WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JACOB BUSHEY, *Applicant*

vs.

CALIFORNIA HIGHWAY PATROL;
legally uninsured, adjusted by SCIF, *Defendants*

Adjudication Number: ADJ11221216
Redding District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact, Award issued by the workers' compensation administrative law judge (WCJ) on December 29, 2025. Therein, and as relevant here, the WCJ found that applicant sustained admitted injury arising out of and occurring in the course of employment (AOE/COE) to the psyche while employed as a patrol officer during the period to and including November 5, 2017. The WCJ further found that applicant "cannot benefit from the provision of rehabilitation, as his restrictions from the industrial injury render him unable to compete for work in the general labor market. Therefore, he is found to be totally permanently disabled."

Defendant contends that the WCJ erred in finding 100% permanent disability arguing that he should have relied on the medical opinion of clinical psychologist panel qualified medical evaluator Richard J. Palmer, Ph.D., to find valid apportionment.

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the WCJ's Opinion on Decision (Opinion) and Report and Recommendation on Petition for Reconsideration (Report) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Opinion and Report, both of which we adopt and incorporate as quoted below, and for the reasons stated below, we will deny reconsideration.

I.

Preliminarily, we note that former Labor Code[1] section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, 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 January 22, 2026 and 60 days from the date of transmission is March 23, 2026. This decision is issued by or on March 23, 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 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 January 22, 2026, and the case was transmitted to the Appeals Board on January 22, 2026. Service of the Report and transmission

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

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 January 22, 2026.

II.

The WCJ stated the following in the Opinion:

OPINION ON DECISION

FACTS

This is an accepted injury to the applicant's psyche, arising out of cumulative trauma from the necessity to observe and deal with disturbing accidents and injuries as part of his job as a California Highway Patrolman. The parties used Dr. Richard Palmer as a PQME, and Dr. Palmer has written multiple reports, twelve of which are in evidence as joint exhibits AA through JJ, and MM and NN. Further, Dr. Palmer was deposed by the parties, and that deposition transcript in in evidence as Joint Exhibit KK.

Both parties obtained opinions from vocational rehabilitation experts. Applicant used Mr. Frank Diaz, and these reports are in evidence as Applicant's Exhibits 31 and 32.

Defendant utilized Mr. Howard Twomey as a vocational expert, and Mr. Twomey's reports are in evidence as defendant's exhibits E, F, G and H.

The main issue and point of contention is the question of permanent disability. In Dr. Palmer's report of 3/5/2018, in evidence as Joint Exhibit AA, and specifically on pages 24 – 26, the doctor finds that the applicant has a GAF score of 45, and apportions 90% of that to the stresses and strains of working for the defendant.

In the doctor's report of 6/4/2019, in evidence as Joint Exhibit DD, the doctor gave the applicant a GAF score of 52, and did not change his apportionment.

In the doctor's report of 1/25/2021, on pages 13 and 14, in evidence as Joint Exhibit EE, he gave the applicant a GAF score of 54, and left the apportionment as previously discussed.

Finally, in the report of 12/22/2023, in evidence as Joint Exhibit HH, Dr. Palmer gave yet a fourth GAF score of 56, and also changed his apportionment to 87% industrial. This is found on pages 7 and 8. Of interest, the doctor erroneously reported his prior apportionment as 95% industrial, rather than the correct 90%.

Believing that the disability suffered by Mr. Bushey was greater than any of these GAF scores represented, the applicant obtained an opinion from a vocational expert in an effort to rebut the scheduled rating of his psychiatric disability. This expert,

Mr. Diaz, concluded that the applicant's work restrictions were such that he could not benefit from the provision of rehabilitation, and thus could not compete in the general work force. At best, it was determined that the applicant might be able to create self employment in a sheltered work environment.

In response, the defendant hired their own expert to provide a second opinion. That expert, Mr. Twomey, determined that the applicant could benefit from rehabilitation to establish some form of work from home.

The parties ultimately found that they could not resolve this dispute on their own, and these questions were tried on 11/4/25. This decision now issues therefrom.

APPORTIONMENT

The applicant has the burden of establishing the percentage of permanent disability directly caused by the industrial injury, and the defendant has the burden of establishing the percentage of permanent disability caused by other factors. The evidence showing these percentages must be substantial. The Board en banc set forth the standard for determining legal apportionment in **Escobedo v. Marshalls (2005) 70 CCC 604**, and specifically on page 621, where the Board said

"*Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions* (citations omitted). *A mere legal conclusion does not furnish a basis for a finding. An opinion that fails to disclose its underlying basis and gives a bare legal conclusion does not constitute substantial evidence. The chief value of an expert's testimony rests upon the material from which his or her opinion is fashioned and the reasoning by which he or she progresses from the material to the conclusion and it does not lie in the mere expression of the conclusion; thus, the opinion of an expert is no better than the reasons upon which it is based."* (all citations omitted)

"Moreover, in the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles."
(citations omitted).

Thus, to be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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.

For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how

and why the disability is causally related to the industrial injury (e.g., the certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

Applying these principles to the opinions of Dr. Palmer, we see that on page 26 of Joint Exhibit AA, the doctor attributes 10% of the disability to *"... personality styles that make him more susceptible to the effects of trauma including his perfectionism, his predisposition toward experiencing anxiety but in comparison to the effects of the job trauma, their contribution is relatively minor. Hence, 90% of his industrial injury can be attributed to experiences during his CHP career and the remaining 10% to a combination of other traumas and vulnerabilities due to his particular personality structure."*

Thus, the doctor is likely saying that the applicant's personality type made his reaction to the work stress worse and therefore worsened his ultimate level of disability. This description is perhaps better than most, but still leaves the reader to interpret to some extent the "why and how" as well as giving a bare minimum of information as to why these particular percentages were chosen, as opposed to any other. A substantial medical opinion on apportionment should be clear on these issues and should not leave the parties to guess or attempt a reasonable interpretation of their meaning.

Thereafter the doctor left this apportionment opinion unchanged until his final report of 12/22/2023, where he stated that *"At this point it has been a bit over 6 years since Mr. Bushey's injury so now the apportionment is with regard to the maintenance (rather than the causation) of the injury. Although he has made significant improvement in the 6 years post injury, he remains moderately impaired psychologically.*
...

Therefore, eighty-seven percent (87%) of the ongoing effect can, within reasonable medical probability, be apportioned to the enduring effects of his injury while thirteen percent (13%) is apportioned to other factors."

This more recent apportionment opinion is problematic. Apportionment "with regard to maintenance" is undefined, so the reader is left to speculate on what this might mean. Additionally, it is unclear what legal standard, if any at all, the doctor is applying here. Are we to take "maintenance" to mean apportionment to causation or disability, or something altogether different? Although we may assume that when the doctor refers to "other factors," he is referring to the same non-industrial personality traits that he discussed in Joint Exhibit AA, that is an assumption that one should not have to make when reading a final apportionment opinion. The

doctor should be clear and should certainly not leave the reader to guess or speculate. Finally, there is no explanation at all as to why there is a change in apportionment to non-industrial factors from 10% to 13% beyond the maintenance comment, which is on its face insufficient. Nor is there an explanation as to why 13% is now appropriate, versus the prior 10%.

Therefore, for these reasons Dr. Palmer's final apportionment opinion does not rise to the level of a substantial opinion on legal apportionment when the tests set forth by the Board in Escobedo are applied.

Without the existence of legal apportionment, 100 percent of the disability is industrial.

PERMANENT DISABILITY

In Dr. Palmer's final report, in evidence as Joint Exhibit HH, he determined that the applicant's GAF score was 56, which is basically consistent with his comment that the applicant remains moderately disabled. Absent any legal apportionment, this would result in a 21% WPI, which adjusts out as follows:

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However, the issue is whether this assessment of permanent disability per the AMA Guides has been rebutted successfully by establishing that he is not capable of competing in the open labor market, cannot benefit from rehabilitation, and therefore has lost all of his earning capacity.

In ***Ogilvie v. WCAB*** **(2011) 76 CCC 624** the Court of Appeal held that despite the amendments to **LC 4660** by **SB 899,** it was permissible to depart from a scheduled rating on the basis of vocational expert opinion that an employee has a greater loss of future earning capacity thanreflected in a scheduled rating. The court held that the schedule can be rebutted by demonstrating:

1. a factual error in the calculation of a factor in the rating formula or its application;

2. the omission of medical complications aggravating the employee's disability in preparation of the rating schedule; or

3. the employee is not amenable to rehabilitation due to industrial injury, and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

For an applicant seeking an award of 100 percent disability, the cause of the work restrictions contributing to his or her inability to compete in the open labor market must be 100 percent industrial, without apportionment.

In our case, it is this third method that the applicant has used to rebut the scheduled rating and argue for total permanent disability. As discussed above, it has already been established that without legal apportionment, all of the disability is industrial.

Turning to the evidence, on page 6 of Joint Exhibit HH, Dr. Palmer addresses disability using Table 14-1 of the AMA Guides. Under the heading of Social Functioning, the doctor reports that, *"…he is generally uncomfortable with any other people due to the considerable anxiety he experiences with strangers, makes minimal effort to expand his circle of social involvement, and when forced to interact with strangers and acquaintances makes a strong effort to make the interaction as minimal and brief as possible."*

Under the heading of Concentration, the doctor reported that, *"…his concentration remains moderately impaired most of the time and rapidly escalates when he leaves his property or when he is considering difficult or uncomfortable issues."*

Under General Adaptation, the doctor found him moderately impaired, but only if he maintained his isolation from people and his extreme control of events in his life. The doctor reported that, *"While he is able to function reasonably well in his current home situation, responsibilities, stresses and demands are limited and very carefully controlled by himself. The levels of stress involved are markedly lower than what would be expected in any workplace setting."*

From all this, the doctor concluded that, *"Hence, at this time Mr. Bushey remains at Maximum Medical Improvement and is Permanently Totally Disabled (PTD). Within reasonable medical probability, his only possibility for additional gainful employment is a career that he can pursue alone, at home, with minimal interpersonal contact, and hours of his choosing although success in this endeavor would remain to be seen. The possibility of gunsmithing is an excellent example of the type of work situation he would require."*

On page 8, the doctor repeated his conclusion, stating that *"At this point, at best, Mr. Bushey might be able to manage a part-time, home based profession centering on manual work only (or primarily) completed on his time frame at times he was feeling capable. The idea of gunsmithing is an excellent example of the type of working arrangement which would be necessary for him to be successful in any employment. And that is not even sure to work. Otherwise, he remains Permanently and Totally Disabled."*

This medical opinion was echoed by the treating counselor, Elisa Hughes, M.A. Ms. Hughes has been providing treatment to Mr. Bushey since 2017. In her deposition, in evidence as Joint Exhibit LL, she stated the following, *"He does not - - he does not do well leaving his home; not to the point necessarily of agoraphobia, but certainly a level of avoidance consistent with the severity of his PTSD. He is unable to work in any capacity, not just in law enforcement, and any piece of mail, any phone call, any e-mail, being anywhere when a police car goes*

by, any of these kinds of things, it is completely still paralyzing to him and will cause a major setback."

The defendant was understandably concerned about the dog breeding and attendance at dog shows done by the Busheys, as well as selling the dogs. When asked about this, Ms. Hughes explained that the Busheys were able to do this activity because they could do it at their own pace, they didn't have to report to any employer or supervisor, they do not have employees, and that they were able to do this with their level of disability because it was therapeutic and they had done it for years as a hobby. The counselor explained that this activity did not require them to socially engage beyond their own decision, timing and schedule, and as their ability allowed. In essence, they created a bubble where they could function to some extent, but could not should they find themselves outside of this very controlled environment.

In later deposition testimony, Ms. Hughes described how even the stress of going to the store caused difficulty in organizing, putting a list together, getting dressed, and getting into the car. Ms. Hughes reported that they experience great distress in driving and being in a retail store. Ms. Hughes stated that when driving, any encounter with a police car, even just seeing one, can be triggering of his PTSD, requiring that he pull over and engage in stress relieving behavior.

Thus, the medical evidence from both Dr. Palmer and Ms. Hughes is consistent in describing the symptoms and their effects on Mr. Bushey's ability to work in any structured work environment beyond the highly controlled bubble they have created around their remote ranch in Texas. There is no medical evidence to the contrary.
Next, having established the opinions of the medical professionals treating and evaluating Mr. Bushey, we turn to the opinions of the two vocational rehabilitation experts hired by the parties to address the question of whether this applicant can benefit from the provision of vocational rehabilitation and/or is able to compete for jobs in the general workforce.

A finding of permanent total disability can be based on vocational evidence. In such cases, the applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause the applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity.

Mr. Diaz wrote two reports, dated 8/19/2022 and 2/21/2024, in evidence as Applicant's Exhibits 31 and 32. After taking a history of the applicant's case, reviewing the medical record, performing testing and interviewing Mr. Bushey, Mr. Diaz determined that *"When considering Mr. Bushey's individualized work history, the medical opinions, impairments, and functional limitations as set forth by Dr. Palmer, the results of the transferable skills analysis, his ability to benefit from vocational rehabilitation, and accommodations that may be available to him in the*

competitive open labor market, I come to the conclusion that Mr. Bushey is not amenable to rehabilitation in that vocational rehabilitation will not restore his access to the open labor market." (page 42, Applicant's Exhibit 31).

Of relevance is Mr. Diaz' conclusion that *"I am of the opinion that many of the accommodations listed by JAN* (a testing protocol to establish accommodation options)*, such as reduction or elimination of workplace stress, restructuring a job to include only essential functions, allowing longer or more frequent work breaks, providing backup coverage for when Mr. Bushey needs to take breaks, and allowing Mr. Bushey to work at home without stress cannot reasonably be provided by employers in the open labor market, and are accommodations that could only be provided in a sheltered workshop situation."*

These opinions and the reasoning behind them are consistent with the opinions of both Dr. Palmer and counselor Hughes on the limitations and accommodations necessary for the applicant to function in a work environment.

Additional vocational opinion was provided by Mr. Howard Twomey, who wrote four reports in evidence as Defendant's Exhibits E through H.

To summarize these reports, Mr. Twomey concluded that the applicant may, with appropriate training, perhaps with the use and support of a voucher, and the ability to work from home, pursue work in taxidermy, gunsmithing or bookkeeping. Dr. Palmer also thought that the applicant might be successful pursuing a gunsmithing career if he could work from home with minimal stress and consistent with the restrictions he described.

It is also important to note, however, that Mr. Twomey could not complete a wage loss analysis as he did not have any evidence from a valid wage statement to review. Further, in his last report, Mr. Twomey noted he did not have the reports from the counselor, Ms. Hughes, and there is no evidence these reports or the deposition transcript were ever provided to him for consideration. Thus, his opinions are derived from an incomplete medical record.

In considering the opinions of these two vocational experts, the evidence suggests that if the applicant was to return to work via rehabilitation, it would need to be a job he did at home, at his own pace, and with minimal contact with other people and certainly without the need to interact with supervisors or an employer. Stress must be kept to a minimum. Mr. Twomey thought that such work might be found for the applicant in taxidermy, gunsmithing or bookkeeping. Dr. Palmer indicated that in his opinion, the job of a self employed gunsmith could possibly work, although there was no guarantee of success (Joint Exhibit HH, page 8). Mr. Bushey himself added some uncertainty to this goal by telling the doctor at one point that he would be interested in attempting home gunsmithing employment, but later testifying under oath at trial that he could not do that job, for various reasons (Summary of Testimony, page 6: 13-15).

These opinions bring up the question of whether such employment, even if successful, would be work in a sheltered and/or protected work environment, which would not be evidence that the applicant would be able to compete for work in the general labor market.

Interestingly, there is nothing in the labor code that would prohibit an employee with total disability from returning to work. An injured worker may be totally permanently disabled even if he or she is able to perform some limited work in a sheltered work environment.

In the case of **The Limited v. WCAB (2012) 77 CCC 1003 (writ denied),** the possibility that the applicant might be able to return to work as a receptionist with significant restrictions was not the same as a showing that she could compete in the open labor market with those restrictions, and thus she was not able to benefit from rehabilitation and a 100% award was appropriate.

In **Spartek Plastics v. WCAB (1998) 64 CCC 124 (writ denied),** the worker was seriously injured while working as a forklift driver. After about two years of treatment, his employer hired him back again as a forklift driver, the same job he was doing before the injury. The Board still awarded 100% permanent disability because the applicant was rehired in a protected work environment, and found that due to the applicant's scarring, he could not compete in the open labor market in general and thus a 100% award was appropriate.

In **Pacific Greyhound Lines v. WCAB (1973) 38 CCC 359 (writ denied),** the fact that the injured worker had started and was running his own repair shop was not sufficient to show that he could compete for work in the open labor market since the evidence showed he was working in a protected work environment that he controlled, and which was otherwise unavailable.

Here, the restrictions discussed by both Dr. Palmer and counselor Hughes are so significant that at best, both vocational experts thought that the applicant might be able to find work if that work could be done at home, at his own pace and with minimal stress and contact with other people and/or supervisors. This is the very definition of a protected or sheltered work environment. Further, only the potential job of a gunsmith was seriously discussed with the applicant, who then testified at trial that he actually didn't think gunsmithing at home would work for him, and then gave the reasons why not, under oath, and without rebuttal.
Of the two opinions from the vocational rehabilitation counselors, it is found that the opinions of Mr. Diaz are both substantial evidence and most persuasive. His analysis and conclusions are consistent with that of the medical opinion. Finally, the persuasiveness of Mr. Twomey's opinion was damaged by the fact that he saw none of the reports of Ms Hughes, nor did he appear to see or comment on the significance of her deposition testimony.

Having said that, it is important to understand that both vocational experts concluded that the only work the applicant might be able to do would be isolated work at home. While Mr. Twomey felt that the applicant could benefit from rehabilitation, the sort of job that the applicant might have obtained even if rehabilitation had been pursued would be so limited that it would fall squarely under the definition of a sheltered or protected workplace. That reality supports the conclusion of Mr. Diaz that this slender possibility of employment did not mean that the applicant could compete for any realistic employment in the general labor market. As we can see from the caselaw cited above, the question is not whether some very limited work can be found for the applicant to do, but whether the restrictions involved would prevent him or her from competing for work in the open labor market. Work in a sheltered or protective work environment that is not practical in the open labor market does not disqualify one from being found to be 100% disabled.

Without the ability to compete in the open labor market due to the extensive restrictions defined by the doctors, it is found that the applicant cannot benefit from rehabilitation, consistent with the analysis provided by Mr. Diaz, and that in the absence of legal apportionment, this inability is 100% industrial.

Therefore, it is found that the applicant has successfully established that he has suffered a complete loss of future earning capacity, that that loss is entirely the result of his industrial injury, and therefore, the scheduled rating has been rebutted. The applicant's industrial injury has rendered him permanently totally disabled.

(Opinion on Decision, at pp. 2-10, emphasis in original.)

The WCJ stated the following in the Report:

REPORT AND RECOMMENDATION OF PETITION FOR RECONSIDERATION

II.
FACTS

This is an accepted injury to the psyche caused by the stresses and strains associated with the applicant's work as a highway patrolman. Dr. Palmer was the PQME, and he wrote twelve reports, in evidence as Joint Exhibits AA through JJ, and MM and NN. Dr. Palmer was also deposed by the parties, and the transcript of that deposition is in evidence as Joint Exhibit KK.

The question presented at trial was whether the scheduled rating was rebutted by the opinions of the vocational experts, and also whether the apportionment discussed by Dr. Palmer was legal substantial evidence.

After trial, it was found that the scheduled rating had been rebutted, and that the apportionment assigned by Dr. Palmer was not legal. The applicant was found to be 100% permanently disabled.

Thereafter, defendant filed a timely Petition for Rehabilitation, asserting that Dr. Palmer's apportionment was in fact legal, and should be taken into account in assessing the applicant's permanent disability.

III.
DISCUSSION

While applicant has the burden to prove the percentage of permanent disability directly caused by the industrial injury, the defendant has the burden to prove apportionment.

The standard for establishing legal apportionment was set forth by the Board in **Escobedo v. Marshalls (2005) 70 CCC 604**, and specifically on **page 621**. There, the board stated that to be substantial evidence on the issue of apportionment, a doctor must describe in detail the exact nature of the apportionable disability. To be substantial evidence, the medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, and most importantly, must set forth the reasoning in support of its conclusion. To illustrate the application of these principles, the Board stated *"For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability."*

Turning to Dr. Palmer's first apportionment opinion, the doctor stated in Joint Exhibit AA, page 26, the following*, "He does have some personality styles that make him more susceptible to the effects of trauma including his perfectionism, his predisposition toward experiencing anxiety but in comparison to the effects of the job trauma, their contribution is relatively minor. Hence, 90% of his industrial injury can be attributed to experiences during his CHP career and the remaining 10% to a combination of other traumas and vulnerabilities due to his particular personality structure."*

The problems with this are,

1. Nowhere does Dr. Palmer say that he is apportioning the current permanent disability to any particular cause. In fact, he never uses the words "permanent disability," or even "disability." Rather, he apportions 90% *of his industrial injury* to his experiences as a CHP officer, and 10% to a combination of other traumas and vulnerabilities due to his particular personality structure. This is apportionment of injury, rather than apportionment of permanent disability. LC 4663(a) requires that apportionment of permanent disability shall be based on causation. The doctor's apportionment to injury violates this requirement.
2. The doctor says that the applicant's personality styles make him more susceptible to the effects of trauma, but because he presents this as apportionment to *injury*, he does not explain how this caused his *disability* to be worse, leaving that to our interpretation. This is the lack of "how and why" necessary for the doctor to explain how these personality styles caused the current disability.
3. The doctor defines 10% of his industrial injury to "…other traumas and vulnerabilities…" but never defines what "other traumas" he is attributing the disability to, and why they were causing permanent disability at that point in time. Neither does the doctor really provide a clear explanation as to his choice of percentages.

For these reasons, this judge found Dr. Palmer's initial discussion of apportionment in Joint Exhibit AA to fail to rise to the standard of legal apportionment set forth by the Board in **Escobedo** and **LC 4663.**

However, these problems pale in comparison to the problems presented by Dr. Palmer's final opinion on apportionment, found on pages 7 and 8 of Joint Exhibit HH.

First, it should be noted that between Dr. Palmer's first attempt at legal apportionment discussed above in Joint Exhibit AA and his last and most recent attempt in Joint Exhibit HH, in multiple intervening reports he left the apportionment of injury to non-industrial sources at 10% without further explanation.

However, this changed in Joint Exhibit HH, his last report, where he begins on page 8 by incorrectly reporting that he had previously apportioned 95% of the causation of the injury to industrial causes, and 5% to non-industrial, and again characterizes this as apportionment to injury rather than disability.

Problematically, he then states that *"At this point it has been a bit over 6 years since Mr. Bushey's injury so now the apportionment is with regard to the maintenance (rather than the causation) of the injury."* What this statement means is unknown and undefined by the doctor. Again, it clearly implies that his prior apportionment was to injury, not to disability. No known legal authority allows apportionment to maintenance, whatever that undefined term might mean.

He goes on to say that *"Unfortunately, this injury altered the entire course of the remainder of his life so the maintenance versus causation apportionment are necessarily close."* Again, what is this supposed to mean?

Dr. Palmer then states that *"...eighty-seven percent (87%) of the ongoing effect can, with reasonable medical probability, be apportioned to the enduring effects of his injury while thirteen percent (13%) is apportioned to other factors."*

What other factors? Why has the percentage changed compared to the percentages assigned in every prior report? When he says "ongoing effect," is he apportioning to disability, or something else? Why is 13% more appropriate now instead of the prior 10%? None of this is explained, and it is the explanation that is critical to the substantiality of his opinion on this subject. Once again, the doctor appears to be apportioning to injury, rather than apportioning disability.

This is on its face not legal apportionment. Since this represents the doctor's final opinion on apportionment, and a change from his previous allocations, it is the opinion that must be legal and must comply with the standards set out by the Board in Escobedo discussed above for establishing legal apportionment.

Contrary to petitioner's contention, this judge did not "completely ignore" a medical expert's mandatory duty to apportion, but rather addressed in the Findings of Fact, Award and Opinion on Decision, and again herein, the medical expert's failure to provide LEGAL apportionment.

In **Nunes (Grace) v. State of California, Department of Motor Vehicles (Nunes II) (2023) 88 CCC 894**, the Board held that in the absence of legal apportionment, the applicant is entitled to an un-apportioned award of permanent disability. Specifically, at page 898 the Board stated that *"It is axiomatic that in those instances where the WCJ determines that no evaluating physician has identified valid legal apportionment, applicant is entitled to an un-apportioned award."*

This is the exact situation we have here.

IV.
RECOMMENDATION

Based on the foregoing discussion, it is respectfully recommended that the Petition for Reconsideration be denied in its entirety.

(Report, at pp. 2-5, emphasis in original.)

III.

Defendant does not dispute the scheduled rating of 40% permanent disability calculated by WCJ in the Opinion on Decision. Likewise, defendant does not dispute the WCJ's finding that applicant cannot benefit from rehabilitation to rebut that scheduled rating. The only issue raised by defendant in its Petition for Reconsideration is apportionment, which defendant argues should be found to be 10% to nonindustrial causes based on Dr. Palmer's earlier reports and not the 13% to nonindustrial causes articulated in Dr. Palmer's December 22, 2023 report.

Section 4663 provides that "[a]pportionment of permanent disability shall be based on causation." (Lab. Code, § 4663(a).) A doctor who prepares a report addressing the issue of permanent disability due to a claimed industrial injury must address the issue of causation of the permanent disability. (Lab. Code, § 4663(b).) Section 4663 requires that the doctor "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Lab. Code, § 4663(c).) Pursuant to section 4663(c) and section 5705, it is defendant that has the burden of establishing the approximate percentage of permanent disability caused by factors other than the industrial injury. (*Benson v. Workers' Comp. Appeals Bd*. (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113]; *Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 607 (Appeals Board en banc).)

The report by the physician addressing the issue of apportionment must be supported by substantial evidence. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 620, citing Lab. Code, § 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) A medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin, supra*, 4 Cal.3d at p. 169; *Place v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 372, 378–379 [35 Cal.Comp.Cases 525].)

In order to comply with section 4663, a physician's report in which permanent disability is addressed must also address apportionment of that permanent disability. However, the mere fact that a physician's report addresses the issue of causation of permanent disability and makes an apportionment determination by finding the approximate respective percentages of industrial and non-industrial causation does not necessarily render the report substantial evidence upon which we may rely.

The 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).) Furthermore, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Id*.)

In the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Appeals Board can determine whether the physician is properly apportioning under correct legal principles. (*Escobedo, supra*, 70 Cal.Comp.Cases at p. 621.) Our decision in *Escobedo* summed up the minimum requirements for an apportionment analysis as follows:

> [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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.

> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain **how** and **why** the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and **how** and **why** the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.
>
> (*Ibid.*, emphasis added.)

Moreover, 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.)

In *LeBoeuf*, the Supreme Court applied a standard of labor market reality stating that, "[a] permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability." (*Ibid*.) The court concluded, "This is to ensure that the permanent disability rating upon which an award is based accurately reflects both the permanent medical and vocational disabilities." (*LeBoeuf, supra,* 34 Cal.3d at p. 243.)

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.) As stated above, defendant did not dispute the applicability of *LeBoeuf* to find that applicant cannot benefit from rehabilitation.

As to apportionment, in its Petition for Reconsideration, defendant asserts that, in his March 5, 2018 report (Joint Exhibit AA, at p. 26), Dr. Palmer does "explain the 'how and why' in apportioning 10% PD to nonindustrial personality traits…." (Petition for Reconsideration, at p. 6:1-19.) However, in a later report, Dr. Palmer refers to his earlier apportionment discussion as related to causation of injury rather than causation of permanent disability. (Dr. Bushey's 12/22/23 report, at p. 8, Joint Exhibit HH). The issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 (Significant Panel Decision).) Thus, the percentage to which an applicant's injury is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury.

Based on the record in this case and for the reasons discussed herein, we agree with the WCJ's determination that Dr. Palmer's opinion is not substantial medical evidence on the issue of apportionment and that, therefore, defendant did not meet its burden of proof on that issue.

Accordingly, we deny reconsideration.

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/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

MARCH 23, 2026

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

JACOB BUSHEY
BROWN & DELZELL, LLP
STATE COMPENSATION INSURANCE FUND

PAG/kl

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