stating only the conclusion that "[b]ased upon my evaluation and the medical records and the incident of the prolonged standing, I feel that his current complaints are mostly the result of the injury occurring on March 7, 2017." (Defendant's Exhibit D, Report of Leslie Levy, D.P.M., dated November 3, 2017, page 18, lines 1-4.) A description of that injury by applicant is provided earlier in the report: "on May 5, 2017, during a hostage barricade, his duties were to do perimeter security for an extended period of time, at least several hours and that is when his feet unfortunately started to give him extreme pain and made it untenable for him to walk and it was very painful for him to walk." (*Id*. at page 2, lines 1-7.)

Although Dr. Levy found that applicant was still temporarily totally disabled on November 3, 2017 (*Id*. at page 18, third paragraph), and gave no indication of what applicant's future level of permanent disability might be, he offered the following thoughts on apportionment:

> Yes, he had plantar fasciitis to begin with, from 2006. He was doing well with orthotics and that one incident and/or combination of incidents, but mostly the one straw that broke the camel's back was that incident in March 2017, where he had prolonged standing and walking which may or may not have been from shoe gear or his orthotics wearing out. However, it would still be an exacerbation of a pre-existing condition and he worked from 2006 to 2017, 11 years, almost his full career without having an incident from the plantar fasciitis and now it occurs.
>
> As far as the numbness due to his tarsal tunnel syndrome versus diabetes, it is most likely at least 90% would be for sure to his tarsal tunnel syndrome and only a 10% to his diabetes. However, this is a supposition on my part and that a nerve conduction study to rule out either the tarsal tunnel syndrome and/or diabetic neuropathy would be helpful…

(*Id*. at page 18, last paragraph to page 19, first paragraph.)

Dr. Levy's second report followed a reevaluation of applicant on June 29, 2018. In this report, Dr. Levy reviews records and reports, including Dr. Brourman's report of April 11, 2018. (Defendant's Exhibit C, Report of Leslie Levy, D.P.M., dated June 29, 2018, page 11, first three paragraphs.) Dr. Levy relates the same history of injury previously provided by the applicant, except that this time, "hostage barricade" was erroneously mistranscribed as "Ostrich Brigade," and Dr. Levy adds a note that applicant "has been previously treated prior to this date of injury for I believe almost as long as he has been with this police department." (*Id*. at page 2, last two paragraphs.) The report notes that applicant had been working as a police officer for the City of

Shafter for 13 years [since 2005] with job activities that include "[f]requent standing, occasional sitting, frequent bending, stooping, squatting, kneeling, reaching, hand work, intermittent climbing, occasional walking and pushing, intermittent pulling, occasional lifting, frequent driving, and frequent twisting" and he "has been doing this type of work 30 years." (*Id*. at page 4, penultimate paragraph.)

Dr. Levy's reevaluation report provides some more detail about applicant's work activities on the date of injury. Applicant "was standing in a control of a portion of an active crime scene, ran back and forth evacuating one witness and had to run back and forth keeping onlookers out of the danger zone. He did this constantly for four hours. This aggravated his tarsal tunnel syndrome, plantar fasciitis and heel spurs. He states his heels and ankles became swollen." (*Id*. page 4, last paragraph.)

The causation analysis in Dr. Levy's reevaluation report of June 29, 2018 expands upon the previous report's statement that "current complaints are mostly the result of the injury occurring on March 7, 2017":

> Based upon my evaluation of this examinee, my understanding of similar-like injuries, it is my medical opinion that this examinee's current complaints are mostly the result of his injuries occurring on March 5, 2017, in terms of exacerbation of the pre-existing diabetic neuropathy and plantar fasciitis and possibly mild tarsal tunnel syndrome at that time. This exacerbation, however, necessitated surgery and now he has residuals from the surgery and *this is specifically due to complications that are normal for this type of surgery*. However, as noted in his carpal tunnel release, he still had residuals and had poor nerve healing and had permanent nerve damage from his procedures and the same can be said for his lower extremity and therefore the corollary psychologically is sound. *So to restate this specifically is that he most likely had these pre-existing, however, due to the exacerbation at that onetime frame where he filed is because for nine years he was doing just fine within the full job description, however, after that timeframe where he exacerbated the problem, it is apparent that conservative care was not going to relieve or ameliorate his symptoms and that surgical intervention was medically necessary and now where at this point with the sequelae to that and residuals as stated.*

(*Id*. at page 19, first paragraph (italics in original).)

Dr. Levy finds in his report of June 29, 2018 that applicant was maximally medically improved at that time with respect to the lower extremities, but still temporarily totally disabled with respect to his upper extremity complaints. (*Id*. at page 19, last paragraph.) He provides Whole Person Impairment (WPI) percentages using the *AMA Guides to the Evaluation of Permanent*

Impairment, Fifth Edition (AMA Guides), but also employing the unusual method of assigning a 7% WPI to plantar fascial pain or heel spur pain, based on the fact that this is the percentage that was assessed by applicant Arthur Cannon's agreed medical evaluator (AME) in the case of *City of Sacramento v. Workers' Comp. Appeals Bd. (Cannon)* (2013) 222 Cal.App.4th 1360 [79 Cal.Comp.Cases 1]. (*Id.* at page 23, second paragraph.) Dr. Levy seems to misunderstand the manner in which WPI percentages are to be combined, and how the holding in *Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679] might apply to this case:

> Now looking at the combination tables, the muscle strength which cannot be combined with peripheral nerve, which can be combined with range of motion, so I have range of motion of 3, peripheral nerve of 8 which would be a 11% whole person impairment and then we have a plantar fasciitis of 7% which could easily be combined. We go to the combined values chart and we take 11 plus 7, we get 14%[1] whole person impairment that would be done the normal way. Now to do a Hikida carve-out, we separate them out again, we have the nerve of 8, we have the range of motion 3, and we have the plantar fascial of 7, if we take the 8% and take that out and make that separate as (Hikida) 100%. We now add the 3 and 7 which gives us 10. We take half of that (fifty percent apportionment) which is 5. We now add from the combined values chart (page 603) 8 and 5, which gives us a total of 10%[2] whole person impairment for this examinee.

(*Id*. at page 23, last paragraph.)

In the same report, but before his WPI analysis, Dr. Levy offers the following discussion of apportionment:

> … I would have to apportion at least some to his diabetic condition as noted in his upper extremities and trying to see if he had nerve conduction studies for his lower extremity. They might be normal, however, even though normal, it does not preclude his diabetic neuropathy, but since he had his prior existing condition, we can apportion some of that to that as he previously had it, but remember that he was working the whole time and even though it is not a CT, but an individual specific injury claim, we could extrapolate that it might be a CT, but since it is a specific injury claim, we would call it an exacerbation of a preexisting condition and you can probably put that at some point with a percentage as he was wearing orthotics and was doing things, so I would probably apportion 50% just as somewhat arbitrary, however, if you know

[1] Dr. Levy is both incorrect in his decision to apply the combined values chart here, and incorrect in his reading of the chart. On the chart, if it were applicable and the numbers correctly determined, a combination of 11 and 7 would be 17.

[2] Again, the combined values chart is incorrectly applied as well as incorrectly read. On the chart, if it were applicable at this stage, and if the numbers had been correctly determined, a combination of 8 and 5 would be 13.

> anything about diabetes, it is progressive he only had diabetes last two years, but obviously has had issues with plantar fasciitis which is very common in police officers and well written up, almost presumptive in some cases.

(*Id*. at page 20, second paragraph.)

Dr. Levy concludes his second report by expressing doubts about the correctness of his methodology:

> I know there are a lot of different ways to do this. There are added, combined and, other adjudications methods. I have tried to do this as simple straight forward utilizing objective methodology. Obviously, if the parties do not agree with my methodology, I am more than happy to reconsider it with suggestions either from the rater or from a combined parties' letter, but to the best of my knowledge, at this point in time, this seems to be the most straight forward and objective way of approaching [applicant's] impairment rating. It is very hard to do this with the overlap, the En Banc bank decision, the exacerbation of preexisting issues in the absence of definitive objective testing that are always correct and not just 50% accurate, therefore, making it difficult to arrive at the most accurate impairment rating.

(*Id*. at page 24, first paragraph.)

On January 7, 2019, Dr. Levy issued a supplemental report. This report responds to a letter from defense counsel, asking specific questions that were recited in the report but not clearly answered by the doctor. The interrogatory asks Dr. Levy whether applicant's plantar fasciitis should be rated by analogy to table 17-5 regarding gait derangement, as the physician did in the case of *Cannon*, cited *supra*, and whether 7 percent whole person impairment is appropriate in this case. (Joint Exhibit B3, Report of Leslie Levy, D.P.M., dated January 7, 2019, page 18, lines 1-4.) The written interrogatory also requests that the doctor review and consider the case of *City of Petaluma v. Workers' Comp. Appeals Bd. (Lindh)* (2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869] with respect to its holding that apportionment must include previously asymptomatic non-industrial conditions that are presently causing permanent disability. (*Id*. at page 3, first paragraph.) The interrogatory further requests that Dr. Levy reconsider whether *Hikida*, cited *supra*, applies to this case, and if so, that the doctor identify a new condition solely caused by failed surgery like in the facts of the *Hikida* case.

Unfortunately, instead of answering these interrogatories directly, Dr. Levy copies the contents of a consultative rating, as well as the verbatim contents of the *Lindh* decision and provides quotes from those cases, as well as text apparently copied from "compensation editorials" written by former WCJ Raymond F. Correio. (*Id*. at page 11, first three paragraphs.) Content from

Dr. Levy's previous report is also repeated here, including the transcription error "Ostrich Brigade" (instead of hostage barricade). (*Id*. at page 13, line 2.) With inartful language, Dr. Levy attempts to further explain his apportionment opinion, which he admits is arbitrary and ultimately seems to be deferring:

> If you read my causation on page 19, it is starting mid paragraph, start however, as noted in his carpal tunnel release, he still has residuals and had poor nerve healing and had permanent nerve damage from his procedure and the same can be said for his lower extremity and therefore the corollary physiologically is sound. So, to restate this specific is that he most likely had these pre-existing, however, due to the exacerbation at that onetime frame where he filed is because for nine years he was doing fine within the full job description, however, after that timeframe where he exacerbated the problem (his plantar fasciitis, tarsal tunnel syndrome) and it is apparent that conservative care was not going to relieve or ameliorate his symptoms and that surgical intervention was medically necessary and now we are at the point with the sequelae to that end and residuals as stated, so therefore the sequelae to the surgeries are what caused the percentage of his industrial related disability and that is why the pre-existing condition is not 100% apportioned, but 8% apportioned and we will get to that in a minute, so that is understood. So the subsequent nerve issues, plantar fascial issues are from the surgery sequelae, therefore industrial.
>
> The pre-existing condition the diabetic neuropathy and the plantar fasciitis are from non-industrial factors, which are not just genetic factors, but actually had disability prior to his stated date of injury or exacerbation of his previous injury. In terms of my apportionment, I stated on page 20 that since it is not a CT, I had to take him at that March 5th date what he was like before and then what he was like after and I made it a 50:50 arbitrarily, however he only had diabetes for two years, but he did have the plantar fasciitis even though asymptomatic for seven years and prior to that, but it was the extended work time that you know again lit up the pre-existing condition, however, since he required surgery to fix his tarsal tunnel and surgery to fix his heel spur and plantar fasciitis, the sequelae from that surgery, I will have to apportion that out because the Hikida case is they did not apportion any disability from that surgery, so we may have to realign some of the percentages and then the disability expert can plug them back into the formulas a little bit differently and may still wind up with the same number as there will be less apportionment on one and greater on another and it may equal out the same anyway, but it may be more correct or more specifically or technically correct, but may still be the same number in that regard.

(*Id*. at page 15, last two paragraphs.)

Not surprisingly, Dr. Levy's deposition was taken on June 14, 2019, seeking clarification. At deposition, Dr. Levy explained his assessments of WPI, noting that there was a complete lack of sensation in all five toes of the right foot and three toes of the left foot, with diminished sensation

in the remaining two toes of the left foot. (Joint Exhibit B3, Deposition Transcript of Leslie Levy, D.P.M., dated June 14, 2019, page 15, lines 14-19.) Dr. Levy then explained the limitations of his testing and the AMA Guides tables, and when asked whether he could assess impairment for sensory deficit with reasonable medical probability, he expressed his belief that he has about a 50 percent probability of being correct. (*Id*. at page 21, line 15 ("I'd go 50 percent.").)

Notwithstanding the fact that Dr. Levy did not himself assess injury or impairment to the upper extremities, at his deposition he seems to express a belief that applicant can no longer work as a peace officer, testifying, "I know he's in his 50's. I know that because of his hands he's not going to be a peace officer anymore. I don't know what he's going to do after, but I have to say that." (*Id*. at page 31, lines 9-12.)

Although it is not entirely clear, Dr. Levy seems to agree that a 15 percent WPI could be justified under AMA Guide Table 17-5 because applicant should be using an ankle brace and orthotics 75 percent of the time. (*Id*. at page 31, line 23 to page 32, line 5.) Alternatively, Dr. Levy agreed that if methods other than gait derangement are used to assess a strict rating, then it would be appropriate to add 1 percent WPI for a pronation restriction bilaterally using Table 17-12. (*Id*. at page 33, lines 13-19.)

Turning to the issue of apportionment, Dr. Levy admits that his apportionment of 50 percent to diabetes is arbitrary, based on a lack of nerve conduction studies, which in Dr. Levy's opinion are only 50 percent accurate, but "would tell me if [applicant] has a peripheral sensory neuropathy from his diabetes." (*Id*. at page 35, lines 6-21.)

Dr. Levy indicates that he would not apportion permanent disability arising out of range of motion impairments, due to a lack of evidence that applicant had any pre-existing impairment from any other cause. (*Id*. at page 38, line 16 to page 39, line 6.) On the other hand, Dr. Levy testifies that "there would have to be some apportionment" of gait derangement, based on the idea that diabetic neuropathy affects this, although he cannot identify any approximate percentage at the time of deposition. (*Id*. at page 39, line 7 to page 40, line 5.)

Upon further cross-examination, Dr. Levy makes the following comments about his understanding of apportionment:

> See, in one of my reports I said there's a lot of different ways to skin the cat, a lot of different ways to rate this. And I'm open to alternative ratings but by the rater because he takes or she takes from my report and does the math better.

> Okay? But there's all different permutations. And so what I chose to do, the most straightforward, most strict, and then apply the Almaraz-Guzman.
>
> So I try to get the best numbers to put together with only apportioning out piecemeal because, if you do the gait derangement one, now you have to add the knee in. The knee is not separate. See? And I'm only bringing up the knee because, when you choose that, remember the left extremity, lower extremity, as a whole is worth 40% if they cut it off here and it's gone.

(*Id*. at page 42, line 11 to page 43, line 1.)

On November 23, 2020, Dr. Levy issued a second supplemental report in response to another interrogatory with two questions, this time from applicant's counsel. The first question was a request for a time restriction on standing and walking, to which Dr. Levy indicates that unless there has been some improvement since his previous examination, applicant could stand two hours or less in an eight-hour day. (Joint Exhibit B2, Report of Leslie Levy, D.P.M., dated November 23, 2020, page 2, lines 10-19.) The second question, very closely related to the first, was how many hours or minutes applicant is able to stand and walk out of an eight-hours workday, and Dr. Levy provides the same answer, two hours, unless there has been some improvement. (*Id*. at page 2, lines 20-26.)

Dr. Levy issued two more supplemental reports, reviewing reports from the parties' vocational experts. Dr. Levy's report dated November 16, 2022 reviews an unspecified vocational expert report and expresses the opinion "I think it was very good, his specificness and his soundness of methodology." (Joint Exhibit B1, Leslie Levy, D.P.M., Report of November 16, 2022, page 3, paragraph 4, lines 1-2.) At the same time, Dr. Levy also suggests that there might be a part-time, semisedentary position that applicant could do, and that "possibly a Functional Capacity Assessment specific to his upper right extremity might be warranted and give the vocational rehabilitation person more insight." (*Id*. at page 3, paragraph 2, lines 1-2.)

Dr. Levy's report of February 21, 2023 reviews a vocational testing report dated June 9, 2022 and a vocational expert evaluation report dated July 15, 2022, both of them from Steven D. Koobatian, Ph.D. of Vocational Designs, Inc. According to Dr. Levy's summary, Dr. Koobatian concluded that "when solely considering the impact of the industrial injuries, [applicant] is amenable to rehabilitation services, and is employable in some light and sedentary occupations." (Defendant's Exhibit B, Report of Leslie Levy, D.P.M., dated February 21, 2023, page 6, lines 13-15.) Dr. Koobatian reiterates his clinical impressions: post tarsal tunnel release with residuals bilaterally; status post plantar fascia release bilaterally; sinus tarsi syndrome, right; ankle

instability, right; status heel spur syndrome, right; diabetic peripheral neuropathy, lower and upper, and status post carpal tunnel releases bilaterally. (*Id*. at page 7, paragraph 1, lines 5-8.) Dr. Levy opines that applicant could go up to four hours of standing and walking if allowed to alternate between 45 minutes of standing and 30 to 45 minutes of sitting, in equal amounts, "and I can say that with 51% probability from the statements off [*sic*] Mr. Willk Marilao." (*Id*. at page 7, paragraphs 2, lines 4-7, and paragraph 3, lines 4-8.) Dr. Levy concludes that he has "an affinity for helping and/or examining police officers" and "anything that I can do to help them return to work of any kind is an excellent goal." (*Id*. at page 9, paragraph 3, lines 2-4.)

Dr. Brourman, the QME in orthopedic surgery, examined applicant for his upper extremity injury in case number ADJ10798774. Dr. Brourman first examined applicant on March 14, 2018. That initial report defers any conclusions to a supplemental report following review of records and updated diagnostic testing, but notes the following description of applicant's job duties:

> In 2005, he began working for City of Shafter as a police officer.
>
> The job duties entailed wearing a uniform with Sam Browne belt that held his gun, baton, pepper spray, magazine and radio. In addition, he would wear a bulletproof vest. He states that his gear weighed about 30 pounds. He would drive a patrol vehicle, making traffic stops, responding to 911 emergency calls, subduing, restraining, and arresting suspects who could be disorderly, drunk, or uncooperative, performing search and seizure activities, writing citation[s] and reports, dealing with public disturbances and mediating disputes, seizing and handling evidence, conducting books procedures, searching for and chasing suspects over various terrain and obstacles, rendering emergency first aid or CPR and all aspects of communication with community service agencies. He would qualify for weapons every four months.
>
> The physical requirements consisted of prolonged sitting, standing or walking; frequent climbing over fences and obstacles; repetitive bending, stooping and squatting; repetitive twisting, pushing and reaching above and below shoulder level and waist level; repetitive arm and hand movement, simple and forceful grasping, torquing motions and fine finger manipulation. He lifted and carried over 200 pounds. He worked 12 hours per day, and he worked 3/12 schedule and four days off.

(Defendant's Exhibit A, Report of Steven Brourman, M.D., dated March 14, 2018, page 2, lines 11-26.)

The initial history of injury related by applicant to Dr. Brourman is as follows:

> Mr. Wil[l]k Marilao reports an injury on July 27, 2015, involving his hands, wrists, and fingers.

> He specifically reports in approximately 2006, he began to experience the onset of pain, numbness and tingling in wrists, hands and fingers. However, he did not know what was causing the symptoms.
>
> He sought medical care with personal physician, David Moore, M.D. located in Bakersfield. Medication for pain was prescribed. However, he did not recall if work was discussed.
>
> He sought medical care through his personal insurance and referred to Dr. Bowen for his hands. He underwent an EMG/NCV and told he [had] severe carpal tunnel syndrome of both hands.
>
> He worked regular duty through August 27, 2015, but with pain, numbness and tingling in his wrists, hands and fingers.
>
> On August 28, 2015, he underwent right carpal tunnel release performed by Dr. Bowen on an outpatient basis. He received postoperative physical therapy for the right hand.
>
> He states that after the surgery, Dr. Bowen began to discuss and asked if you would type, and details about his jaw booties. He was told the symptoms were work related and due to the repetitive arm movement at work.
>
> About one week later he filed a claim for his hands, which was accepted.

(*Id*. at page 3, lines 10-26.)

Dr. Brourman issued a supplemental report dated April 11, 2018. After reviewing records and diagnostic studies, Dr. Brourman concludes that "it is within a reasonable degree of medical probability that Mr. Marilao developed bilateral carpal tunnel syndrome and right ulnar neuropathy as a result of cumulative trauma while working as a police officer for City of Shafter." (Joint Exhibit A5, Report of Steven Brourman, M.D., dated April 11, 2018, page 2, lines 11-26.)

In his supplemental report, Dr. Brourman finds that applicant has reached maximal medical improvement for the bilateral upper extremities, with temporary total disability from August 28, 2015 through March 2016, but also noting that applicant "is presently off work for a separate claim involving his bilateral feet." (*Id.* at page 21, last paragraph, and page 22, paragraphs 2-4.) Dr. Brourman finds 20 percent WPI of the right upper extremity using Table 16-10 in the AMA Guides for ulnar neuropathy and median neuropathy, which he combines with grip weakness using an "Almaraz-Guzman" analysis (referring to *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837]), notwithstanding instructions to the contrary in the AMA Guides. (*Id*. at page 22, last three paragraphs, and page 23, paragraphs 1-2.) Dr. Brourman finds 14 percent WPI of the left upper extremity for median neuropathy and grip weakness, using the same approach as the right upper extremity. (*Id*. at page

23, paragraphs 4-6.) Dr. Brourman apportions 100 percent of the upper extremity disability to cumulative trauma. (*Id*. at page 26, paragraphs 4-6.) He also opines that upper extremity impairments should be combined on the combined values chart and not added, citing *East Bay Municipal Utility District v. Workers' Compensation Appeals Board (Kite)* (2013) 78 Cal.Comp.Cases 213 (writ den.). (*Id*. at page 25, paragraphs 1-3.)

On September 5, 2018, counsel for defendant took Dr. Brourman's deposition. At his deposition, Dr. Brourman confirmed and explained his diagnoses and opinions regarding impairment and apportionment, noting that he only uses grip loss as a basis for impairment in carpal tunnel cases where surgery has been performed, and that in applicant's case, the grip loss was a direct result of his carpal tunnel release surgery. (Joint Exhibit A4, Deposition Transcript of Steven Brourman, M.D., September 5, 2018, page 9, lines 9-10, and page 11, lines 10-21.)

Dr. Brourman issued a supplemental report dated December 3, 2020 in response to a written interrogatory from counsel for defendant. In that report, Dr. Brourman responds to a request for weight restrictions in pounds for the upper extremities by referring to his April 11, 2018 report, which indicated at page 25 that applicant should avoid heavy lifting and forceful grasping with over 20 pounds of force. To this, Dr. Brourman adds that applicant should also avoid lifting, gripping, grasping, pushing, pulling, squeezing, twisting or torquing of over 20 pounds with either hand, as well as forceful suspect contact that would require gripping and grasping, fine manipulative tasks, and "repetitive" gripping, grasping, pushing, pulling, squeezing, twisting and torquing for more than 45 minutes per hour. (Joint Exhibit A5, Report of Steven Brourman, M.D., dated April 11, 2018, page 25, last paragraph; Joint Exhibit A3, Report of Steven Brourman, M.D., dated December 3, 2020, page 2, paragraph 2.)

Dr. Brourman issued another supplemental report, dated October 5, 2022, responding to an interrogatory from applicant's counsel seeking clarification of work restrictions, and providing a vocational expert report of P. Steve Ramirez dated October 7, 2020. Dr. Brourman makes no comment on the vocational expert report, but offers his opinion that applicant should not be required to stand or walk for more than two hours per day, which could be extended to four hours if the applicant is feeling comfortable on a good day. (Joint Exhibit A2, Report of Steven Brourman, M.D., dated October 5, 2022, page 2, paragraph 2.) Dr. Brourman notes that applicant described being able to handle, grasp, and perform fingering activities for 10 to 15 minutes, after which he would stop and rest for 20 to 30 minutes. Dr. Brourman offers his opinion that gripping,

grasping and fine finger manipulation should be less than one-third of an eight-hour day, especially given the applicant's severe right carpal tunnel syndrome, severe right ulnar sensory neuropathy at the elbow, and mild left carpal tunnel syndrome. (*Id*. at page 2, paragraph 3.)

Dr. Brourman's last supplemental report is dated August 27, 2025. This report reviews Dr. Koobatian's June 9, 2022 vocational testing report and July 15, 2022 vocational evaluation. Dr. Brourman describes Dr. Koobatian's conclusions as "conceptually accurate, but also somewhat vague." (Joint Exhibit A1, Report of Steven Brourman, M.D., dated March 1, 2023, page 3, paragraph 3, lines 3-4.) Dr. Brourman concedes that applicant could be employable in an occupation that accommodates applicant's work restrictions, but also expresses concern that applicant's severe right carpal tunnel syndrome and severe right ulnar nerve entrapment neuropathy would have a significant impact on applicant's ability to maintain employment as a teacher. (*Id*. at page 3, paragraphs 4-5.)

The vocational experts reviewed the medical expert opinions of QMEs Dr. Levy and Dr. Brourman, as well as each other's reports. Applicant's vocational expert concludes that applicant "is 100% vocationally disabled, not amenable to rehabilitation, and has lost 100% of his earning capacity." (Applicant's Exhibit 1, Vocational Report of Steve Ramirez, dated August 5, 2024, page 7, paragraph 5.) Defendant's vocational expert concludes that "when solely considering the impact of the industrial injuries, Mr. Marilao is amenable to rehabilitation services, and is employable in selected accommodated occupations." (Defendant's Exhibit E, Vocational Rehabilitation Report of Steven Koobatian, Ph.D., dated February 9, 2024, page 20, paragraph 1.)

The WCJ issued Joint Findings and Awards dated April 7, 2025, which found a specific injury of August 27, 2015 to the upper extremities, including bilateral wrists in the form of carpal tunnel syndrome, right elbow, and bilateral hands and fingers, with an award of 64 percent permanent disability and further medical treatment, based on the unapportioned impairment percentages assessed by Dr. Brourman. The April 7, 2025 Joint Findings and Awards also found a specific injury of March 5, 2017 to the lower extremities, particularly knees, ankles, and feet, with an award of 23 percent permanent disability and further medical treatment, based on the impairment and apportionment opinions of Dr. Levy. The WCJ declined to find permanent, total disability because he found the vocational expert opinions of Dr. Koobatian to be more persuasive than those of Mr. Ramirez.

Applicant filed a timely but unverified Petition for Reconsideration dated April 29, 2025, contending that the Joint Findings and Award are without or in excess of the WCJ's powers and that the evidence does not justify the findings of fact because the apportionment opinions of Dr. Levy do not constitute substantial medical evidence, and because applicant is additionally entitled to an unapportioned 100 percent permanent disability award based on the vocational expert opinions of Mr. Ramirez.

Defendant responded to the Petition for Reconsideration with a timely, verified Answer dated May 5, 2025. Defendant's Answer contends that the WCJ acted within his powers, and that the evidence justifies the findings or fact, because the apportionment opinions of Dr. Levy do constitute substantial medical evidence, and the vocational expert opinions of Mr. Ramirez fail to rebut the scheduled ratings based on the medical opinions of Dr. Levy and Dr. Brourman. Defendant's Answer also points out that the petition for reconsideration was not verified as required by Labor Code section 5902 and WCAB Rule 10510(d) (Cal. Code Regs., tit. 8, § 10510(d)), and that Applicant's Exhibits 2, 3, and 4 were properly excluded by the WCJ as they were filed on January 30, 2025, which was 15 days after trial, and not 20 days in advance of trial as required by WCAB Rule 10620 (Cal. Code Regs., tit. 8, § 10620).

Applicant's counsel filed a May 12, 2025 petition to file a late verification (titled "Request to Consider Supplemental Legal Brief and Supplemental Legal Brief"), which included a verification of the April 29, 2025 Petition for Reconsideration.

DISCUSSION

I.

Former Labor Code 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, Labor Code 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 Labor Code 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 22, 2025, and 60 days from the date of transmission is Monday, July 21, 2025. This decision is issued by or on Monday, July 21, 2025, so that we have timely acted on the Petition as required by Labor Code section 5909(a).

Labor Code 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. Labor Code 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 by the workers' compensation administrative law judge, the Report was served on May 22, 2025, and the case was transmitted to the Appeals Board on May 22, 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 Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on May 22, 2025.

II.

As a preliminary matter, it appears that applicant's May 12, 2025 petition to file a late verification (titled "Request to Consider Supplemental Legal Brief and Supplemental Legal Brief") was not answered with any timely opposition after the date of the petition. Accordingly, we accept the Supplemental Brief, and the verification that was included with the petition is deemed to have been filed with the Petition for Reconsideration.

In granting the petition to file a later verification, we also note that while Labor Code section 5902 and WCAB Rules 10510(d) and 10940(c) (Cal. Code Regs., tit. 8, §§ 10510(d), 10940(c)) require verification of a petition for reconsideration, failure to verify a petition for

reconsideration is not a jurisdictional defect that mandates dismissal, and it is held generally that failure to verify a pleading is a defect which does not operate to deprive a court of jurisdiction to hear and determine the matter presented thereby. (*Mullane v. Industrial Acci. Com.* (1931) 118 Cal.App. 283, 286 [5 P.2d 483], citing *Security Trust & Sav. Bank* v. *Fidelity & Deposit Co.* (1920) 184 Cal. 173, 176; *Lucena v. Diablo Auto Body, Liberty Mut. Ins.* (2000) 65 Cal.Comp.Cases 1425, 1426, [Appeals Board Significant Panel Decision].) However, a petition for reconsideration may be dismissed if the petitioner fails to correct the defect or offer a valid reason for not doing so within a reasonable time after receiving notice of the lack of verification. (See *Lucena*, *supra*, 65 Cal.Comp.Cases at pp. 1426-1427.) In this case, applicant's counsel of record cured the defect within a reasonable time by filing a verification with a request for leave to file it on May 12, 2025, which is within one week of defendant's May 5, 2025 Answer to the Petition for Reconsideration, which constitutes notice of the defect.

Turning to the merits of the Petition for Reconsideration, it is correct in its assertion that the evidence in this case does not support the findings of fact regarding apportionment, but incorrect in its assumption that there is substantial medical evidence to support a finding of two specific injuries that are causing permanent disability.

We 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. Industrial Acc. Com. (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. Industrial Acc. Com. (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 [Appeals Board en banc].)

We also remind the parties that while the Appeals Board may make findings and awards based upon the stipulations of the parties, it may also reject stipulations for good cause and base its decision upon the evidence or order further investigation, hearing, and testimony as necessary. (Lab. Code, § 5702; *Turner Gas Co. v. Workmen's Comp. Appeals Bd.* (1975) 47 Cal.App.3d 286, 290 [40 Cal.Comp.Cases 253].) Moreover, WCAB Rule 10517 (Cal. Code Regs., tit. 8, § 10517) allows pleadings to be amended to "conform to proof," which means as relevant here, that even if

the parties stipulated that applicant sustained a specific injury, if substantial medical evidence supports that applicant sustained a cumulative injury, the WCJ or the Appeals Board can make such a finding.

In this case, we reject as unsupported by the evidence the stipulation of the parties that applicant sustained a specific injury of August 27, 2015 to the upper extremities, and a specific injury of March 5, 2017 to the lower extremities. Based on the lack of substantial medical evidence establishing that applicant sustained any specific injury and based on indications by both physicians that he sustained a cumulative injury to the upper extremities and may have sustained a cumulative injury to the lower extremities as well, we rescind the April 7, 2025 Joint Findings and Awards in their entirety for further hearing and development of the record consistent with this decision.

It is well established that any decision of the WCAB must be supported by substantial evidence. (Lab. 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]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Board en banc].)

The finding that applicant sustained a specific injury of August 27, 2015 to the upper extremities is not only unsupported by substantial medical evidence, but also directly contradicted by the medical expert opinion of Dr. Brourman, who provides the only substantial medical opinion in evidence addressing the mechanism of applicant's injury to the upper extremities. Dr. Brourman unequivocally concludes that applicant has sustained a cumulative injury, not a specific injury, to his upper extremities. (Joint Exhibit A5, Report of Steven Brourman, M.D., dated April 11, 2018, page 2, lines 11-26 ("it is within a reasonable degree of medical probability that Mr. Marilao developed bilateral carpal tunnel syndrome and right ulnar neuropathy as a result of cumulative trauma while working as a police officer for City of Shafter.").)

The finding that applicant sustained a specific injury of March 5, 2017 to the lower extremities is also unsupported by substantial medical evidence, because the opinions of Dr. Levy do not provide substantial medical evidence on the mechanism of injury to the lower extremities. 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*, *supra*, 70 Cal. Comp. Cases at pp. 620-621; *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.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

Dr. Levy expressly admits multiple times that his opinions on apportionment are arbitrary. (Defendant's Exhibit C, Report of Leslie Levy, D.P.M., dated June 29, 2018, page 20, second paragraph ("I would probably apportion 50% just as somewhat arbitrary"); (Joint Exhibit B3, Report of Leslie Levy, D.P.M., dated January 7, 2019, page 15, last paragraph ("I made it a 50:50 arbitrarily").)

Dr. Levy's opinions on causation of injury are unfortunately no less speculative than his opinions on causation of disability, and unlike Dr. Brourman, Dr. Levy fails to provide any substantial opinion on whether applicant sustained a specific injury or a cumulative trauma to his lower extremities.

Labor Code section 3208.1 dictates that every injury is either specific or cumulative, but not both:

> An injury may be either: (a) "specific," occurring as the result of one incident or exposure which causes disability or need for medical treatment; or (b) "cumulative," occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment. The date of a cumulative injury shall be the date determined under Section 5412.

Dr. Levy seems to erroneously believe he is bound by the allegations of the claim with respect to whether an injury is specific or cumulative, stating, "even though it is not a CT, but an individual specific injury claim, we could extrapolate that it might be a CT, but since it is a specific injury claim, we would call it an exacerbation of a preexisting condition…" (Defendant's Exhibit C, Report of Leslie Levy, D.P.M., dated June 29, 2018, at page 20, second paragraph.)

Dr. Levy's statement "it might be a CT" (cumulative injury) is not expressed in terms of reasonable medical probability, so it cannot form the basis for a finding that the mechanism of applicant's lower extremity injury was cumulative, but it raises a serious question about whether the parties, who lack medical expertise, have misclassified a cumulative injury as a specific injury. The facts provided in Dr. Levy's report also raise this question. Dr. Levy describes applicant's plantar fasciitis as starting in 2006, which is after applicant began his employment with the City of Shafter as a police officer in 2005, so there is evidence to at least suggest that the origin of

applicant's lower extremity condition was an industrial cumulative exposure. (Defendant's Exhibit D, Report of Leslie Levy, D.P.M., dated November 3, 2017, page 18, last paragraph.) The activity of prolonged walking on March 5, 2017 during a hostage barricade is itself a repetitive trauma, because it happened over the course of several hours, and it does not seem out of the ordinary in the context of applicant's regular job duties as a police officer for the City of Shafter since 2005, which included "[f]requent standing, occasional sitting, frequent bending, stooping, squatting, kneeling, reaching, hand work, intermittent climbing, occasional walking and pushing" (Defendant's Exhibit C, Report of Leslie Levy, D.P.M., dated June 29, 2018, page 4, penultimate paragraph.) Indeed, Dr. Levy notes that plantar fasciitis "is very common in police officers" to the point where he considers it "almost presumptive." (*Id*. at page 20, second paragraph.)

The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].) In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[Labor Code sections] 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, inconsistent or incomplete." (*McDuffie*, *supra*, at p. 141.)

Here, until the record is developed to address this question and clearly indicate whether as a matter of reasonable medical probability there is or is not a cumulative mechanism of injury to applicant's lower extremities, and not just that there "might be a CT," it is premature to decide any other issues. We also note that the issue of whether the vocational expert reports marked as Applicant's Exhibits 2, 3, and 4 were properly excluded is also premature because vocational expert opinions cannot rebut a scheduled rating until there is first substantial medical evidence of injury and disability to support such a rating.

Accordingly, we grant the Petition for Reconsideration, rescind the F&A, and return the matter to the WCJ for further proceedings consistent with this decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the Joint Findings and Awards issued by the WCJ on April 7, 2025 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Awards of April 7, 2025 are **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ JOSEPH CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 21, 2025

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

WILLK MARILAO
GHITTERMAN, GHITTERMAN & FELD
LEVITON, DIAZ & GINOCCHIO
DUNCAN CASSIO LUCCHESI BINKLEY & VAN DOREN

CWF/abs

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