WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

HANK BURNS, *Applicant*

vs.

CALIFORNIA HIGHWAY PATROL, legally uninsured, administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ14292485
Santa Rosa District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the June 25, 2026 Amended Findings and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a highway patrol officer on October 1, 2020, sustained injury arising out of and in the course of employment (AOE/COE) to his brain, psyche, neuropsychiatric system, cervical spine, and thoracic spine. The WCJ found that applicant's injuries resulted in permanent and total disability.

Defendant contends that the WCJ failed to adequately consider applicant's residual functional capacity and post-injury activities. Defendant further asserts the WCJ erred in rejecting defendant's vocational expert reporting and that the evidentiary record does not support a finding of permanent and total disability.

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

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate, and for the reasons set forth below, we will deny reconsideration.

FACTS

Applicant sustained admitted industrial injury to his brain, psyche, neuropsych[iatric system], cervical spine, and thoracic spine, while employed as a highway patrol officer by defendant California Highway Patrol on October 1, 2020. Applicant was working his usual and customary duties in his patrol vehicle when he was struck "head-on in an intersection by a drunk driver." (Transcript of Proceedings, dated April 14, 2026, at p. 11:13; Ex. 20, Traffic Collision Report, dated October 1, 2020.) Defendant disputes the nature and extent of the injury.

On May 11, 2021, applicant filed an Application for Adjudication of Claim. Applicant also applied for disability benefits through the California Public Employees' Pension and Retirement System (CalPERS).

Thereafter, the parties selected agreed medical evaluators (AMEs) Fredric Newton, M.D., in neurology, Stephen Conrad, M.D., in orthopedic medicine, and Jed Sussman, Ph.D., in neuropsychology. The parties also selected qualified medical evaluators (QMEs) Lorenzo Hughes, M.D., in pain management, and Lindsey Hailston, Psy.D., in psychology.

On March 30, 2022, neurology AME Dr. Newton conducted a clinical evaluation of applicant and diagnosed a cervical spine flexion/extension injury with myofascial disorder, a secondary cerebral concussion with post-traumatic headache and post-traumatic dizziness, and neuropsychiatric symptom complex. (Ex. 6, Report of Fredric Newton, M.D., dated March 30, 2022, at p. 23.) Applicant's condition was noted to be at maximum medical improvement (MMI), and the AME assigned whole person impairment for applicant's headaches and equilibrium-related condition. (*Id.* at p. 24.)

On April 19, 2022, orthopedic AME Dr. Conrad conducted a clinical evaluation of applicant and record review. Dr. Conrad recorded a diagnostic impression of multilevel cervical disc disease with right cervical radiculitis and post-concussion syndrome. (Ex. 7, Report of Stephen Conrad, M.D., dated April 19, 2022, at p. 11.) Dr. Conrad assigned whole person impairment applying a range of motion methodology reflecting compromised activities of daily living. (*Id.* at p. 14.)

On October 18, 2022, Anthony Bellomo, M.D., conducted an Independent Medical Evaluation (IME) of applicant in orthopedic medicine with regard to applicant's claim for disability retirement with CalPERS. (Ex. 18, Report of Anthony Bellomo, M.D., dated October 18, 2022.) Following a record review and clinical evaluation, Dr. Bellomo opined that

applicant's "actual and present orthopedic (neck & upper back area) impairment" resulted in a "substantial incapacity to perform their usual job duties." (*Id.* at p. 14.) Dr. Bellomo identified cervical spine work preclusions including "frequent bending at the neck, twisting at the neck, repetitive head and neck motion, lifting, carrying, pulling and pushing," and upper back preclusions including "frequent lifting, carrying, pulling, pushing and standing." (*Id.* at p. 15.) Applicant was further noted to be cooperative with the examination, and "put forth best effort and there was no exaggeration of complaints." (*Id.* at p. 17.)

On October 26, 2022, Daniel Shalom, M.D., evaluated applicant in relation to applicant's pending CalPERS benefits claim as the IME in neurology. Dr. Shalom completed a clinical evaluation and a record review and similarly concluded that applicant's neurologic impairment resulted in "substantial incapacity to perform [his] usual job duties." (Ex. 19, Report of Daniel Shalom, M.D., dated October 26, 2022, at p. 4.) Applicant's physical limitations were noted to include an inability to pull/drag an incapacitated person, stand for extended periods of time, walk continuously on foot, and a general preclusion from running, jumping, and climbing. (*Id.* at p. 5.)

On November 14, 2022, neuropsychology AME Dr. Sussman conducted a comprehensive evaluation of applicant including a clinical examination and record review. Dr. Sussman noted applicant was likely past maximum medical improvement. (Ex. 1, Report of Jed Sussman, Ph.D., dated November 14, 2022, at p. 25.) Dr. Sussman noted that "[c]onsidering Mr. Burns' contemporary neurocognitive test results, complaints, and observations of his behavior, in all probability he cannot return to his former job as a patrol officer for the CHP, even with work restrictions … [h]is cognitive processing, most outstandingly, is too slow to effectively discharge all of his duties as a CHP officer and especially since CHP officers sometimes have to think and react quickly to situations." (*Ibid*.) Dr. Sussman identified and assigned whole person impairment without apportionment.

On December 17, 2022, neuropsychology AME Dr. Sussman issued a supplemental report identifying the following work restrictions:

> [D]ue to [applicant's] residual PD involving slow cognitive processing he needs extra time to process input and to formulate replies and responses, written and verbal. Due to residual PD in the areas of concentration and working memory, he needs to have instructions repeated and probably written, if input is prolonged and more than moderate complexity. Due to problems with memory Mr. Burns needs to have the freedom to take notes or have reference material to refer to if information to be remembered is more than short to moderate. Due to

> stimulation sensitivity he is precluded from working in environments where it is loud and/or visually busy in the forefront or background. Secondary to central processing slowness Mr. Burns needs extra time and repetition to learn and retain new procedures and to carry-out tasks. Additionally, due to cognitive processing limitations and the draining effect of continuous cognitive demand Mr. Burns most likely cannot work continuously for more than an hour or two without a 15-30 minute break to try to reconstitute. In all probability, he further is incapable from a neuropsychological perspective of working more than 4 hours per day even if his job abides by his restrictions.

(Ex. 2, Report of Jed Sussman, Ph.D., dated December 17, 2022, at p. 2.)

On July 3, 2023, psychology QME Dr. Hailston evaluated applicant, including a battery of testing and review of the medical record. Dr. Hailston found psychiatric injury in the form of chronic post-traumatic stress disorder (PTSD) and a mild cognitive disorder due to traumatic brain injury. (Ex. 12, Report of Lindsey Hailston, Psy.D., dated July 3, 2023, at p. 13.) Dr. Hailston observed that applicant "meets criteria for Post-Traumatic Stress Disorder, Chronic, because he was exposed to a traumatic incident, being hit by a drunk driver, which involved intense fear/the threat of death," and that applicant further met the relevant criteria for neurocognitive disorder. Applicant was noted to be moderately credible, and that applicant wants "to get better and positive attitude which is why he underreports the severity of his symptoms … [t]he fact he underreported instead of overreporting lent to his credibility." (*Ibid*.)

On January 15, 2024, psychology QME Dr. Hailston reevaluated applicant via telemedicine. (Ex. 13, Report of Lindsey Hailston, Psy.D., dated January 15, 2024.) Dr. Hailston noted that applicant's psychometric testing reflected continued understatement of applicant's condition. (*Id.* at p. 12.) Dr. Hailston identified a Global Assessment of Functioning (GAF) Score of 59 without factors of nonindustrial apportionment. (*Id.* at p. 11.) The report noted that "applicant experiences both depression and anxiety symptoms," including panic attacks and that "[b]eing in the car is a trigger for him … [d]epression and anxiety symptoms are present in PTSD and neurocognitive disorder from a TBI which is why I did not diagnose these separately and is considered part of his other primary diagnosis." (*Id.* at p. 14.) Applicant was noted to be "medically retired from the Highway Patrol," and Dr. Hailston recommended that applicant receive supplemental job displacement benefits. (*Id.* at p. 18.)

On February 21, 2024, pain management QME Dr. Hughes evaluated applicant, but determined that applicant's condition had not yet reached MMI. (Ex. 8, Report of Lorenzo Hughes, M.D., dated February 21, 2024.)

On May 2, 2024, pain management QME Dr. Hughes reevaluated applicant and determined that applicant's condition had reached MMI and assigned whole person impairment to the cervical and thoracic spine, and for pain. (Ex. 9, Report of Lorenzo Hughes, M.D., dated May 2, 2024, at p. 5.)

On May 15, 2024, the parties undertook the deposition of pain management QME Dr. Hughes. Therein, Dr. Hughes testified in relevant part that he would require a functional capacity evaluation to complete his analysis of work restrictions arising out of applicant's industrial injury. (Ex. 11, Transcript of Deposition of Lorenzo Hughes, M.D., dated May 15, 2024, at p. 16:9.)

On September 23, 2024, applicant completed a functional capacity evaluation. The assessment determined that applicant "demonstrates significant functional impairment for ADLs [activities of daily living], IADLS [instrumental activities of daily living], activities due to cognitive processing from post-concussive syndrome and TBI." (Ex. 17, Functional Capacity Report, dated September 23, 2024, at p. 4.) Applicant's ability to return to work was described as follows:

> Client's symptoms limit him from prolonged sitting for sedentary work due to exacerbation of pain in his neck (stretching, rubbing, repositioning), especially if his neck is unsupported. Despite pain management techniques, increased physical activity historically can cause him debilitating pain and flare-ups and physical disfunction when he is recovering. He is occasional for standing and walking also due to needing rest breaks for total times. He can perform these 3 postures in "bursts", but requires a long time to recover from by laying down in between these postures. He is constant for other demands such as twisting, squatting, kneeling, grasping, and fingering. However, with dynamic and unpredictable environments, he is unable (sic) to perform but at a decreased velocity, if at all. Client requires significant external assistance for executive functioning, e.g., family members for time keeping, task demands and difficulty, insight, sequencing, and can easily become overstimulated. He rates the task of driving to the store and picking up a few items as extremely difficult. His wife is the primary driver unless he drives in remote roads. Increased task demands can easily cause him to become emotionally disregulated and affect his self-regulation, decision making, problem solving, task resumption, and task completion. As a result, client is currently not fit to return to work at this time.

(*Id.* at p. 1.)

On November 1, 2024, pain management QME Dr. Hughes reviewed the submitted medical record and issued work restrictions for applicant, including "no driving more than one

hour a day, with driving limited to low traffic and low stress areas; no driving for more than 30 minutes continuously, and even then, opportunities for unexpected 15 minutes breaks due to increased symptoms (including pain), are required; no standing for more than 15 minutes continuously, a total of 45 minutes of cumulative standing a day; no walking for more than 15 minutes continuously, a total of 45 minutes of cumulative standing a day … [t]he applicant is limited to even terrain; no reaching overhead more than 2 hours a day, 30 minutes continuously; no reaching forward more than 2 hours a day, 30 minutes continuously; no repetitive grasping more than 2 hours a day, 30 minutes continuously; no typing or mousing more than 2 hours a day, 30 minutes continuously; no reaching downward more than 2 hours a day, 30 minutes continuously; no running; no lifting or carrying more than 10 pounds; no repetitive rotation of his thoracic or cervical spine; no climbing stairs for more than 15 minutes a day." (Ex. 10, Report of Lorenzo Hughes, M.D., dated November 1, 2024, at pp. 19-20.) Dr. Hughes further also noted that applicant would require 15-minutes breaks due to unexpected pain. (*Ibid*.) Dr. Hughes concluded:

> After taking into consideration the history according to the applicant, including subjective complaints, radiologic findings, physical examination findings and my review of all medical records, it is this author's finding, based upon reasonable medical probability, that the described industrial injury has caused both residual whole person impairment and total permanent disability. As stated previously, the applicant is not only unable to return to his usual and customary job duties. Based on the information available to this author, realistically and from a common-sense perspective, he is not able to be employed due to his permanent work restrictions directly caused by the industrial injury.

(*Id.* at p. 20.)

On March 31, 2025, defense vocational expert Howard Twomey completed an evaluation of applicant. Mr. Twomey reviewed the submitted medical record, including the reports generated as a result of both applicant's workers' compensation and CalPERS disability pension claims. (Ex. 16, Report of Howard Twomey, dated March 31, 2025, at pp. 2-5.) Mr. Twomey indicated that a transferable skills analysis "was not completed as the worker's restrictions as described by the medical community preclude work." (*Id.* at p. 9.) Applicant was "observed to sit and stand throughout the approximately three-hour meeting, notably he became more irritable as he fatigued over the three hours." (*Id.* at p. 2.) Mr. Twomey discussed with applicant the availability of various vocational rehabilitation programs that would be "available to him should fatigue and falling abate." (*Id.* at p. 9.) However, Mr. Twomey concluded that while "Mr. Burns has an excellent

range of occupational skills that would provide for employment opportunities," applicant appeared to be "restricted from work based upon the reports of Drs. Hughes, Bellomo, Newton, Hailston and Sussman." (*Id.* at p. 1.)

On June 5, 2025, neuropsychology AME Dr. Sussman conducted a reevaluation of applicant. Dr. Sussman administered additional psychometric testing and assessed a "slight neurocognitive improvement" in applicant's condition. (Ex. 3, Report of Jed Sussman, Ph.D., dated June 5, 2025, at p. 23.) Accordingly, Dr. Sussman modified applicant's whole person impairment under Table 13-5 of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides) from 29 percent to 22 percent. Dr. Sussman further confirmed there were no factors of nonindustrial apportionment. (*Id.* at p. 24.)

On July 1, 2025, neuropsychology AME Dr. Sussman issued a report confirming that there were no changes to the work restrictions identified in his December 17, 2022 report. (Ex. 4, Report of Jed Sussman, Ph.D., dated July 1, 2025, at p. 2.)

On July 11, 2025, neuropsychology AME Dr. Sussman issued a report following his review of the reporting of defense vocational expert Mr. Twomey. Dr. Sussman opined to no changes to his prior opinions.

On September 18, 2025, applicant's vocational expert Scott Simon evaluated applicant and issued a corresponding report. Pursuant to his evaluation, Mr. Simon reviewed applicant's vocational history, ADLs, and the results of a battery of vocational tests. (Ex. 15, Report of Scott Simon, dated September 18, 2025, at p. 5.) Mr. Simon further reviewed the body of reporting adduced pursuant to applicant's workers' compensation and CalPERS disability retirement claims and specifically identified the corresponding work restrictions identified in each report. (*Id.* at p. 9.) Mr. Simon identified the available occupations consistent with applicant's occupational history and skills as well as work from home employment opportunities. Mr. Simon opined:

> In this case, in my opinion, Mr. Burns is not amenable to rehabilitation or sustaining employment in the open labor market.
>
> Dr. Newton stated that Mr. Burns does not have limitations due to his headache impairment. Regarding the applicant's dizziness, this evaluator precluded working at unprotected heights, such as on ladders. Dr. Newton deferred return to work to the field of neuropsychology, noting that the predominant limiting factors are from Mr. Burns's neuropsychiatric symptom complex.

Dr. Conrad stated that the applicant is unable to perform his regular duty work. This evaluator precluded Mr. Burns from completing more than five rotations of the head and neck per hour.

Dr. Bellomo reported that Mr. Burns is incapable of performing his usual and customary job. The applicant is unable to perform tasks that require frequent bending at the neck, twisting of the neck, repetitive head and neck motion, lifting, carrying, pulling, pushing, or standing. He is noted to have a significant range of motion loss involving his cervical spine. This evaluator also reported that Mr. Burns would be challenged with driving a motor vehicle.

Neurology IME, Dr. Shalom, stated that the applicant is permanently incapacitated and unable to perform the required tasks of his previous occupation, such as pulling or dragging an incapacitated or resistant individual 5-20 feet; separating uncooperative individuals and/or restraining or subduing a resistive person using force; standing for extended periods of time to stake out an area or at accidents/crime scenes; walking continuously on foot patrol or to conduct searches; running to an emergency or after a suspect, climbing over fences or walls, or jumping over obstacles. This evaluator also validated the preclusion from the orthopedic evaluation, in that Mr. Burns is not to complete more than five rotations of the head or neck per hour and the limitation of range of motion due to cervical pain.

ExcelABLE completed a Functional Capacity Evaluation (FCE) with Mr. Burns and reported that he is unable to work. The applicant was limited to standing and walking for a total of 45 minutes per day. Activities of sitting, balancing, and reaching (overhead, forward, and downward) are restricted to two hours per day. Mr. Burns is precluded from crawling or climbing stairs for greater than 15 minutes and driving for more than one hour per day. It is noted that Mr. Burns requires rest breaks and that increased task demands will affect his ability to self-regulate, make decisions, solve problems, and resume and complete tasks. Dr. Hughes noted that the applicant is totally permanently disabled and unable to return to the open labor market. Mr. Burns is restricted to sedentary work and is limited to driving one hour, 30 minutes at a time. Reaching overhead, forward, or down; repetitively grasping; typing; and mousing are restricted to a total of 30 uninterrupted minutes for a maximum of two hours. This evaluator precluded the applicant from ambulating on uneven terrain, running, and repetitive rotation of his thoracic or cervical spine. Dr. Hughes stated that Mr. Burns will require unexpected 15-minute breaks.

Dr. Sussman reported that Mr. Burns is unable to return to his previous occupation and is a Qualified Injured Worker (QIW). This evaluator noted that the applicant struggles with communication (sentence formation, slow speech, and word recall), sustained concentration, and stimulation intolerance.

(*Id.* at p. 29.)

Following his interview with applicant, and pursuant to a review of the vocational testing, applicant's vocational history, and the submitted medical-legal reporting, Mr. Simon concluded "Mr. Burns is not amenable for rehabilitation and has sustained a 100% loss of future earning capacity, labor market access and amenability." (*Id.* at p. 30.)

On April 14, 2026, the parties proceeded to trial, and framed for decision the issues of permanent disability, apportionment, and attorney's fees. (Transcript of Proceedings, dated April 14, 2026, at p. 7:24.) Defendant further raised the issue of whether additional discovery was necessary to fully develop the record. (*Id.* at p. 8:1.) The WCJ heard testimony from applicant, and ordered the matter submitted for decision. (*Id.* at p. 42:25.)

On June 25, 2026, the WCJ issued the F&A, determining in relevant part that applicant's industrial injuries resulted in permanent and total disability. (Finding of Fact No. 6.) The WCJ's Opinion on Decision reviewed the medical-legal reporting in evidence and observed that applicant had been deemed to be permanently and totally disabled by multiple evaluators, including neuropsychology AME Dr. Sussman, pain management QME Dr. Hughes, and psychology QME Dr. Hailston. (*Id.* at pp. 4-5.) The WCJ further explained that in addition to the permanent and total disability identified in the medical-legal reporting, the vocational evidence established that applicant was not amenable to vocational rehabilitation such that the applicant successfully rebutted the scheduled rating under the Permanent Disability Rating Scheduled (PDRS). (Opinion on Decision, at p. 5.)

Defendant's Petition asserts that the evidentiary record establishes that applicant continues to maintain substantive "residual functional capacity and post-injury activities," that are not consistent with a finding of permanent and total disability. (Petition, at p. 2:14.) Defendant's Petition contends that the WCJ failed to adequately consider applicant's post-injury participation in vocational classes, his unrestricted driver's license, and his permit to carry a concealed weapon, all of which contraindicate a finding of permanent and total disability. (*Id.* at p. 3.) Defendant further contends the WCJ improperly accorded little evidentiary weight to the reporting of the defense vocational expert, and that the assessments of permanent total disability by AME Dr. Sussman are inconsistent with applicant's "actual functional abilities." (*Id.* at p. 5:1.)

Applicant's Answer responds that defendant's Petition decontextualizes his activities of daily living and functional capacity. Applicant asserts that defendant's characterization of applicant's participation in vocational classes is incomplete, and elides the fact that applicant was

provided with unlimited time to complete his assignments in classes, that he limits his driving to once or twice a week, and that applicant has not actually used a firearm in over a year at least. (Answer, at p. 5:3.) Applicant further observes that the WCJ observed applicant during his testimony and found applicant to be fully credible. (*Id.* at p. 5:11.) Applicant further agrees with the WCJ's determination that defense vocational expert Mr. Twomey's identification of occupational titles to which applicant would be amenable were his physical and neurological condition to materially improve is inherently speculative. (*Id.* at p. 5:26.)

The WCJ's Report responds that applicant's permanent and total disability is supported by the totality of the evidence in the record, and specifically, the medical-legal reporting in the form of AME and QME reporting of Drs. Sussman, Hughes and Halston. (Report, at pp. 5-6.) The WCJ observes that in addition to permanent disability established directly in the medical-legal reporting, applicant met his burden of rebutting the PDRS with persuasive evidence of an inability to meaningfully participate in vocational retraining as evidenced by the reporting of Mr. Simon. Accordingly, the WCJ recommends we deny reconsideration. (*Id.* at p. 7.)

DISCUSSION

I.

During the period from July 1, 2026 to July 13, 2026, Labor Code[1] section 5909(a) 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(a).)

Here, the Petition for Reconsideration was filed on July 10, 2026, and 60 days from the date of filing is September 8, 2026. This decision is issued by or on September 8, 2026, so that we have timely acted on the petition as required by section 5909(a).

[1] All further references are to the Labor Code unless otherwise noted.

II.

In addition to the WCJ's Report, which we adopt and incorporate, we observe the following.

Section 4660.1 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (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, 1320 [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]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

Here, the WCJ's Opinion on Decision analyzes the relevant medical-legal reporting and details the ratings corresponding to the WPI percentages assigned by the various physicians. (Opinion on Decision, at p. 4.) The WCJ observes that combined value of applicant's various impairments following adjustment per the PDRS yields a scheduled rating of 80 percent permanent partial disability. (*Ibid*.)

However, the scheduled rating is not absolute. (*Fitzpatrick, supra,* 27 Cal.App.5th 607, 619-620.) A rating obtained pursuant to the PDRS may be rebutted by showing applicant's diminished future earning capacity is greater than the factor supplied by 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 119] (*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.)

The issue presented herein is whether the medical and vocational evidence constitutes substantial evidence to support the conclusion that applicant is permanently and totally disabled due to applicant's inability to benefit from vocational rehabilitation.

"The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force. This necessarily requires an individualized approach…It is this individualized assessment of whether industrial factors preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule." (*Dahl, supra,* at p. 758.)

Here, the WCJ takes careful inventory of the work restrictions identified by the reporting medical-legal physicians. The restrictions identified by AME Dr. Sussman included the need for extra time to process input and to formulate replies and responses, written and verbal; the ability to have instructions repeated and probably written; the freedom to take notes or have reference material to refer to if information to be remembered is more than short to moderate; a preclusion from working in environments where it is loud and/or visually busy in the forefront or background; extra time and repetition to learn and retain new procedures and to carry-out tasks; a preclusion from working continuously for more than an hour or two without a 15-30 minute break to try to reconstitute; and a preclusion from working more than 4 hours per day even if applicant's job

abides by his restrictions. (Ex. 2, Report of Jed Sussman, Ph.D., dated December 17, 2022, at p. 2.)

In addition, pain management QME Dr. Hughes has restricted applicant to "no driving more than one hour a day, with driving limited to low traffic and low stress areas; no driving for more than 30 minutes continuously, and even then, opportunities for unexpected 15 minutes breaks due to increased symptoms (including pain), are required; no standing for more than 15 minutes continuously, a total of 45 minutes of cumulative standing a day; no walking for more than 15 minutes continuously, a total of 45 minutes of cumulative standing a day … [t]he applicant is limited to even terrain; no reaching overhead more than 2 hours a day, 30 minutes continuously; no reaching forward more than 2 hours a day, 30 minutes continuously; no repetitive grasping more than 2 hours a day, 30 minutes continuously; no typing or mousing more than 2 hours a day, 30 minutes continuously; no reaching downward more than 2 hours a day, 30 minutes continuously; no running; no lifting or carrying more than 10 pounds; no repetitive rotation of his thoracic or cervical spine; no climbing stairs for more than 15 minutes a day." (Ex. 10, Report of Lorenzo Hughes, M.D., dated November 1, 2024, at pp. 19-20.) Dr. Hughes also opines that applicant will require 15-minutes breaks due to unexpected pain.

Applicant's vocational expert Mr. Simon has similarly surveyed the medical-legal record, and the breadth and scope of the work restrictions identified by the various medical evaluators. Mr. Simon's review includes the wide-ranging restrictions identified by Dr. Sussman and Dr. Hughes and further considers the additional array of work restrictions identified in applicant's September 23, 2024 functional capacity evaluation. Following his review of the entirety of the submitted medical record, and consideration of the effect of the relevant work restrictions, Mr. Simon concludes that applicant is not amenable to rehabilitation. Applicant's "orthopedic, neurological, neuropsychological, and psychological impairments result in numerous debilitating symptoms and render him completely unable to participate in any employment." (Ex. 15, Report of Scott Simon, dated September 18, 2025, p. 38.)

The pervasive nature and scope of the restrictions identified in the medical-legal record is clear and undisputed. Applicant's vocational expert has taken a thorough and fact-based approach to assessing applicant's feasibility for vocational retraining and has concluded that applicant is unable to meaningfully participate in vocational retraining. We also observe that while the WCJ found defendant's vocational reporting to be speculative as to applicant's potential return to work

should his condition improve, Mr. Twomey's report also provides that applicant "has an excellent range of occupational skills that would provide for employment opportunities, *albeit appears to be restricted from work based upon the reports of Drs. Hughes. Bellomo, Newton, Hailston and Sussman*." (Ex. 16, Report of Howard Twomey, dated March 31, 2025, at p. 1, italics added.) Mr. Twomey further states that a transferable skills analysis "was not completed as the worker's restrictions as described by the medical community preclude work." (*Id.* at p. 9.) It thus appears that applicant's inability to reenter the labor market is supported by the assessment of both reporting vocational experts. We therefore agree with the WCJ that applicant has successfully met his burden of establishing that he is not amenable to vocational rehabilitation.

Insofar as defendant raises issues of applicant's post-injury residual functional capacity and participation in vocational classes at a local community college, we agree with the WCJ's weighing of the evidence as set forth in the Report, including the need to contextualize applicant's post-injury learning pursuits with the functional restrictions applicant must now negotiate on a daily basis. (Report at pp. 7-8.)

Finally, we observe that inasmuch as the WCJ had the opportunity to observe the demeanor of the applicant at trial, we accord to the WCJ's finding that applicant was fully credible the great evidentiary weight to which it is entitled. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination(s). (*Id*.)

Based on our review of the entire record, including the medical-legal and vocational reporting, we concur with the WCJ's conclusion that the reporting of applicant's vocational expert successfully rebuts the presumptively correct PDRS and establishes that because applicant is not feasible for vocational retraining, applicant's disability is permanent and total. (*Ogilvie*, *supra*, at p. 1274.)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

September 4, 2026

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

HANK BURNS
JONES CLIFFORD, LLP
STATE COMPENSATION INSURANCE FUND

SAR/abs

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

REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION

I

INTRODUCTION

Defendant State Compensation Insurance Fund (SCIF), by and through its counsel, filed a timely and verified Petition for Reconsideration on July 10, 2026 challenging the Amended Findings and Award issued on June 25, 2026. Applicant filed an Answer on July 15, 2026.

Applicant Hank Burns, while employed as a sworn patrol officer for California Highway Patrol, sustained injury to his thoracic spine, cervical spine, brain, psyche and neuropsyche during an on-duty motor vehicle accident on October 1, 2020. (MOH/SOE, p. 2, lines 8-13). The applicant was 32 years old on the date of injury.

The issues for Trial on April 14, 2026 included permanent disability, apportionment, attorney's fees, and additional discovery alleged by Defendant. (MOH/SOE, pp. 2-3). A Findings & Award issued on June 18, 2026 finding the applicant permanently and totally disabled (100% PD). An Amended Findings & Award issued on June 25, 2026 to correct the commutation of attorney's fees only.

Defendant SCIF filed a Petition for Reconsideration alleging the following: (1) the WCJ failed to consider material evidence of Applicant's demonstrated post-injury functional capacity and post-injury activities, (2) the WCJ rejected Defendant's Vocational Rehabilitation (VR) expert report without proper analysis, (3) the medical opinions do not constitute substantial medical evidence, and (4) the record does not support rebuttal of the scheduled rating. *Petition, pp. 2-5.*

II

FACTS

Applicant Hank Burns, while employed as a sworn patrol officer for California Highway Patrol, sustained injury to his thoracic spine, cervical spine, brain, psyche and neuropsyche during an on-duty motor vehicle accident on October 1, 2020. (MOH/SOE, p. 2, lines 8-13). Specifically, the applicant was hit at an intersection by a drunk driver. (MOH/SOE, p. 4, lines 40-41; Joint Exh. 20).

The applicant underwent treatment by various physicians and was evaluated by the following doctors: neuropsyche AME Dr. Jed Sussman (Joint Exh. 1-5), psyche QME Dr. Lindsey Hailston (Joint Exh. 12-13), pain medicine QME Dr. Lorenzo Hughes (Joint Exh. 8-11), neurology AME Dr. Fredric Newton (Joint Exh. 6), IME Dr. Anthony Bellomo (Joint Exh. 18), and IME Dr. Daniel Shalom (Joint Exh. 19). The applicant also underwent vocational rehabilitation evaluations with Applicant's expert Scott Simon (Joint Exh. 15), and Defense expert Howard Twomey (Joint Exh. 16).

Dr. Sussman diagnosed the applicant with concussion and post-concussion syndrome with a 22% WPI. (Joint Exh. 3, p. 23).

Dr. Hailston diagnosed the applicant with PTSD and mild cognitive disorder due to TBI and provided a GAF of 59 (17%WPI). (Joint Exh. 13, p. 11).

Dr. Hughes diagnosed the applicant with cervical spine radiculopathy, bilateral cervical and thoracic spondylosis, and chronic cervical and thoracic central neuropathic pain syndrome. (Joint Exh. 9, p. 3). He provided an 18% WPI plus 3% pain add-on for the cervical spine and 5% WPI for the thoracic spine. (Joint Exh. 9, p. 5).

Dr. Newton diagnosed the applicant with cervical spine flexion/extension injury with myofascial disorder, secondary cerebral concussion with post-traumatic headache and dizziness and neuropsychiatric symptom complex. (Joint Exh. 6, p. 23). He provided 7% WPI for headaches and 3% WPI for dizziness.

The above-evaluators apportioned 100% of applicant's disability to the October 1, 2020 motor vehicle accident. The combined permanent disability under the AMA Guides was found by the undersigned WCJ to be 80% for this injury.

The parties stipulated that the applicant was permanent and stationary for all injuries as of June 5, 2025. (MOH/SOE, p. 2, lines 37-38). Regarding permanent work restrictions, Dr. Hughes stated in his November 1, 2024 report that the applicant is unemployable due to his permanent work restrictions and has reached "total permanent disability." (Joint Exh. 10, pp. 19-20).

Dr. Sussman reported that the applicant is incapable of working more than 4 hours per day even if his job abides by his permanent restrictions. (Joint Exh. 2). And, within those four hours, the applicant would need to take a 15-30 minute break every 1-2 hours. (Id.). Dr. Sussman quoted Dr. Hughes' report stating that, "The applicant not only is unable to return to his usual and customary duties, but based on the information available to this author, and from a common sense

perspective, he is not able to be employed due to his permanent work restrictions." (Joint Exh. 4, p.1).

Dr. Hailston testified in deposition that neuropsyche overlaps with the psyche in this case and that they are "intertwined." (Joint Exh. 14, p. 31, lines 19-23). She thereafter defers Applicant's work restrictions to Dr. Sussman. (Id. at p. 34, lines 2-6).

Defense VR expert Howard Twomey issued a report dated March 31, 2025. (Joint Exh. 16). In his report, Mr. Twomey finds that the scheduled rating is not rebutted because the applicant can work if his physical capabilities improve. (Joint Exh. 16, p. 5). However, Mr. Twomey also notes that Drs. Hughes, Bellomo, Newton, Hailston and Sussman restrict Applicant from working. (Id.).

Applicant's VR expert Scott Simon found that the applicant is unemployable because of his October 1, 2020 injury. Specifically, he stated, "Mr. Burns would not be considered to be a viable candidate for even the least physically rigorous jobs within the economy." (Joint Exh. 15, p. 33). Mr. Simon concluded that the applicant is unable to return to the workforce, and is not amenable to rehabilitation. (Id.).

At Trial, the applicant testified that he does not believe he can work in any job without accommodation due to his neck and back pain, lack of communication skills, and cognitive issues, stating, "he would not hire himself." (MOH/SOE, p. 5, line 45 – p. 6, line 1). After his injury, he attended the college courses with his SJDB voucher. (MOH/SOE, p. 5, lines 30-32). He took classes in metallurgy, welding, jewelry making and photography. (MOH/SOE, p. 6, lines 5-9). His instructors allowed him to take as much time as he needed, and when he could not make it to class, the instructors did not count that against him. (MOH/SOE, p. 5, lines 25-28). He testified that he had to drop a class because it was too much reading for him. (MOH/SOE, p. 7, lines 39-40).
The applicant further testified that he feels comfortable maintaining and storing firearms safely, although he has not bought ammunition since 2020, and has not actively used a firearm in one to two years. (MOH/SOE, p. 6, line 44 – p. 7, line 11). He does not use or carry his firearms when he feels slow cognitively. (Id.).

The applicant's wife does most of the driving, cooking and cleaning. (MOH/SOE, p. 7, lines 25-32). Due to his physical and cognitive pain, the applicant does not know what each day will be like and whether he will be able to get out of bed. (Id. at p.7, lines 34-37).

Based on the above evidence, the undersigned WCJ found that the scheduled rating was rebutted by VR expert Scott Simon and that the applicant was permanent and totally disabled. It is from this Findings & Award that Defendant seeks reconsideration.

III
DISCUSSION

A. THE TOTALITY OF EVIDENCE (MEDICAL, VOCATIONAL, FUNCTIONAL, AND TESTIMONIAL) SUPPORTS A FINDING OF 100% PERMANENT DISABILITY

Petitioner/Defendant asserts that the undersigned WCJ failed to properly analyze their expert VR report from Howard Twomey, and that the reporting of the medical-legal evaluators does not support an award of permanent and total disability. The undersigned WCJ disagrees.

The Findings & Award of 100% PD is supported by the totality of evidence in this case. First, all of the medical-legal evaluators indicated the applicant's permanent work restrictions practically excluded him from the workforce. Dr. Sussman reported that the applicant is incapable of working more than 4 hours per day even if his job abides by his permanent restrictions. (Joint Exh. 2). And, within those four hours, the applicant would need to take a 15-30 minute break every 1-2 hours. Dr. Sussman quotes Dr. Hughes' report stating that, "The applicant not only is unable to return to his usual and customary duties, but based on the information available to this author, and from a common-sense perspective, he is not able to be employed due to his permanent work restrictions." (Joint Exh. 4, p.1). Dr. Hailston defers Applicant's work restrictions to Dr. Sussman. (Id. at p. 34, lines 2-6).

Second, the undersigned WCJ found Dr. Simon's VR report to be more persuasive than that of Mr. Twomey. Mr. Twomey's report was contradictory and speculative whereas Mr. Simon's report was consistent with the entire medical record and applicant's testimony.

Mr. Simon opines that the applicant is unemployable as a result of his October 1, 2020 injury. He reported, "Mr. Burns would not be considered to be a viable candidate for even the least physically rigorous jobs within the economy." (Joint Exh. 15, p. 33). Mr. Simon concludes that the applicant is unable to return to the workforce and is not amenable to rehabilitation. (Id.).

However, Mr. Twomey's vocational report is not consistent with the medical record and is speculative in nature. Mr. Twomey acknowledges that Drs. Hughes, Bellomo, Newton, Hailston and Sussman restrict Applicant from work. He stated, "the worker's restrictions as described by

the medical community preclude work. (Joint Exh. 16, p.5). However, he then goes on to state that the applicant may be able to return to work if his physical capabilities improve. (Id.). Whether the applicant will improve is speculative. Moreover, the parties stipulated that the applicant was permanent and stationary as of June 5, 2025.

Third, the undersigned WCJ found the applicant to be a credible witness. On questions of credibility, judgment is deferred to the WCJ, who is in the best position to observe the demeanor of the witness. (*Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal. 3d 312, 318).

In the case at hand, the undersigned WCJ observed the applicant to be struggling with focus and comprehension during even brief periods of testimony at Trial. Moreover, Applicant's testimony regarding metallurgy, welding, jewelry making and photography were akin to hobbies and trying to keep his mind working, not future job prospects. The applicant testified that he has not done any metallurgy, welding, jewelry making or photography since he took classes in 2023. (MOH/SOE, p. 6, lines 40-41). He has not made knives since high school. (Id.).

With respect to driving, cooking, and cleaning, the applicant testified that his wife does the majority of these chores now. (MOH/SOE, p. 7). With driving in particular, the applicant does not know whether he should have any restrictions on his driver's license since the injury, but he knows that he can only do limited driving on country roads. (Id.).

Overall, Applicant's testimony combined with the medical-legal and vocational reports supports a finding of permanent and total disability.

B. <u>THE FINDINGS & AWARD IS SUPPORTED BY SUBSTANTIAL MEDICAL EVIDENCE</u>

An award of permanent disability pursuant to the Permanent Disability Rating Schedule (PDRS) must be supported by substantial medical evidence. A medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. (*Milpitas Unified School District v. WCAB* (*Guzman*) (2010) 75 Cal. Comp. Cases 837). Vocational reports must also be supported by substantial evidence.

In the case at hand, the record is extensive and comprehensive. It includes twelve medical-legal reports, two IME reports, transcripts of two QME depositions, a functional capacity evaluation report, two vocational expert reports, and Applicant's testimony. The medical-legal evaluators discussed Applicant's medical history in depth, reviewed all necessary documentation, and provided thoroughly reasoned reports based on their medical expertise.

Moreover, the doctors and vocational experts were aware of, and considered, applicant's college attendance post-injury, his firearm retention and his driving capabilities. This evidence and reporting was also considered by the undersigned WCJ. The evidence showing that the applicant went to college post-injury, still has a drivers' license and still maintains a firearm, does not negate the 100% PD rating. The activities described (attending college, driving, maintaining a firearm) come with significant restrictions post-injury. The applicant has had to drop classes, miss classes, limit driving to country roads, and not use firearms due to cognitive disfunction. The medical experts in this case agree that these restrictions are so significant that the applicant is essentially precluded from the workforce, and the VR report of Scott Simon supports this conclusion.

IV
RECOMMENDATION

It is respectfully recommended that the Petition for Reconsideration be denied.

Dated: July 23, 2026

Heidi K. Hengel
Workers' Compensation
Administrative Law Judge