WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

EARL ULLOM, *Applicant*

vs.

BARRETT BUSINESS SERVICES AND L&M LUMBER;
ACE AMERICAN INSURANCE COMPANY, administered by CORVEL, *Defendants*

Adjudication Number: ADJ12944113
Bakersfield District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Applicant and defendant each seek reconsideration of the Findings of Fact & Order[1] issued by the workers' compensation administrative law judge (WCJ) on May 12, 2026. Therein, the WCJ found that applicant sustained injury arising out of and in the course of employment (AOE/COE) to his right foot and right ankle and in the form of a Chronic Pain Syndrome but not his hip, while employed as a truck driver on June 21, 2019. The WCJ further found that as a result of the injury herein, applicant sustained "at least 40% permanent partial disability indemnity, after applicable adjustment and apportionment" and that "[f]urther development of the medical-legal record is needed to determine whether Applicant Earl Ullom is permanently totally disabled or has permanent partial disability in excess of 40%." The WCJ ordered the parties to develop the record with medical-legal evaluation in the field of pain management by selection of an agreed medical evaluator (AME) or, if unable to do so, to request assignment of a panel qualified medical evaluator (PQME).

Applicant contends that the WCJ should have relied on the current medical and vocational evidence to find him 100% permanently disabled, with no apportionment.

Defendant contends that the WCJ erred in ordering a new PQME.

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[1] The full captioned title of the WCJ's May 12, 2026 decision is "RULINGS AND ORDERS ADMITTING EVIDENCE FINDINGS OF FACT & ORDER OPINION ON DECISION."

We did not receive any answers. The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant the Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code[2] section 5950 et seq.

I.

Up through July 1, 2024, petitions for reconsideration were subject to former section 5909, which 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.)

During the period from July 2, 2024 through June 30, 2026, petitions for reconsideration were subject to former section 5909, which stated 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.
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> (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) (in effect from July 2, 2024 through June 30, 2026), 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."

[2] All further statutory references are to the Labor Code, unless otherwise noted.

Here, according to Events, the case was transmitted to the Appeals Board on July 29, 2026 and 60 days from the date of transmission is Sunday, September 27, 2026. The next business day that is 60 days from the date of transmission is Monday, September 28, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[3]]. This decision is issued by or on Monday, September 28, 2026, so that we have timely acted on the petition as required by section 5909(a) (in effect from July 2, 2024 through June 30, 2026).

Section 5909(b)(1) (in effect from July 2, 2024 through June 30, 2026) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Section 5909(b)(2) (in effect from July 2, 2024 through June 30, 2026) provides that service of the Report and Recommendation shall be notice of transmission.

Here, according to the proof of service for the Report by the WCJ, the Report was served on July 29, 2026, and the case was transmitted to the Appeals Board on July 29, 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) (in effect from July 2, 2024 through June 30, 2026), because service of the Report in compliance with section 5909(b)(2) (in effect from July 2, 2024 through June 30, 2026) provided them with actual notice as to the commencement of the 60-day period on July 29, 2026.

II.

The WCJ provided the following discussion in the Report:

> I. Introduction: Both primary parties seek reconsideration of the Findings of Fact, Award and Order of May 12, 2026.
>
> Applicant Earl Ullom, then 62 years of age, sustained a specific industrial injury to his right foot, right ankle as well as a Chronic Pain Syndrome and claimed to have sustained injury to his hip when he was struck on the right foot by a wooden beam falling from a forklift on June 21, 2019, while employed in San Bernardino, California, as a Truck Driver (Occupational Group 460) by

[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

Defendant-Employer L&M Lumber. On June 21, 2019, Defendant-Employer L&M Lumber was insured for California workers' compensation liability by Defendant-Carrier Ace American Insurance Company.

The present case was initially submitted for decision on November 2, 2023, to WCJ Joseph Prothro. Findings and Award issued January 8, 2024. Applicant was found to have sustained 40% permanent partial disability, pending further development of the medical-legal record, and to need further medical treatment. Compensation was awarded consistent with findings and Orders for Further Development of the Medical-legal Record were issued. *Findings of Fact, Award and Orders 1/08/2024.*

After further development of the record, this case returned to Trial on January 22, 2026. Following submission for decision to the undersigned PWCJ on February 13, 2026, Findings of Fact, Award and Orders issued on May 12, 2026. Applicant was found to have sustained the specific injury to his right foot and right ankle. Applicant was still found to have at least 40% permanent partial disability and a need for further medical treatment. Still further development of the medical-legal record was found to be necessary regarding the extent of Applicant's impairment from a Chronic Pain Syndrome (including Applicant's claim of permanent total disability on vocational basis) and Applicant's claim of impairment from the disputed injury to his hip. *Findings of Fact, Award and Order 5/12/2026 p. 3 (Findings of Fact #5, #6 and #7).* Permanent disability indemnity and further medical treatment were awarded. *Findings of Fact, Award and Orders 5/12/2026 p. 4 (Award).* Further development of the medical-legal record in the field of Pain Management was ordered. Parties were authorized to seek an Agreed Medical Evaluator and directed to obtain a panel of Qualified Medical Evaluation nominees if an AME was not selected. *Findings of Fact, Award and Orders 5/12/2026 pp. 4-5 (Orders).*

By timely[] verified and properly served petition, Applicant Earl Ullom seeks reconsideration. *Petition for Reconsideration (Applicant) 6/01/2026 p. 14 (verification); Proof of Service 6/01/1026.* Grounds for reconsideration are alleged consistent with Lab.C. §5903 {a}, {c} & {e}. Applicant complains that the issue of permanent total disability, either as a result of limited tolerance for walking or standing in combination with his Chronic Pain Syndrome as well as permanent total disability on a vocational basis were presented for decision at Trial and should have been decided in his favor rather than deferred for further development of the medical-legal record. *Petition for Reconsideration (Applicant) 6/01/2026 p. 1 line 21 to p. 4 line 23.*

By timely[] verified and properly served petition, Defendants also seek reconsideration. *Petition for Reconsideration (Defendants) 6/02/2026 p. 9 (verification) pp. 10-11 (Proof of Service).* Authorized grounds for reconsideration are alleged consistent with Lab.C. §5903 {a}, {c} and {e}. *Petition for Reconsideration (Defendants) 6/02/2026 p. 1 lines 22-27.*

Defendants appear to agree that the present medical-legal record is in need of further development but dispute the Order to select an Agreed Medical Evaluation or panel Qualified Medical Evaluation in the field of Pain Management. Defendants call for obtaining a supplemental opinion from QME Dr. Fass regarding Applicant's Chronic Pain Syndrome and resulting impairment. *Petition for Reconsideration (Defendants) 6/02/2026 p. 3 line 15 to p. 7 line 11.*

The primary parties have not answered each other's pending petition for reconsideration as of the composition of this Report and Recommendation.

Denial of both petitions is recommended. For the reasons discussed herein, instructing further development of the medical-legal record including an AME or QME evaluation in Pain Management is felt to have be appropriate. Moreover, Applicant's petition appears to be a tardy attack on the prior determination, which also did not find permanent total disability on a vocational basis and ordered further development of the medical-legal record.

II. Facts: Applicant initiated the present claim with a DWC-1 claim form and an Application for Adjudication dated January 30, 2020, for the specific injury of June 21, 2019. Applicant initially alleged injury to his right foot and ankle when a "stack of beams weight 2,000 lbs. fell on right foot." *Application for Adjudication of Claim 1/30/2020* p. 2 §2; *DWC-1 Claim for 1/28/2020.*

Arthur H. Fass, D.P.M. is serving as a Qualified Medical Evaluator in the field of Foot and Ankle Surgery. He initially evaluated Applicant on September 8, 2020, and provided a report. Dr. Fass received a history of injury indicating:

> The foreman had pulled down 4 large 40' foot pieces of lumber called blue lams what were very thick and heavy and are used for the large beams for building rooftops. They can weigh from 800-1000 pounds each. They were stacked in a column of four lams on the ground on top of each other. The patient and his coworkers went to lift up the first lam when the stack of the remaining three toppled over and struck the patient on the right lateral foot and ankle. The force was great and it brough the patient to the ground as the wood beams slammed against the foot. There was immediate severe pain and loss of function. *Joint Exhibit 02: QME Report of Arthur Fass, D.P.M. 9/08/2020 p. 2*

Applicant was taken to an occupational medical center. He was not taken off work entirely but was provided with "restricted duty at the yard sitting and counting materials leaving and entering the yard." *Joint Exhibit 02: QME Report of Arthur Fass, D.P.M. 9/08/2020 p. 2.* Applicant continued with modified work, with his work activities increasing to loading trucks, lifting and carrying cement bags and board as well as sawing. After about one month of these activities, Applicant developed open wounds on his right foot. Applicant was noted to have

a history of diabetes mellitus. He received wound care including a cam walker boot. Applicant reported MRI scanning indicating two ruptured ligaments in his right foot and ankle. Applicant was examined by a pain management specialist who recommended spinal nerve blocks which were not authorized. Applicant was eventually switched to a light-duty position consisting of data entry. He complained to Dr. Fass of severe pain and swelling in the right foot and ankle as of the initial QME examination. *Joint Exhibit 02: QME Report of Arthur Fass, D.P.M. 9/08/2020 pp. 2-3.*

Dr. Fass diagnosed a crush injury and "CRPS involving the peripheral nerves involving the superficial peroneal and sural right Synovitis of the dorsal midfoot and Lisfranc's joints right." *Joint Exhibit 02: QME Report of Arthur Fass, D.P.M. 9/08/2020 p. 6.* Dr. Fass opined that "the work injury is 100% responsible for the patient's disability." He endorsed Applicant's modified work but indicated that Applicant "may need to go on TTD if the therapy I recommend is instituted." Dr. Fass denied that Applicant was permanent and stationary and recommended further treatment with a podiatrist, compression dressing, limb elevation, bracing, strengthening exercises and orthopedic shoes. *Joint Exhibit 02: QME Report of Arthur Fass, D.P.M. 9/08/2020 p. 7.*

Dr. Fass provided a supplemental report on May 29, 2021. At Defendant's request, QME Dr. Fass reviewed treatment reports of treating orthopedist Dr. Scheinberg. He noted that Applicant had declined the treatment recommended in Dr. Fass's prior report on the recommendation of Dr. Scheinberg who "did not recommend this treatment and recommended only ice and elevation with activities as tolerated." *Joint Exhibit 01: QME Report of Arthur Fass, DPM 5/19/2021 p. 1.* Dr. Fass opined that if the treatment he had recommended was not going to be provided, then Applicant could be considered permanent and stationary with impairment consistent with CRPS Category II with 19% Whole Person Impairment. *Joint Exhibit 01: QME Report of Arthur Fass, DPM 5/19/2021 pp. 7-8.*

Gene G. Gonzales is serving as Applicant's vocational evaluator. He initially examined Applicant and provided a report dated October 26, 2021. He reviewed the available medical reports, including the QME reports of Dr. Fass, administered vocational testing and interviewed Applicant. He opined that Applicant "cannot stand or walk more than ten minutes per hour. As such, it is improbable that this Applicant has the capacity to walk or stand to a significant degree as required by Light Work occupations in which the weight lifting may be a negligible amount." *Applicant's Exhibit 01: Vocational Evaluation Report of Gene G. Gonzales 10/26/2021 pp. 17-18.*

Mr. Gonzales opined that Applicant's foot and ankle impairment in combination with a Complex Regional Pain Syndrome which will interfere with his functioning in both a learning or work environment and "creates a significant, and likely insurmountable, barrier to employment." *Applicant's Exhibit 01:*

Vocational Evaluation Report of Gene G. Gonzales 10/26/2021 p. 36. He concluded that Applicant was permanently and totally disabled on a vocational basis, entirely as result of the work injury. *Applicant's Exhibit 01: Vocational Evaluation Report of Gene G. Gonzales 10/26/2021 pp. 36-37.*

Emily Tincher, M.S. is serving as Defendant's vocational evaluator. She provided a vocational assessment dated January 20, 2023. She also reviewed the available medical records, performed vocational testing and interviewed Applicant. Ms. Tincher relied on the work restrictions suggested by QME Dr. Fass and Treating Dr. Scheinberg and opined that Applicant was amendable to vocational rehabilitation including various Low Skill Sedentary jobs. She noted that Applicant had been performing Light duty desk jobs of that type. She also opined that Applicant "is not precluded from using his hands and fingers for computer-related tasks, such as keyboarding, mousing and data entry" had has express interest in such activities. Ms. Tincher reported that Applicant's testing results indicated "average intelligence and average ability to learn" such that he could benefit from basic computer training, keyboard drilling and vocational courses. *Defendant's Exhibit C: Vocational Rehabilitation Report of Emily Tincher, M.S. 1/20/2023 p. 27.* She concluded at "Mr. Ullom retains a reasonable opportunity to work in the open labor market." *Defendant's Exhibit C: Vocational Rehabilitation Report of Emily Tincher, M.S. 1/20/2023 p. 43.*

The parties were unable to settle this case. Following Trial on November 2, 2023, Findings of Fact and Award issued on January 8, 2024. It was found that Applicant sustained the claimed industrial injury, was at least 40% disabled thereby and was in need of further medical treatment. However, it was also found that further development of the medical-legal record was needed, including review of the vocational evaluation reports and a re-evaluation by QME Dr. Fass. *Findings and Award; Order for Further Development of the Record 1/08/2024.*

Medical-legal discovery resumed. QME Dr. Fass provided a re-evaluation report dated March 12, 2024. He noted a request from Defendants for a final supplemental report in light of Applicant's refusal to undergo the treatment he had recommended in light of the contrary recommendations from Treating Dr. Scheinberg. *Joint Exhibit 07: Report of Arthur Fass, D.P.M. 3/12/2024 p. 2.* Dr. Fass reported review of treatment records from Dr. Scheinberg and the vocational evaluation reports of Mr. Gonzales and Ms. Tincher. *Joint Exhibit 07: Report of Arthur Fass, D.P.M. 3/12/2024 pp. 6-7*

Dr. Fass' review of Dr. Scheinberg's treatment reports noted that Applicant was considered permanent and stationary as of October 21, 2021. Applicant was noted to have suffered the crush injury as well as Type II diabetes, peripheral neuropathy and CPRS. *Joint Exhibit 07: Report of Arthur Fass, D.P.M. 3/12/2024 p. 7.*

Dr. Fass noted further reports from Dr. Schneiberg dated January 10, 2022, and June 1, 2022. Increased foot pain was reported as well as the onset of hip from altered gait as a compensable consequence of the original injury although the records indicated pain in the right hip while Applicant reportedly indicated pain in the left hip. *Joint Exhibit 07: Report of Arthur Fass, D.P.M. 3/12/2024 p. 7.*

Dr. Fass re-affirmed his recommendations regarding appropriate treatment for Applicant. He disagreed that Applicant could probably do sedentary work due to chronic pain making him unable to concentrate and work with a team. He held out the possibility of computer work but noted that no such work or training had been offered and success was "unlikely." He considered Applicant "100% work disabled" and that "the work injury is 100% responsible for the claimant's disability." *Joint Exhibit 07: Report of Arthur Fass, D.P.M. 3/12/2024 p. 9.* On the other hand, Dr. Fass re-affirmed his Category II classification for CPRS with 19% Whole Person Impairment. *Joint Exhibit 07: Report of Arthur Fass, D.P.M. 3/12/2024 p. 10.*

QME Dr. Fass was deposed on June 26, 2024. He was asked about his indication that Applicant was unable to do light sedentary work in light of Ms. Tincher's vocational report, including a history that Applicant had, in fact, done such work. After review the report, Dr. Fass testified that Applicant's light duty sedentary work had been performed without the care of a pain management specialist. With such care, Dr. Fass testified that "if he gets pain management, he might be able to do those kinds of jobs. But until he get some pain management, he can't." He therefore recommended an evaluation with a pain management specialist. *Joint Exhibit 09: Deposition of Arthur Fass, D.P.M. 6/26/2024 p. 9 line 20 to p. 10 line 4.* Dr. Fass went on to testified that the condition of Applicant's foot and ankle, if properly braced, would not prevent him form working but the CPRS is a progressive condition making him less and less able to deal with a working situation. Dr. Fass again recommended a pain management evaluation followed by a re-evaluation with him. *Joint Exhibit 09: Deposition of Arthur Fass, D.P.M. 6/26/2024 p. 10 line 23 to p. 13 line 17.*

QME Dr. Fass provided a re-evaluation report dated May 13, 2025. He noted that he had not been provided with any additional treatment records, including records from Applicant new treating podiatrist, Dr. Sinale and would he like to review "for any further revision of my opinion." *Joint Exhibit 08: Report of Arthur Fass, D.P.M. 5/13/2025 p. 8 and p. 12.* Pending the review of additional records, Dr. Fass reaffirmed his prior opinions although he did add that Applicant "continues to require an orthopedic consult for his painful left hip." Dr. Fass opined that "When the claimant gets his pain under better control with medical and podiatric treatment, he can be offered education funds and learn skills such as computer skills." *Joint Exhibit 08: Report of Arthur Fass, D.P.M. 5/13/2025 p. 11.*

Notwithstanding the further guidance of Dr. Fass, the parties remained unable to resolve this case. A second Trial was held on January 22, 2026. Following submission for decision to the undersigned PWCJ on February 13, 2026, Findings of Fact, Award and Orders issued on May 12, 2026. Applicant was found to have sustained the specific injury to his right foot and right ankle. Applicant was still found to have at least 40% permanent partial disability and a need for further medical treatment. Still further development of the medical-legal record was found to be necessary regarding the extent of Applicant's impairment from a Chronic Pain Syndrome (including Applicant's claim of permanent total disability on vocational basis) and Applicant's claim of impairment from the disputed injury to his hip. *Findings of Fact, Award and Order 5/12/2026 p. 3 (Findings of Fact #5, #6 and #7).* Permanent disability indemnity and further medical treatment were awarded. *Findings of Fact, Award and Orders 5/12/2026 p. 4 (Award).* Further development of the medical-legal record in the field of Pain Management was ordered. Parties were authorized to seek an Agreed Medical Evaluator and directed to obtain a panel of Qualified Medical Evaluation nominees if an AME was not selected. *Findings of Fact, Award and Orders 5/12/2026 pp. 4-5 (Orders).*

Whereupon, both primary parties seek reconsideration.

III. Discussion: Applicant complains that the issue of permanent total disability, either as a result of limited tolerance for walking or standing in combination with his Chronic Pain Syndrome as well as permanent total disability on a vocational basis were presented for decision at Trial and should have been decided in his favor rather than deferred for further development of the medical-legal record. *Petition for Reconsideration (Applicant) 6/01/2026 p. 1 line 21 to p. 4 line 23.*

The first problem with Applicant's petition is that it appears to be a tardy attack on the Findings of Fact, Award and Orders of January 8, 2024. Applicant's time to seek reconsideration of Judge Prothro's decision not to decide the present case on the then-available evidence but to seek further development of the record has long since expired.

The second problem with Applicant's petition is that further development of the record is still needed. As discussed in the prior section of this Report and Recommendation, the causation and extent of Applicant's hip claim is still uncertain and Applicant's ability to benefit from vocational rehabilitations appears to depend very much on whether he can obtain appropriate pain management evaluation and treatment in the shadow of the progressive nature of his Complex Regional Pain Syndrome.

Defendant's petition has the problem, only more so. Defendants appear to agree that the present medical-legal record is in need of further development but dispute the Order to select an Agreed Medical Evaluation or panel Qualified

Medical Evaluation in the field of Pain Management. Defendants call for obtaining a supplemental opinion from QME Dr. Fass regarding Applicant's Chronic Pain Syndrome and resulting impairment. *Petition for Reconsideration (Defendants) 6/02/2026 p. 3 line 15 to p. 7 line 11.* This is somewhat striking since obtained further input from QME Dr. Fass is exactly what has been done with this case since the initial Trial, including two evaluation reports from Dr. Fass as well as his deposition.

Defendant's petition is also flawed by QME Dr. Fass' express enforcement of further pain management treatment and evaluation. *Exhibit 09: Deposition of Arthur Fass, D.P.M. 6/26/2024 p. 10 line 23 to p. 13 line 17.* The decision for further development of the medical-legal record is well supported by substantial medical evidence.

IV. Recommendation: It is recommended that both pending petition be denied.

(Report, at pp. 1-10, emphasis in original.)

III.

We highlight the following legal principles that may be relevant to our review of this matter:

Section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides, as applied by the Permanent Disability Rating Schedule (PDRS) in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680] (*Fitzpatrick*); *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Guzman*).)

However, the scheduled rating is not absolute. (*Fitzpatrick, supra*, at pp. 619-620.) A rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning capacity is greater than that reflected in the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 1119]

(*Dahl*).) In analyzing the issue of whether and how the PDRS could be rebutted, the Court of Appeal has observed:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal. 3d 234 [193 Cal.Rptr. 547, 666 P.2d 989]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id*. at pp. 237-238.) Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating."
>
> (*Ogilvie, supra*, at p. 1274.)

Thus, "an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.' (*Ogilvie, supra*, at p. 1277.)

Moreover, 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, supra*; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion … It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence "… a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Here, it appears from our preliminary review that the record may not be complete regarding the issues of permanent disability, apportionment, and parts of the body injured. Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

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. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587,

593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

V.

Accordingly, we grant applicant's and defendant's Petitions for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. ***While this matter is pending before the Appeals Board, we encourage the parties to participate in the Appeals Board's voluntary mediation program. Inquiries as to the use of our mediation program can be addressed*** **to WCABmediation@dir.ca.gov**.

For the foregoing reasons,

IT IS ORDERED that applicant's and defendant's Petitions for Reconsideration are **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ PAUL F. KELLY, COMMISSIONER

KATHERINE WILLIAMS DODD, COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 28, 2026

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

EARL ULLOM
GHITTERMAN, GHITTERMAN & FELD
YRULEGUI & ROBERTS

PAG/cm

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