WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JAVIER MAGANA, ***Applicant***

vs.

SANTA BARBARA INN; PREFERRED EMPLOYERS INSURANCE COMPANY,
Defendants

Adjudication Number: ADJ11271941
Goleta District Office

OPINION AND ORDER
DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of July 9, 2026 wherein it was found that while employed on May 10, 2027 as a houseman, applicant sustained industrial injury to his lumbar spine and left hip causing permanent total (100%) disability. In finding permanent total disability, it was found that the standard AMA Guides impairment had been rebutted by vocational evidence proving that applicant's injury rendered him unable to compete in the open labor market and unamenable to vocational rehabilitation.

Defendant contends that the WCJ erred in finding that applicant's injury had caused permanent total disability, arguing that the WCJ should have relied upon the opinion of defense vocational expert Keith S. Wilkinson rather than the opinion of applicant's vocational expert David Van Winkle. We have received an Answer from the applicant, and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

For the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, and for the additional reasons stated below, we will deny applicant's Petition.

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code section 5909, which states that:

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.

(b)

(1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.

(2) For purposes of paragraph (1), service of the accompanying report, pursuant to subdivision (b) of Section 5900, shall constitute providing notice.

Under Labor Code section 5909(a), the Appeals Board must act on a petition for reconsideration within 60 days of transmission of the case to the Appeals Board. Transmission is reflected in Events in the Electronic Adjudication Management System (EAMS). Specifically, in Case Events, under Event Description is the phrase "Sent to Recon" and under Additional Information is the phrase "The case is sent to the Recon board."

Here, according to Events, the case was transmitted to the Appeals Board on August 17, 2026 and 60 days from the date of transmission is October 16, 2026. This decision is issued by or on October 16, 2026, so that we have timely acted on the Petition as required by Labor Code section 5909(a).

Labor Code section 5909(b)(1) requires that the parties and the Appeals Board be provided with notice of transmission of the case. Transmission of the case to the Appeals Board in EAMS provides notice to the Appeals Board. Thus, the requirement in subdivision (1) ensures that the parties are notified of the accurate date for the commencement of the 60-day period for the Appeals Board to act on a petition. Labor Code section 5909(b)(2) provides that service of the Report shall be notice of transmission.

Here, according to the proof of service for the Report, the Report was served on August 17, 2026, and the case was transmitted to the Appeals Board on August 17, 2026. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we conclude that the parties were provided with the notice of transmission required by Labor Code section 5909(b)(1) because service of the Report in compliance with Labor Code section 5909(b)(2) provided them with actual notice as to the commencement of the 60-day period on August 17. 2026.

II.

Turning to the merits, we deny reconsideration for the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below. With regard to the comments of our dissenting colleague, we note that defendant did not allege in its Petition that applicant's condition was not permanent and stationary. Although defendant did object to applicant's Declaration of

Readiness to Proceed, it did so on the basis of wishing qualified medical evaluator orthopedist Thor Gjerdrum, M.D. to review Mr. Wilkinson's vocational report, not on the basis of any upcoming hip replacement surgery or any allegation that applicant was not permanent and stationary. Defendant did not seek to take the matter off calendar at the mandatory settlement conference or at trial on the basis that applicant was not permanent and stationary or on the basis of any upcoming hip surgery. Defendant has waived this issue.

Turning to the contentions in defendant's Petition, defendant argues that the WCJ should have followed the opinions of Mr. Wilkinson rather than Mr. Van Winkle. Defendant does not identify any deficiencies in Mr. Van Winkle's reporting that renders the reporting non-substantial. As stated by the WCJ in the Report, applicant has very restrictive work preclusions. While Mr. Wilkinson gives examples of sedentary jobs that applicant can purportedly participate in, these do not appear to consider Dr. Gjerdrum's opinion that "two hours is the maximum [applicant] can sit in any given day." (June 23, 2023 deposition at p. 24.) The WCJ was well within his discretion in choosing to follow the opinions of Mr. Van Winkle rather than the opinions of Mr. Wilkinson.

We thus deny reconsideration for the reasons stated in the Report, which we quote below:

II.
FACTS

> Applicant sustained an admitted specific industrial injury to his lumbar spine and left hip. Applicant was evaluated by Thor Gjerdrum, M.D., in the capacity of a PQME. Each side retained their own vocational evaluator.
>
> Following a finding of Permanent Total Disability (PTD), Defendant filed a Petition for Reconsideration, disputing the finding of PTD.

III.
DISCUSSION

> It should be noted that the Opinion on Decision clearly states the basis for each issue decided. All medical reporting, transcript and documentary evidence relied upon is clearly identified. However, to the extent that the Opinion on Decision may seem skeletal, pursuant to Smales v. WCAB (1980) 45 CCC 1026, this Report and Recommendation cure those defects.
>
> One of Defendant's arguments is that the WCJ did not discuss, comment, or explain whether the additional reports of Thor Gjerdrum, M.D., were reviewed. As recited in the Opinion on Decision, the WCJ primarily relied on the medical

report of Thor Gjerdrum, M.D., dated July 24, 2024, and his deposition taken on June 23, 2023.

Exhibit 11 is a July 24, 2024, four-page supplemental report. At the top on page 4, he wrote,

> COMMENT ON RECORDS REVIEWED
>
> "The additional information does not lead me to change any of my opinions. It is apparent that if the applicant returns to the workplace without a hip replacement, his employment will have to be sedentary or desk work only. Other activities would appear to be beyond his physical capabilities at this time. In summary, I am entirely in agreement with the functional capacity evaluation, which is consistent with my own observations."

Exhibit 13 is a March 23, 2026, four-page supplemental report. Although it documents additional problems that Applicant is undergoing and the need for potential hip surgery, there are no changes vis a vis the July 23, 2024, report's conclusions.

Exhibit 12 is a June 3, 2025, four-page supplemental report, and concludes leaving it to the vocational evaluators as to whether Applicant is PTD.

None of the supplemental reports changed the findings by the physician in the July 24, 2024, report, nor was Dr. Gjerdrum deposed again following his June 23, 2023, deposition. The mere passage of time does not render a report or a physician's opinions stale if there is no change in position or condition. Here there were no changes and the doctor's report, deposition and the conclusion arrived there can be relied upon by the trier of fact.

The finding of Applicant being PTD was premised upon a number of factors contained within the medical and vocational reporting.

Applicant is limited to standing for one to two hours per day with 30-minute breaks in between; no walking; or walking less than one hour per day. The same is true for standing- two hours maximum for an eight-hour day, and 30-minute breaks.

He cannot be on his feet for more than four hours per day in an eight-hour day.

There are days where two hours of standing and walking may not be possible. Two hours is also the maximum capacity for sitting, and a change in position every 30 minutes. He has full-time use of a cane.

He cannot climb, bend forward, crouch, or kneel.

Although he can lift up to 20 pounds at no more than four hours per day, Dr. Gjerdrum clarified the lifting of 20 pounds was while Applicant was in a seated position and only lifting up to shoulder level- approximately two feet.

David Van Winkle's vocational report provided a detailed review of Dr. Gjerdrum's deposition testimony; and on page 14 of his vocational report, Mr. Van Winkle listed the permanent restrictions found by Dr. Gjerdrum.

Mr. Van Winkle conducted lengthy discussion of Applicant's work restrictions and how those preclude him from employment. Page 24 – 26, and on page 28, concludes Applicant is not amenable to vocational rehabilitation, does not possess the physical capacity to perform full-time and/or part-time work, and is not placeable because he does not possess the physical capacity to work. This was found to be more persuasive than the vocational reporting of Keith Wilkinson.

When all of the work restrictions imposed by Dr. Gjerdrum are considered; e.g. sedentary work, limited to no lifting or carrying, use of a cane, lifting only in a seated position; and those are then applied in a vocational context, Mr. Magana is Permanently Totally Disabled.

IV.
RECOMMENDATION

For the reasons stated, it is respectfully recommended that Defendant's Petition for Reconsideration be denied based on the arguments and merits addressed herein.

(Report at pp. 2-3.)

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of July 9, 2026 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PAUL F. KELLY, COMMISSIONER

I CONCUR,



/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I DISSENT,

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 16, 2026

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

JAVIER MAGANA
WOLFF-WALKER LAW
EMPLOYER DEFENSE GROUP

DW/bp

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

DISSENTING OPINION OF DEPUTY COMMISSIONER LISA A. SUSSMAN

I respectfully dissent. I would have granted reconsideration, rescinded the WCJ's decision, and returned this matter to the trial level for further development of the medical and vocational record and decision. Reluctantly, I conclude that applicant's condition is simply not permanent and stationary, and Dr. Gjerdrum's permanent work restrictions were expressly premised on the absence of hip replacement surgery.

In his final March 23, 2026 report, Dr. Gjerdrum plainly states that "applicant is very likely going to need a hip replacement in the near future." (March 23, 2026 report at p. 2.) Applicant's primary treating physician wrote in a February 11, 2026 progress report that applicant "meets all the criteria for a Left total hip arthroplasty.[¶] The patient would like to proceed with surgery and will meet with my surgery scheduler to find an appropriate time." (Ex. 15, p. 11.) An April 17, 2026 progress report notes that "Surgery is approved. He is not yet scheduled." (Ex. 15, p. 19.) Apparently, there were still issues regarding procuring appropriate care for applicant after the surgery at the time of the last report in the evidentiary record, dated May 13, 2026.

It appears that the work restrictions given by Dr. Gjerdrum apply only if applicant does not undergo hip replacement surgery. In his July 24, 2024 report, Dr. Gjerdrum writes, "without a hip replacement, his employment will have to be sedentary or desk only." (July 24, 2024 report at p. 4.)

Permanent disability is not compensable until it is ratable. Except in the case of insidious, progressive diseases, a disability is not ratable until it is permanent and stationary. (*Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473 [56 Cal.Comp.Cases 631].) "A disability is considered permanent when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." (Cal. Code Regs., tit. 8, § 10152.) "There is only one permanent and stationary date for an injury, even if some body parts stabilize before others. The permanent and stationary date would be the date on which the last body part became permanent and stationary." (*American Ins. Co. v. Workers' Comp. Appeals Bd. (Mathat)* (2003) 68 Cal.Comp.Cases 926, 931 [writ den.].)

While Dr. Gjerdrum may have opined earlier in this matter that applicant had reached maximal medical improvement, the peculiarities of this case made this an erroneous prediction. Where the medical evidence or opinion on an issue is incomplete, stale, and no longer germane,

or is based on an inaccurate history, or speculation, it does not constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Similarly, "[t]he same considerations used to evaluate whether a medical expert's opinion constitutes substantial evidence are *equally applicable* to vocational reporting. In order to constitute substantial evidence, a vocational expert's opinion must detail the history and evidence in support of its conclusions, as well as 'how and why' any specific condition or factor is causing permanent disability." (*Nunes v. State of California* (2023) 88 Cal.Comp.Cases 741, 751 [Appeals Bd. en banc].)

Because of applicant's upcoming surgery, applicant is not permanent and stationary, and any discussion of permanent disability or permanent work restrictions is premature. While I sympathize with applicant given the amount of time that has elapsed since the injury, and given his two failed surgeries, any decision of the WCAB must be based on substantial evidence. (*Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 [Appeals Bd. en banc].) Since the medical and vocational reporting in this matter does not rise to the level of substantial evidence, I would have granted reconsideration, rescinded the WCJ's decision, and returned this matter to the trial level for further development of the medical and vocational record after applicant's condition reached maximal medical improvement.

I therefore respectfully dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ LISA A. SUSSMAN, DEPUTY COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 16, 2026

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

JAVIER MAGANA
WOLFF-WALKER LAW
EMPLOYER DEFENSE GROUP

DW/bp

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