

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

DION BARRERA, *Applicant*

vs.

**ATKINSON WALSH;
ZURICH AMERICAN INSURANCE COMPANY,
administered by ZURICH NORTH AMERICA, *Defendants***

**Adjudication Number: ADJ10293027
Riverside District Office**

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

Applicant and lien claimant Casa Colina Hospital Centers for Rehabilitation have each filed a timely, verified Petition for Reconsideration of the April 15, 2026 Findings and Order (F&O), wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that defendant was not negligent with respect to applicant's injury of October 9, 2015, and that defendant is entitled to credit in the amount of \$1,565,231.70 against liability for compensation.

Applicant contends that: (1) the evidentiary record contains substantial evidence of employer negligence; (2) the WCJ applied an erroneous legal standard regarding employer negligence; (3) the WCJ erred in excluding Cal/OSHA records; (4) the evidence does not support a finding that defendants are entitled to full credit; (5) the WCJ improperly relied on a previously-issued credit order; and (6) further development of the record is required.

Lien claimant likewise contends that the evidence, including applicant's trial testimony, establishes employer negligence, or at a minimum raises significant questions about employer negligence. Lien claimant also maintains that substantial justice requires that the Cal/OSHA records be admitted into evidence.

Defendant has filed an answer to each of the two Petitions, requesting that they be denied. The WCJ has prepared a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of the Petitions for Reconsideration, the Answers thereto, and the contents of the WCJ's Report. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, rescind the F&O, and return this matter to the WCJ for further proceedings consistent with this decision.

FACTS

Applicant, while employed on October 9, 2015 as a carpenter for defendant Atkinson Walsh, sustained injury arising out of and occurring in the course of employment to his head, neck, back, and shoulders.

As pertinent here, at trial on February 11, 2026, the parties submitted three issues for decision: jurisdiction, third-party credit, and employer negligence. (February 11, 2026 Minutes of Hearing and Summary of Evidence (MOH), p. 2, lines 17-21.)

About 15 months before trial, defendant filed a petition for third-party credit dated December 16, 2024. Defendant's petition for third-party credit was served on applicant's counsel at her former address and not at her address of record, which was noticed in a change of address served on defendant and its counsel of record more than six months prior on June 7, 2024.

On December 18, 2024, two days after the date of defendant's improperly served third-party credit petition, the WCJ issued an order allowing third-party credit. The third-party credit order delegated service of the order to defense counsel of record and also included a provision that a timely objection showing good cause within 15 days of service would void the order and defer the credit issue for hearing. Although the Official Address Record showed the correct current address for applicant's counsel of record, the WCAB served the order on defense counsel only, pursuant to delegated service, on December 20, 2024. Defense counsel then erroneously¹ served the Order Allowing Credit on applicant's counsel at her former address on December 23, 2024.

On February 11, 2026, the parties proceeded to trial on the issues of third-party credit and employer negligence. A statement of disbursement of proceeds was admitted into evidence as Joint

¹ Notwithstanding defendant's assertion that applicant's counsel "chose" not to object to the order that was incorrectly served on her (Answer, p. 8, line 4) we shall engage in no such uncharitable assumptions and will instead presume that defendant's failure to update applicant's counsel's address of record was an honest mistake.

Exhibit 1. Applicant offered four exhibits into evidence. Marked for identification as Applicant's Exhibits 1 and 2 were two volumes of applicant's deposition transcript in the case of *Austin Gillespie, et al. v. State of California Dept. of Transportation, et al.*, Superior Court Case Number RIC1606486. Marked as Applicant's Exhibit 3 were subpoenaed records of Zurich American Insurance and marked as Applicant's Exhibit 4 were "[s]ubpoenaed records from Cal OSHA dated 2-11-2026."

The WCJ admitted Applicant's Exhibit 3 into evidence, but deferred defendant's objection to the admissibility of Applicant's Exhibits 1, 2, and 4 as follows:

LET THE MINUTES REFLECT THAT Applicant's Exhibits 1, 2, and 4 are marked for identification as the defendant objects that they were not served, and defendant is not in possession of the documents.

In which the response by the applicant's attorney is that it is applicant attorney's understanding that the office had served them, and that defendant was in possession of the records.

The admissibility of **Applicant's Exhibits 1, 2, and 4** will be discussed and determined in the Opinion on Decision. Otherwise, they are marked for identification.

(MOH, p. 3, lines 16-25, boldface in original.)

Applicant was the sole witness at trial and testified in relevant part as follows.

He was working as a journeyman carpenter for Atkinson Walsh on October 9, 2015.² He and his crew were attempting to lower a bridge on the 91 freeway corridor. They had built falsework beams on each side of the bridge, and a scaffold on top. They set up jacks, with a man on a scaffold manning each jack. He was assigned to operate two jacks. There were five men on each side. (*Id.* at p. 4, lines 8-20.)

He had five years of experience working on bridges before this assignment. He noted that usually bridges are built where they need to be, but he had experience dropping bridges on three prior occasions. The bridge that he was helping to lower on October 9, 2015 had to be lowered because it was built higher to allow traffic to go through. (*Id.* at p. 4, lines 21-24.)

²Applicant's counsel requested a transcript of the February 11, 2026 trial proceedings with a fee deposit check. The request was stamped received by the Riverside District Office on April 28, 2026, but as of the date of this decision no transcript has been filed. We assume that the transcript will be prepared and included in the record when this matter is again at the trial level. Accordingly, all references to applicant's testimony are to the WCJ's summary thereof as set forth in the MOH.

He did not remember how many people from Atkinson Walsh were assigned to work on the bridge, but he remembered that they were short some men that night. They did not have enough manpower. There were two crews. He remembered that Jacob Witt and Eric Rodarte were on the other crew. He thought that usually two crews drop bridges onto abutments. He could not remember all of the crew members' names but believed they were all Atkinson Walsh employees. (*Id.* at p. 5, lines 1-5.)

The night superintendent, "Fred," who oversaw all of the crews on the night shift, was there that night. He could not remember his foreman's name at first, but remembered that Scott Garrison was in charge of applicant's crew and was also present at the time of applicant's injury. Mr. Garrison was applicant's supervisor during the entire time that applicant worked for Atkinson Walsh. (*Id.* at p. 5, lines 5-15.)

He later remembered that his senior foreman was Doug Hoyt, who had a lot of experience, but Mr. Hoyt was not present when the bridge dropped and applicant was injured. Mr. Hoyt had his own crew, which was not there when the bridge dropped. (*Id.* at p. 8, lines 23-25.)

Everyone from applicant's crew answered to him, and he would then tell Scott Garrison. (*Id.* at p. 9, lines 1-2.) Mr. Garrison was handling one of the two sets of controls set up in the middle of the bridge where applicant was injured. Controls were hooked up to hoses in the jacks, which provided pressure to lift up the bridge. Pressure could be released or increased from the jacks. There was a button or switch that controls some or everything. (*Id.* at p. 5, lines 5-13.)

He noticed some potential problems before his injury. He usually worked with someone who had a lot of experience, but because someone was on vacation, his employer sent a crew that had no experience to replace the crew that was supposed to drop the bridge with him. He also noticed that a new foreman was assigned to control the manifold, even though that person did not know how to do it. The superintendent did not like to have anyone on manifolds who was not a foreman. (*Id.* at p. 5, lines 14-20.)

On the night of the bridge drop they were short three men, so Fred brought in two laborers without experience or knowledge of how to control jacks. They were still short one man, so applicant had to control two jacks, which he believed was inappropriate. He expressed concern to Fred and Scott Garrison. He told them that it was not wise to have him attempt this for the first time without being watched. Based on his experience, this seemed very dangerous. (*Id.* at p. 5, lines 21-25; p. 6, lines 1-2.)

In his experience, bridges are dropped in increments of a quarter inch. The equipment used is very heavy. Usually, it takes about 10 hours to lower a bridge 16 to 18 inches. Although a crew was working on the bridge 24 hours a day, his shift was at night. At the time of accident, he had just started his shift. It seemed to him that it happened right away. He recalled that as soon as they got up there, they had an issue. There was creaking and cracking, which would be normal, because they were using wood, but they also heard water inside the bridge. (*Id.* at p. 6, lines 2-6.)

He recalled that at that time, it was the rainy season. When they lifted the bridge with the jacks, they had to lift it up evenly. He was concerned because he did not believe the engineer had calculated for water. Water was not coming out, so he did not think there was that much water in that bridge. He believes that they should have checked for water in the bridge and pumped it out. (*Id.* at p. 6, lines 6-14.)

Scott Garrison was on other side with the manifold, and the new person was on his side on the manifold. Both crews can communicate with each other. Usually there is a guy with a walkie-talkie, and on the other side, they have the same process. On another channel, they can talk to all personnel. When communicating, there is a lot going on. (*Id.* at p. 6, lines 9-12.)

He explained that a manifold is the control to the jacks. Bridges above are "cast high," and other bridges are cast in place. He believes that "cast high" bridges are rare. There were 6-8 bridges throughout that street. Most of the bridges were cast in place. He worked on cast high bridges before. On the same street and area, two bridges down, they had dropped a different bridge, as part of a different project. (*Id.* at p. 6, lines 15-18.)

It was his impression that most of the time they had problems with jacks, and that his employer knew of problems with the jacks. They had numerous jacks, and he thought that they had some leaking jacks that were the same brand and color as the ones that were used on the bridge that collapsed. He was concerned about the jacks, but did not know that the jacks were leaking on the bridge that collapsed. It was within 20 minutes of starting that they had an issue. (*Id.* at p. 6, lines 19-24.)

He remembered that he had a safety meeting the night of his injury. While safety meetings were standard and happened every night, the meeting on the night of his injury lasted longer, because they were dropping the bridge. The meetings are usually ten minutes, but this meeting lasted longer. He thinks that the meeting took place in a trailer, but he was not a hundred percent

sure. It was his impression that when they're doing a job like this, they have to pay more attention to safety. (*Id.* at p. 6, lines 1-2; p. 7, lines 1-3.)

He did not specifically recall what was discussed at the safety meeting. He remembers how they were going to drop the bridge, positions, the crew, and that it was an all-night job. He cannot recall the length of the meeting. Since it was a dangerous job, they likely went over different areas of dropping the bridge. He thought that they discussed things like watching pinch points and making sure that workers' hands didn't get stuck between plates, the bridge, and tie-offs. He explained that a pinch point is where a worker's body is between two things, like a jack and a plate, or a jack and an I-beam. An I-beam is a steel beam that they use in falsework, which is what holds concrete where it is to be poured. The falsework is the structure that holds everything on the bridge. They built scaffolds with an I-beam for use in dropping the bridge. They used the I-beam and wood in the center. (*Id.* at p. 7, lines 4-15.)

The night of his injury, he and his coworkers were standing on a scaffold with a concrete seat. They stripped away all of the falsework when the concrete was poured. In this case, they had stringers holding up the bridge. Stringers are made of iron or metal. and were supposed to be the safety net when the bridge came down. All of the falsework has to be removed when lowering a bridge. His crew removed the falsework from the bridge a week before his injury, or earlier that week. During the year that he was employed by Atkinson Walsh, he worked on the same project as the one where he was injured. (*Id.* at p. 7, lines 16-21; p. 8, lines 2-3.)

Where the stringer is closer to the abutment, there are plates that are one-half inch to one inch thick. They set plates on top of the stringer and the jack on top of the plates. They lift it up and the other plates are holding up on the other side. When they bring it down, it comes down slowly. They reset the jacks gradually when lowering a bridge. He had to remove plates, which were there for purpose of dropping the bridge. Everything they did was for the purpose of lowering the bridge back down. (*Id.* at p. 7, lines 22-25.; p. 8, lines 1-2.)

He explained how everyone was issued a harness with hooks and pelican hooks and fall protection equipment. which employees were responsible for keeping in working order. He thought that the harnesses with positioning hooks or pelican hooks were issued when workers were working at a height of over 6 to 8 feet. His employer required him to use tie-offs unless he was using a harness for fall protection, but since there was a handrail on the scaffolding, they were not

required to use a harness and hooks when he was injured, even though he was working at a height of 20 feet. (*Id.* at p. 8, lines 2-10.)

He thought that he may have been on the east side of the bridge, but he was not sure. The crew was responsible for handling jacks and plates. Handling jacks entailed one person positioning a jack in a spot to lift and lower without the jack getting stuck. They had to lift it, set it down, and take it out, then take the plate and repeat the process. He could not remember how many plates were used. The plates could be 75-100 pounds each. The jacks are approximately 150 pounds each. The process is a slow process. By the time it was lowered, he was crouched down. The process was back breaking. When the bridge came down, the workers were under the bridge. That is the only way it worked on cast-high bridges. (*Id.* at p. 8, lines 10-14 and 18-20.)

He believed that one of the jacks he was handling got stuck while he was working on this bridge. Everyone was aware that the jack got stuck. To get it out, they had to lift the bridge. The jack only got stuck due to a lack of clearance. When it came down, it was wedged in. When they removed a jack, they put it on the scaffold. He could not recall the weight of the bridge itself. The other bridge he had worked on was cast-high and a smaller bridge. (*Id.* at p. 8, lines 14-17 and 21-22.)

They lifted the bridge and would bring it down when everyone had the jacks out. He was manning the last two jacks on the corner. One of those jacks got stuck, and they were trying to raise the bridge to get the jack out to continue with the process. When they lift the bridge, they try to do it evenly on all sides, but it doesn't always happen like that. There are a lot of variables. They have a maximum pressure they can go to when picking it up. When the jack releases, they put the plates in. They then take the jack out. They don't do it at the same time. The bridge goes down gradually. (*Id.* at p. 9, lines 5-10.)

His jack got stuck. Usually, they have one person per jack, but he was doing the job of two men in a job that was already difficult. The jacks were approximately six feet apart. The jacks have the same spacing. They placed them where the engineer told them to place them. He believes the supervisors were aware that there were not enough people to do this job. (*Id.* at p. 9, lines 10-13.)

He and other members heard water which would make the bridge heavier. The jacks can hold only so much weight. No one knew there was water in the bridge. When they were lifting the bridge, they heard water. When settled, there were puddles in the concrete. The goal is to lift the bridge to level. They heard water, and there was in fact a lot of water. (*Id.* at p. 9, lines 14-17.)

At the time, he did not know if Mr. Garrison knew about the water, but he believed everyone knew that his jack was stuck. A jack being stuck stops the whole process. Scott Garrison was on the other side. They were not all on the same walkie-talkie channel, but he could change to the other channel. The new foreman was manning his manifold. He (applicant) said on the walk-talkie that the jack was stuck. It was on the channel with his foreman. Scott Garrison then spoke to him on the walk-talkie and came over to talk to him. Everyone knew, and it was a big deal, because everyone had to pause while something was done about the stuck jack. However, they never got to take the jack out because the bridge collapsed. They heard a big bang. He does not know what caused the noise. (*Id.* at p. 9, lines 17-24.)

The next thing he remembered after the loud bang was waking up with the I-beams on top of him. He was on the ground. He woke up but was knocked back out. They took beams off of him with a forklift. Someone was holding his head. He took off his tool belt and tried to walk, but he passed out again. They were on the scaffold, and it went down and hit the abutment. They were almost on their knees when it fell. When the bridge came down on his side, everyone got knocked out, because they were hit onto the street. There was debris all over the ground when he woke up. (*Id.* at p. 9, lines 24-25; p. 10, lines 1-5.)

The jacks were leaking hydraulic oil on a prior job. He believes there was some leaking on the bridge he worked on. Without oil or fluid, the jacks cannot work properly. The leaking jacks were reported to the foreman on the prior bridge and on this bridge. The leaking jacks were on the other side and may have been replaced. If a jack failed and was not replaced, they would have to shut down the whole thing. If leaking, the jack can fail, and will need to be replaced. They cannot go on with the process. If stuck, there is just not enough clearance. (*Id.* at p. 10, lines 5-10.)

Safety meetings were different on cast-high bridges versus cast in place ones. When there's a cast-high meeting, they cover different topics as it is a whole different job. They had to pay attention, checking pressure levels, clearances, and pinch points. It's a whole different job when doing cast-high bridges. At the safety meeting, they discussed trying to get the bridge done before the sun came up. (*Id.* at p. 10, lines 10-14.)

Lowering a bridge this way is only done by a select few. That day, in his opinion, only three of them had done it before. Laborers should not have been there, because it was a job for people with experience. He understands that you learn by doing, but only if you are taught. He was the only one on the scaffold that had done that on his side of the bridge, and there were two others

on the other side that had done it. He knew they were laborers, because he had seen them do miscellaneous work. (*Id.* at p. 10, lines 14-18.)

The laborers cleaned up around the jobsite prior to being brought in to man the jacks. When they stripped something, they were taking things down. So, the laborers some up and pulled the nails out of the wood, took the wood and got everything out of the way. They were cleaning stuff up and helping to maintain the area. (*Id.* at p. 10, lines 19-22.)

The supervisors would not stop the task. They were intent on finishing. If they were going to stop the task, they would have stopped it due to not having enough manpower. The laborers had no experience with the jacks. (*Id.*, page 10, lines 22-24.)

OSHA [California Division of Occupational Safety and Health] spoke to him after his injury. He did not talk to anyone from OSHA after going to their office to give a statement about the incident for their report. (*Id.* at p. 9, lines 2-4.) When they interviewed him, they told him that someone from Atkinson Walsh was passing notes then tossed the notes in a trash can. They told him that they went to the trash and retrieved the notes. He does not remember when they said it. They were passing notes on the night of incident, but he does not know who wrote the notes. He was told that the notes were from the higher ups, people that could be held accountable from Atkinson Walsh. (*Id.* at p. 11, lines 1-6.)

Someone from Atkinson Walsh contacted him by coming to his house and to the hospital. He did not know who it was. They brought him an ice chest and snacks. When out of the hospital, the higher-ups came to his house, and they talked about what they could do for him. (*Id.* at p. 11, lines 1-6.)

He believes the bridge was later knocked down and redone. The foreman, Mr. Garrison, and the other foreman were not injured, but the bridge incident has affected him (applicant). He did not go back to work in any capacity after the accident. He spent years in rehabilitation. He went to a hospital in Wildomar for weeks. He had surgeries in the hospital including facial reconstruction. He has been trying to get back close to where he was before his injury. (*Id.* at p. 11, lines 10-17.)

His employer used another crew without experience. He knew, because he talked to the crew members, who specifically told him that they did not have experience. He thinks that the engineer for the project where he was injured did not know that water had accumulated there. (*Id.* at p. 11, lines 19-22.)

He remembers that he filed a lawsuit, but he could not remember against whom. He believes he did not file against the State of California and Department of Transportation because of deadlines, but defendants filed against Caltrans. He does not believe he had a lawsuit against Caltrans, or that his attorney included allegations in the complaint that because of Caltrans' negligence, there was inadequate load bearing soil, or that the soil was compromised by improper compaction and further weakening by flooding, standing water, and mud as a result of soil failure modes which caused failure of the bridge deck. He agreed that he settled his civil case for a gross amount of \$2,892,560.00, and that the net recovery of \$1,510,730.85 may have been the net amount that he received, but he did not remember. He got two checks, and they were about the same as the amount stated. The total net recovery, he could not remember. There was only one settlement, and those were the only two cases. It was a third-party case against multiple companies. The settlement was for the aftermath of what happened to him. (*Id.* at p. 11, lines 23-25; page 12, lines 1-9.)

As far as he was aware, his employer did give him instructions on the night of his injury. He answered a question about the engineer and the water in the bridge. He remembers questions of weights and measurement, and they were addressed. He asked why they would calculate the project or put a hold on the project. (*Id.* at p. 12, lines 12-14.)

He agreed that the foremen were on another level on the project higher up, so they could not have heard the water from their position. There was a lot of noise. He had to talk using his radio even if it was a short distance. The foremen also had to communicate using a walkie-talkie. However, he did inform his foremen about hearing water and was not told to stop. His statements were not addressed. (*Id.*, page 12, lines 14-18.)

He did not know the weight of the bridge. No measurement was taken of the water in the bridge. The superintendent and others did not communicate any calculation regarding the water. Nothing changed after he told them that he heard water in the bridge. (*Id.* at p. 12, lines 19-21.)

When he regained consciousness, he heard a lot of water like a waterfall, which was unlike the sound he heard before the bridge collapsed. (*Id.* at p. 12, lines 19-21.)

He indicated that hydraulic jacks could only handle a certain amount of weight. Different jacks could be used for different categories. Jacks were used at the accident location the night of his injury. He did not know whether there were any spare jacks at the jobsite. He did see them

replace a jack, but he did not see where they got the replacement. (*Id.* at p. 12, lines 23-25; p. 13, lines 1-2.)

His wife had a loss of consortium claim that was part of his civil case, but he does not think that the settlement funds he received were for her claim. His civil case also included other plaintiffs who were injured. (*Id.* at p. 13, lines 2-5.)

He does not know for sure that the engineer did not calculate for the water in the bridge, but it is his opinion that he did not. (*Id.* at p. 13, lines 7-8.)

Defendant called no witnesses.

After trial, the WCJ issued the following findings:

1. The applicant received a net civil recovery of \$1,565,231.70 regarding his industrial injury while working at Atkinson Walsh on 10/09/2015.
2. The applicant did not carry the burden of proving negligence of defendant.
3. The defendant is entitled to credit for applicant's civil recovery in the amount of \$1,565,231.70 against liability for compensation up to that amount.

The WCJ ordered that "defendant Atkinson Walsh was not negligent regarding injury of 10/09/2015" and that "defendant is entitled to credit in the amount of \$1,565,231.70 against liability for compensation, with jurisdiction reserved over disputes."

In the Opinion on Decision, the WCJ ruled on the deferred evidentiary objections to Applicant's Exhibits 1, 2, and 4 as follows:

The defendant objected to the transcripts of the applicant parts I and II and subpoenaed records from Cal Osha as the records were not served on their office. The applicant attorney responded that it was her understanding that the applicant attorney office had served them.

With regard to the two transcripts of the applicant's deposition in the civil arena, even though there is no proof that they were served on the defendant, an attorney for Atkinson Walsh was present at both depositions. However, the applicant was present at trial and testified. There is no harm in admitting the evidence and the Board is not bound by California Code of Civil Procedure or Evidence. The transcripts may be helpful in determining the credibility of the witness and are admissible.

The records from Cal Osha are more problematic. There is no proof of service in FileNet and no proof that defendant was served with the subpoenaed records from Cal Osha. Since there is no proof these records were served on defendants, they will be found inadmissible. The defendant was not given the opportunity to review, object, challenge, or contradict the records.

Even if the Cal Osha records were admissible, they do not prove the negligence of the employer, the percentage of employer negligence, the value of damages, comparative negligence of employer or co-defendants in civil case.

(Opinion on Decision, April 15, 2026, pages 1-2.)

DISCUSSION

I

Former Labor Code section 5909³ 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 transmitted to the Appeals Board on May 21, 2026, and 60 days from the date of transmission is Monday, July 20, 2026. This decision is issued by or on Monday, July 20, 2026, so that we have timely acted on the petition 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

³ All further references are to the Labor Code unless otherwise noted.

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 by the workers' compensation administrative law judge, the Report was served on May 21, 2026, and the case was transmitted to the Appeals Board on May 21, 2026. 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 May 21, 2026.

II

WCAB Rule 10832(e) requires that “[a]n order with a clause rendering the order null and void if an objection is received is not a Notice of Intention and must be served by the Workers' Compensation Appeals Board.” (Cal. Code Regs., tit. 8, § 10832(e).)

In this case, the WCJ's prior order allowing third-party credit contained a clause rendering the order null and void if an objection is received, and the order was not served by the WCAB as required by WCAB Rule 10832(e). As cumbersome as this requirement may seem, the present case illustrates its purpose.

The WCJ delegated service of the order allowing credit to defense counsel, who then erroneously served applicant's counsel at her former address of record. If WCAB Rule 10832(e) had been followed by the WCJ, applicant's counsel would have been served with a copy of the order at her correct address on the Official Address Record which, unlike defense counsel's records, had been properly updated before the order was served.

We note that defendant's petition seeking the order was also erroneously served on applicant's counsel at the wrong address. Because the petition and order were not properly served on applicant's counsel, the December 18, 2024 Order Allowing Credit from Net Civil Recovery is unenforceable and did not resolve the issue of third-party credit prior to trial of that issue on February 11, 2026.

III

The relevant portion of section 5502, subdivision (d)(3) that governs the closure of discovery at an MSC provides as follows:

Discovery shall close on the date of the mandatory settlement conference. Evidence not disclosed or obtained thereafter shall not be admissible unless the proponent of the evidence can demonstrate that it was not available or could not have been discovered by the exercise of due diligence prior to the settlement conference.

(Lab. Code, § 5502(d)(3).)

In this case, it appears that the records of Cal/OSHA that applicant sought to admit as Applicant's Exhibit 4 meet the requirements of section 5502 for admissibility. Applicant listed OSHA records as an exhibit on a pre-trial conference statement Dated October 20, 2025, which is the date of a mandatory settlement conference (MSC) that was continued to December 16, 2025, on which date the February 11, 2026 trial date was set. The minutes of hearing for the October 20, 2025 MSC indicate that "AA filed PTCS today," from which one may reasonably conclude that applicant's counsel obtained Cal/OSHA records and disclosed to defendants her intent to introduce those records into evidence prior to the disposition of the October 20, 2025 MSC.

While the WCJ is correct that under WCAB Rule 10635(a), applicant's counsel had a duty to serve documents that were clearly intended to be offered into evidence, there is no indication in the rule that failure to timely serve essential evidence renders it inadmissible. In the case of evidence that is indispensable to the just resolution of a submitted issue, the proper remedy for violation of WCAB Rule 10635(a) would be sanctions under section 5313 and WCAB Rule 10421(b)(3) and (4), provided the failure to serve was the result of bad-faith actions or tactics that were frivolous or solely intended to cause delay, and not unintentional. In the present case, there is no indication that applicant's failure to file a proof of service of the Cal/OSHA records was intentional. On the contrary, applicant must have genuinely believed that all relevant evidence had already been served, as evidenced by the declaration of readiness, indicating that applicant's counsel of record believed that she was ready to proceed on the issue of third-party credit.

Evidence may be introduced not only after the MSC, but even after trial testimony when necessary to accomplish substantial justice. (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-407 [65 Cal.Comp.Cases 264] (hereafter *Kuykendall*).) In *Kuykendall*, the Court of Appeal rejected the arguments raised by the respondent that *County of Sacramento v. Workers' Comp. Appeals Bd. (Estrada)* (1999) 68 Cal.App.4th 1429 [64 Cal.Comp.Cases 26] and *San Bernardino Cmty. Hosp. v. Workers' Comp. Appeals Bd. (McKernan)* (1999) 74 Cal.App.4th 928 [64 Cal.Comp.Cases 986] require strict application of the section 5502, subdivision (d)(3)

discovery cutoff, even where it would deprive the parties of substantial justice. (*Kuykendall*, *supra*, 79 Cal.App.4th 396 at p. 406.) The Court in *Kuykendall* cited *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924], *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261], and *M/A Com-Phi v. Workers' Comp. Appeals Bd.* (1998) 65 Cal.App.4th 1020 [63 Cal.Comp.Cases 82] to support its conclusion that a WCJ's duty to base decisions on substantial evidence makes augmentation of the record necessary, even where the requirements of section 5502, subsection (d)(3) would otherwise prohibit it.

Unlike most cases enforcing a strict discovery cutoff under section 5502, subsection (d)(3), the present case involves evidence that was in fact disclosed and obtained prior to the final MSC, with no evidence of any actual prejudice to defendant, who participated in the Cal/OSHA investigation. Further, any theoretical prejudice could have been easily addressed by permitting additional discovery by defendant following confirmation that it had received the records of its own Cal/OSHA investigation that applicant wanted to offer into evidence. The facts in this case are easily distinguishable from the facts in *Telles Transp., Inc. v. Workers' Compensation Appeals Bd. (Zuniga)* (2001) 92 Cal.App.4th 1159 [66 Cal.Comp.Cases 1290], where applicant's counsel strategically choose not to disclose medical records at an MSC. In this case, no such strategy can reasonably be implied, as the intention to use Cal/OSHA records was disclosed to all parties before trial was set, and the records were of an investigation in which defendant participated.

On the contrary, it seems almost as if defendant strategically chose not to obtain a copy of the Cal/OSHA records. If the trial minutes of hearing and summary of evidence is correct in its indication that the Cal/OSHA records were obtained by subpoena duces tecum, then defendant should have received a copy of the subpoena and an invitation to order a copy of the records from the copy service obtaining the records. Even if the records were not obtained by subpoena, a copy could easily have been requested by defendant while meeting and conferring with applicant's counsel about stipulations, issues, and exhibits prior to the MSC as required by WCAB Rule 10759(b). (Cal. Code Regs., tit. 8, § 10759(d).) What is far more baffling than applicant's counsel's inadvertent failure to serve exhibits is defense counsel's apparent failure to obtain⁴ a copy of all Cal/OSHA records of its own accord as early as possible, both in the interest of preparing a

⁴ If defendant in fact had the Cal/OSHA records at the time of trial, then its representation through counsel to the WCJ that it was not in possession of those documents may be sanctionable as a bad-faith action or tactic under section 5313. (Lab. Code, § 5313.)

competent defense and in compliance with defendant's ongoing duty of investigation under AD Rule 10109. (Cal. Code Regs., tit. 8, § 10109.)

The discovery cut-off contained in subdivision (d)(3) of section 5502 and the service requirements of WCAB Rule 10635(a) must be applied in a manner consistent with the requirement of the California Constitution that the administration of all workers' compensation legislation "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." (Cal. Const., Art. XIV § 4.) The clear purpose of this constitutional mandate is to achieve justice in a timely, resourceful, and efficient manner, and not to permit injustice simply because it would save time, money, and effort. To this end, while all hearings before the Appeals Board or a WCJ are governed by Division 4 of the Labor Code, including section 5502, in their conduct they "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." (Lab. Code, § 5708.)

Furthermore, it is well established that decisions by 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].) Substantial evidence must be based upon an adequate history that includes all germane facts. (*Escobedo v. Marshalls* (2007) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc); *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.*, 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].) The Workers' Compensation Appeals Board "may not leave undeveloped matters which its acquired specialized knowledge should identify requiring further evidence." (*Raymond Plastering v. Workmen's Comp. Appeals Bd.* (1967) 252 Cal.App.2d 748, 753 [32 Cal.Comp.Cases 287, 291].) Accordingly, if the evidentiary record in this case did not include available documents showing the results of a government investigation into the critical issue of whether the employer defendant breached statutory or regulatory duties with respect to applicant's injury, the record would then require development by the WCJ irrespective of any discovery cutoff in order to ensure an adequate history, sufficient evidence, and substantial justice.

Additionally, decisions of the Appeals Board “must be based on admitted evidence in the record.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Because the WCJ did not admit the Cal/OSHA records into evidence, it was inappropriate to comment in the Opinion on Decision that “[e]ven if the Cal Osha records were admissible, they do not prove the negligence of the employer, the percentage of employer negligence, the value of damages, comparative negligence of employer or co-defendants in [the] civil case.” (Opinion on Decision dated April 15, 2026, page 2, paragraph 3.) Evidence cannot legally be weighed or applied in support of a decision until after it has been formally admitted. (*Hamilton, supra*, at p. 476.)

In its Answer to lien claimant Casa Colina Hospital Centers for Rehabilitation’s Petition for Reconsideration, defendant asserts that as a lien claimant, Casa Colina lacks standing to seek reconsideration and is not an “aggrieved” party under section 5900 until applicant’s entitlement to benefits has been adjudicated and its lien allowed. This argument is not only incorrect, it borders on frivolous.

Section 5900 clearly articulates the standing requirement that “**any person aggrieved directly or indirectly**” by a decision may seek reconsideration. (Lab. Code, § 5900(a), emphasis added.) In addition, although our previous regulations provided that lien claimants could only participate as parties in proceedings after resolution of the case-in-chief in order to allow applicants seeking benefits priority, they are now at all times deemed a party to the case, with full rights of participation. (See Cal. Code Regs., tit. 8, § 10305(q)(3).) Furthermore, lien claimant Casa Colina’s ability to collect outstanding medical bills is clearly and directly affected by the F&O, which allows defendant to ignore \$1,565,231.70 of what would otherwise be part of its obligation to provide ongoing medical care.

Although applicant’s extensive and un rebutted testimony at trial strongly suggests employer negligence, and certainly does not establish that the employer was not negligent, his memory may be imperfect. This only underscores the importance of admitting the Cal/OSHA records as an independent and reliable source of corroboration, or rebuttal, of applicant’s testimony. Instead of simply dismissing applicant’s testimony as failing to establish employer negligence, the WCJ should have developed the record by way of testimony or other evidence to address numerous serious questions raised by applicant’s testimony, including whether the employer took adequate safety measures, whether there were enough people in applicant’s crew

on the night of his injury, whether those people had adequate skills and experience, whether it is safe for one person to operate two jacks when lowering a bridge, whether the jacks were in good condition and used appropriately, whether the accumulation of water contributed to the bridge's unexpected collapse, and whether applicant's report to his foreman and supervisor that he heard water should have been grounds for his foreman or supervisor to stop work and investigate further before the bridge dropped.

Further, although applicant has some experience working on bridges, he does not possess enough expertise to qualify as an expert witness who could establish the applicable standard of care and answer the above questions on his own. On the other hand, Cal/OSHA records would logically address these very issues, using applicable statutory and regulatory standards of care.

In this case, for the reasons set forth above, we are persuaded that both applicant and lien claimant Casa Colina Hospital Centers for Rehabilitation were substantially prejudiced by the WCJ's decision of the issue of employer negligence without first properly admitting and considering the Cal/OSHA records, which by any conceivable reckoning should include facts essential to a just decision of that issue. However, to ensure that defendant's due process rights are not violated, defendant must be formally served⁵ with a copy of Applicant's Exhibit 3 and must be given a reasonable opportunity to conduct discovery in response thereto, before this essential evidence is admitted into the record at further trial proceedings.

Because applicant's due process rights and substantial justice require formal admission and consideration of the Cal/OSHA records before the issues of employer credit and negligence can be properly determined, and because defendant may want to exercise additional discovery rights in response to this decision that the record must be developed in this manner, the merits of the issues of employer credit and negligence are necessarily not addressed at this juncture.

Accordingly, we grant both Petitions for Reconsideration, rescind the F&O and return the matter for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the April 15, 2026 F&O is **GRANTED**.

⁵ While we recognize that Applicant's Exhibit 3 has been uploaded to FileNet and is likely already in defendant's possession, due process requires evidence that defendant has, in fact, been provided with its full and exact contents.

IT IS FURTHER ORDERED that lien claimant Casa Colina Hospital Centers for Rehabilitation's Petition for Reconsideration of the April 15, 2026 F&O is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Appeals Board that the April 15, 2026 Findings and Order is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PAUL F. KELLY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG L. SNELLINGS, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 20, 2026

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

**DION BARRERA
TINA ODJAGHIAN LAW GROUP
LAW OFFICES OF TAPPIN & ASSOCIATES
MICHAEL SULLIVAN & ASSOCIATES**

CWF/kl

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