WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SHARON SWIFT, *Applicant*

vs.

CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION, CENTINELA STATE PRISON, legally uninsured; administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Numbers: ADJ9097135; ADJ9097288; ADJ9099801
San Diego District Office

OPINION AND ORDER GRANTING PETITIONS FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Both defendant and applicant filed Petitions for Reconsideration (Petitions) of the Joint Findings, Award and Order (FA&O) issued on October 9, 2025, wherein the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant while employed by defendant as a psychiatric technician, sustained injury arising out of and in the course of her employment: on October 29, 2008 (ADJ9097135), to the neck, back, spine and psyche; on July 21, 2009 (ADJ9097288), to the low back and psyche; on July 19, 2012 (ADJ9099801), to the low back; that applicant's earnings are $1,344.65 per week; that applicant is permanently and totally disabled with no apportionment in ADJ9097135 so that permanent disability in ADJ9097288 and ADJ9099801 is subsumed into ADJ9097135; that Labor Code sections 4650 and 5814 penalties are to be adjusted by the parties; that the permanent and stationary date for all body parts is June 20, 2021 and payment of permanent disability indemnity is to begin on that date.

Defendant asserts in its Petition that it was denied due process by not being given the opportunity to conduct discovery and by proceeding to trial without three additional cases filed by applicant also being heard at the same time;[1] that penalties should not have been addressed in the

[1] ADJ9099802, ADJ7270379, and ADJ2752713.

FA&O; that permanent total disability is not appropriate where applicant can compete in the open labor market; that the apportionment opinion is based on substantial medical and is valid; and that earnings were improperly calculated.

Applicant asserts that the WCJ erred by using the permanent and stationary date as the start date for permanent total disability payments and that an earlier date is appropriate.

Applicant filed an Answer to defendant's Petition seeking to have the Petition denied.

The WCJ's Report and Recommendation (Report) recommends earnings be reduced to $1,292.41 per week, that penalties should be deferred, and otherwise that both Petitions be denied.

We have accepted applicant's Supplemental Petition. (Cal. Code Regs., tit. 8, § 10964.)

We have considered the allegations of both Petitions, the Answer and the Supplemental Petition and the contents of the Report of the WCJ with respect thereto.

After our review of the record and for the reasons discussed below, we will grant defendant's Petition for Reconsideration, grant applicant's Petition for Reconsideration, and amend the FA&O to defer penalties and correct clerical errors in a date and to award payment of permanent and total disability benefits to commence as of October 20, 2011, and otherwise affirm the FA&O.

I.

Former Labor Code section 5909[2] 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. (Former 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.

[2] Unless otherwise stated, all further statutory references are to the Labor Code.

(Lab. Code, § 5909.)

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 cases were transmitted to the Appeals Board on November 13, 2025, and 60 days from the date of transmission is Monday, January 12, 2026. This decision issued by or on January 12, 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 shall be notice of transmission.

According to the proof of service, the Report was served on November 13, 2025, and the cases were transmitted to the Appeals Board on November 13, 2025. Service of the Report and transmission of the cases 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 November 13, 2025.

II.

As found by the WCJ in the Findings, Award and Order, applicant, while employed by defendant on October 29, 2008, sustained injury to the neck, back, spine and psyche (ADJ9097135 (MF)), while employed on July 21, 2009, sustained injury to the low back and psyche (ADJ9097288), and while employed on July 19, 2012, sustained injury to the low back (ADJ9099801).

These cases have an extensive documentary record, and although we have reviewed the entire record, the following digest is limited in the effort to be succinct.

A.

On February 8, 2012, qualified medical evaluator (QME) in neuropsychiatry, Kristi Dove, M.D., issued a report for October 28, 2008 and July 21, 2009 dates of injury. (Exhibit E, QME Kristi Dove, M.D., February 8, 2012.)

On February 24, 2014, treating physician John Cleary, M.D., issued a report following his examination of applicant for the July 2008 and October 30, 2009 low back injuries. (Exhibit D, John Cleary, M.D., February 24, 2014.) On August 13, 2014, Dr. Cleary issued a report concluding that applicant was permanent and stationary for her low back in the July 2008 and October 30, 2009 injuries. (Exhibit B, John Cleary, M.D., August 13, 2014.)

Over ten years ago, in 2015, agreed medical evaluator (AME) in psychiatry, Rapheal Morris, M.D., issued a report of his evaluation of applicant for June 9, 2005 date of injury. (Exhibit F, AME Rapheal Morris, M.D., July 1, 2015.)

Some two years after Dr. Morris' report, on September 21, 2017, neurosurgeon Kevin Yoo, M.D., issued an AME Report following his evaluation of applicant on August 21, 2017, for the injuries of October 29, 2008, October 31, 2009, and July 19, 2012. Dr Yoo opined that: "Based on this substantial and exhaustive record, it is my opinion that the accidents of which the patient complains, occurring in the course of her employment on 2008, 2009 and 2012 have caused the patient to sustain the symptoms about which she now complains. The causation of the patient's current and continued medical complaints is industrial." (Exhibit 8, Kevin Yoo, M.D., September 21, 2017, pages 26-27.)[3] Dr. Yoo states further:

> Prior to 2008, the patient was symptom free as regards to her lower back. The medical record does not reveal any treatment for low back complaints prior to 2008. In 2008, while at work, the patient suffered an injury to her lower back when she was pulling a metal cart loaded with medical charts. In the course of this project, she was lifting a box of medical charts out of the cart with her arms extended. The box lost its bottom and the charts began to fall to the floor. The patient lunged forward and reached to catch the falling charts. In doing so she twisted her spine and put torque on it in a sudden downward motion. Subsequently she began to experience painful symptoms in her low back.
>
> In 2009, the patient, who was 12 to 24 months into conservative treatment for her continued low back pain, while at work, reached into a copier machine to reload the paper tray. As she pulled on the tray, it released from the machine suddenly

[3] For unknown reasons, Doctor Kevin Yoo is referred to as doctor "Frank" Yoo in exhibiting at the trial on February 26, 2025.

> causing the patient to fall backward onto her buttocks. This caused trauma to her lower spine. In 2010, again at the copier, the patient relates that she pulled out the paper tray and lifted it. The tray was full of paper and the weight lifted caused her lower back pain to flare up once again.

(Exhibit 8, pages 27-28.)

Periods of temporary total or temporary partial disability were deferred. (Exhibit 8, page 30.) Dr. Yoo then stated that:

> It appears Ms. Swift has persistent low back pain which can aslo [sic] be called a chronic pain syndrome. It appears she has tried to return to work with this condition and failed in continuing to work due to her pain symptoms. For this reason, I agree with Dr. Cleary insofar as her chronic back pain is now advanced to a stage where the patient is unable to perform the activities required of her employment. Without surgical intervention, my professional and medical opinion is that Sharon Swift is, and will be, incapable of returning to work, even with modifications.

(Exhibit 8, page 30.)

His opinion on the issue of apportionment was deferred. (Exhibit 8, page 31.)

On October 24, 2017, Dr. Yoo issued a supplemental report. "Therefore, I confirm my opinion that based on the medical record, including Dr. Kramers 2017 report, this patient should be worked up thoroughly to determine her suitability as a candidate for spinal surgery." (Exhibit 7, Kevin Yoo, M.D., October 24, 2017, page 3.)

On April 28, 2018, Dr. Yoo issued another supplemental report. "It is my opinion, based upon my review of the medical records presented to me, as well as the physical exam, that this patient is not yet MMI." "In the course of this medical odyssey she has developed and been diagnosed with an opioid dependency due to the continued reliance on pain medications." "In the face of this continuous failure of multiple medical treatment regimens over nine years, the patient has developed anxiety and depression in addition chronic pain combined with severe headaches. The only course of medical treatment not offered to and tried by this patient is spinal surgery." (Exhibit 6, Kevin Yoo, M.D., April 28, 2018, page 2.)

On July 12, 2018, Dr. Yoo issued another supplemental report, again for dates of injury on October 29, 2008, October 31, 2009, and July 19, 2012. "I believe that the approach to pinpointing her pain generator as suggested by Dr. Raiszadeh is both prudent and well considered. I therefore concur in his medical findings and conclusions as set forth in the medical report of 2-22-2018." (Exhibit 5, Kevin Yoo, M.D., July 12, 2018, page 2.)

Applicant began treatment for her psychiatric injury with Stephen Pfeifefr, Ph.D., and on January 28, 2019, he issued a comprehensive report. "It is my opinion that Ms. Swift's primary psychological disturbance has been caused by a combination of her psychological condition (industrial and slight nonindustrial contribution); by her orthopedic injurie [*sic*] affecting back; and by physical issues caused by cycling of stressors resulting in chronic headaches as well as hypertension. However, causation is deferred to the AME, Dr. Morris." (Exhibit 15, Stephen Pfeiffer, Ph.D., January 28, 2019, page 38.) The report also includes "it is the undersigned's professional opinion that Ms. Swift is a candid historian who is not exaggerating her symptoms for secondary gain. There is no psychological test date [*sic*] to support the phenomena of pain amplification. There is no scientific basis to suggest the patient is consciously malingering symptoms. Ms. Swift self-disclosed appropriately during the evaluation process and I never sensed she was minimizing personal problems existing prior to industrial injury." "I defer to Dr. Morris' AME disability rating. He sees her as Permanently Totally Disabled from working at the prison, it is my understanding." (Exhibit 15, page 39.)

On March 29, 2020, Dr. Yoo issued a report for the October 29, 2008, date of injury, and he determined that applicant was permanent and stationary date on December 20, 2019. "On October 29, 2008, Sharon was working at Centinela State Prison and injured her back when she was pulling a cart and felt a "pop" in her back." "On October 31, 2009, the patient was at work, when she was working at the copier, when she opened the tray to place more paper. She apparently fell and sustained another back injury. In 2012, the patient experienced another copier related incident when she pulled out [sic] and it was overloaded with copy paper." (Exhibit 4, Kevin Yoo, M.D., March 29, 2020, page 1.) He assigned 4% impairment to the lumbar spine, 8% to the cervical spine and a 3% add on for pain. (Exhibit 4, page 2.) The impairment was "100%" caused by the October 29, 2008, injury. No other apportionment and significant work restrictions were given other than "cannot bend, lift, twist/turn repetitively or sit and stand for extended period of time greater than 1 hour." (Exhibit 4, pages 4-5.)

Dr. Yoo next issued a March 25, 2021 functional capacity report for applicant's upper extremity for injury dates of October 29, 2008, October 31, 2009, and July 19, 2012. Applicant was reasonably expected to sustain competitive work three hours each day. (Exhibit 3, Kevin Yoo, M.D., March 25, 2021, page 1.) "Side effects from industrial medications are medically probable and include sweating, difficulty maintaining concentration, constipation, nausea, dry mouth,

depression, feeling weak, dizziness, confusion, low energy and fatigue. Applicant will be "off task" up to 15% of the time in an 8-hour day. It is also noted the applicant will experience side effects from non-industrial medications, however those side effects are not identified." (Exhibit 3, page 4.) "There is a reasonable medical probability that applicant will need to lie down or recline from work activity during the workday to relieve or control pain." (Exhibit 3, page 5.) "Applicant will miss work about four days per month." (Exhibit 3, page 6.)

On June 20, 2021, Dr. Pfieffer completed a functional capacity report for applicant's headaches, listing six claim numbers in the caption but only one date of injury of June 9, 2005. (Exhibit 13, Stephen Pfieffer, Ph.D., June 20, 2021, page 1.)

Also on June 20, 2021, Dr. Pfieffer completed a mental functional capacity assessment for a June 9, 2005 date of injury noting "[w]ill be "off task" up to 40% of the time over the course of an 8 hour day when performing the mental activity." (Exhibit 14, Stephen Pfieffer, Ph.D., June 20, 2021.)

Then on June 21, 2021, Dr. Pfieffer issued a supplemental medical-legal report in the cases at issue here ADJ9097135 (MF), ADJ9097288, ADJ909980l, and additional cases ADJ2752713, ADJ7270379, as well as for injury on June 9, 2005. "*I believe that she is currently Permanent and Stationary and suffers with moderate to severe levels of psychological sequelae from her work injuries*." "Ms. Swift is currently Totally Psychologically Disabled on an Industrial basis. Her injuries resulted over many years of working at Centinela Prison in the Imperial Valley. The causation for these matters is chronicled in my Initial Psychologica1 Evaluation in January of 2019." "*She is entirely unable to work*. Her Global Assessment of Functioning level is currently at 55. I would leave it to the QME to determine any apportionment or other considerations." (Exhibit 12, Stephen Pfieffer, Ph.D., June 21, 2021, page 2, emphasis added.)

Dr. Pfeiffer noted in a December 25, 2021, report for an August 17, 2016, date of injury, "TTD on Psych Basis. In process of medical retirement. Now Permanent and Stationary on Psychological basis as of date June 2021 PR-2 report. Her current GAF Is 55, reflecting the continued incarceration of her son, and the removal of the newborn child from her daughter's care." (Exhibit 11, Stephen Pfeiffer, Ph.D., December 25, 2021, page 2.)

Next on July 28, 2023, Dr. Pfeiffer completed a mental residual functional capacity assessment for six dates of injury including the three cases at issue here. In the form "Markedly Limited" is defined as "assumes an inability to perform the activity." The applicant was "Markedly

Limited" in multiple areas including the ability to make simple work-related decisions, to complete a normal workday and workweek without interruptions from psychologically based symptoms, and to perform at a consistent pace without an unreasonable number and length of rest periods. (Exhibit 10, Stephen Pfeiffer, Ph.D., July 28, 2023, pages 1-2.)

On August 1, 2023, applicant's vocational expert Laura Wilson, MBA, issued a Vocational Evaluation Report. When assessing applicant's physical residual functional capacity and employability in the open labor market, the expert relied solely on the opinions of Dr. Kevin Yoo as provided for the three cases tried. For example, the vocational expert states:

> I have reviewed the residual functional capacity by Agreed Medical Examiner Dr. Kevin Yoo where he indicated that Ms. Swift cannot reasonably be expected to sustain competitive work eight hours a day and could only reasonably be expected to sustain competitive work if occasionally and medically compatible workers identified three hours per day. Ms. Swift could only sit, stand, walk, or drive up to two hours out of an eight-hour day. *It is my opinion that an employer in an open labor market would not be able to accommodate these limitations*.

(Exhibit 16, Laura Wilson, MBA, August 1, 2023, page 30, emphasis added.)

For the psychiatric residual functional capacity and employability in the open labor market, applicant's expert relied solely on the opinions of Dr. Stephen Pfeiffer. For example:

> Dr. Pfeiffer is of the opinion that Ms. Swift suffers a moderate impairment to carry out detailed instructions, maintaining attention and concentration for extended periods of time, performing activities within a schedule, maintaining regular attendance to be punctual within customary tolerances, sustaining an ordinary routine without special supervision, work in coordination with the proximity to others without being distracted by them, make simple work-related decisions and complete a normal workday and workweek without interruption from psychologically based symptoms and to perform a consistent pace without an unreasonable number and length of rest periods. *It is my opinion that an employer in the open labor market would be unable to accommodate these limitations*.

(Exhibit 16, page 32, emphasis added.)

The vocational expert then globally concludes:

> After careful review and consideration of Ms. Swift's physical and emotional work limitations, the dosage of medications that she is currently taking, and its side effects, along with her transferable skills, determined by SkillTRAN it is my professional opinion that solely based on her industrial related impairments and her industrial physical limitations that were provided in the medical reports of Dr. Stephen M. Pfeiffer, Dr. Gerald H. Markovitz, Dr. Susan Sprau, Dr. Kevin Yoo, and Dr. Raphael Morris, Ms. Swift *is not amenable to vocational rehabilitation*. Ms. Swift is not able to sustain gainful employment and therefore she is not able to

> compete in the open labor market. As a direct result of her industrial-related impairments provided by considering her pre-injury capacity and abilities, Ms. Swift has at present no consistent and stable future earning capacity.

(Exhibit 16, page 34, emphasis added.) Attached to the report is a proof of service showing service on both the adjustor and attorney for defendant on August 1, 2023.

Then on August 6, 2023, Dr. Pfeiffer issued a report for injuries on June 9, 2005, February 1, 2009 to November 6, 2009, October 29, 2008, July 21, 2009, July 19, 2012, and November 9, 2012. "I have provided psychological treatment for Sharon Swift for a total of 33 cognitive behavioral therapy sessions beginning on 03/06/19 and I conducted an extended psychotherapy session with her on 07/28/23." (Exhibit 9, Stephen Pfeiffer, Ph.D., August 6, 2023, page 1.) The report notes:

> It is my opinion, based on the extended therapy session I conducted with her on July 28, 2023 that her psychological condition has worsened over the most recent 6 month period during which she had no psychological treatment between January 2023 and July of 2023. Her condition has worsened and regressed markedly since I provided a Permanent and Stationary Report in November of 2021. There is now some apportionment to non-industrial stressors, as she is providing full care for her 4 Grandchildren (ages are: 14, 11, 9, and 3) who now live with her and her husband on a full-time basis. Her son is in jail and the children's mother has abandoned them and her whereabouts are unknown. This situation is both a source of stress for Ms. Swift, but also provides to her a sense of "meaning" in her life that provides her with positive impact on her psyche, as well. Fatigue for her is chronic given the activity levels required to provide care for 4 young children spanning in age from ages 3 to 14. Her twin daughters intermittently provide occasional assistance with the care of the 4 children.

(Exhibit 9, page 1.)

> Apportionment was as follows:
>
> Due to the fact that Ms. Swift is now caring for her 4 grandchildren who range in age from years of age [sic] to 14 years of age, such responsibility and the shear labor involved in round the clock provision of care adds a factor contributing to her depression and chronic fatigue. However, at the same time, this major responsibility also contributes to her sense of meaning derived from serving the children as well as benefitting to from the love that emanates from the role of parent that she is now integrally involved in their lives.
>
> 1) Industrial - Psychological Injuries while employed by CDC-R - 90%
> 2) Non-Industrial - Current role as primary caretaker of 4 grandchildren - 10%

> I believe the multiple injuries Ms. Swift sustained while employed by CDC-R are impossible to separate with respect to apportionment to each individual injury.

(Exhibit 9, page 4, emphasis in original.)

On May 6, 2024, Dr. Yoo completed a "To Whom It May Concern" letter. "Upon reviewing the applicant's industrial injury, *I do agree that the work restrictions placed on Ms. Swift will likely preclude her from regaining meaningful employment*." (Exhibit 2, Kevin Yoo, M.D., May 6, 2024, emphasis added.)

Then on June 18, 2024, Dr. Yoo issued a supplemental report for injury on October 29, 2008, in which he again reviewed the vocational rehabilitation expert reporting of Laura Wilson dated August 1, 2023. "I do agree with Ms. Wilson's report as the applicant is unlikely able to find gainful employment and is 100% disabled. She has residual symptoms, including severe headaches, fatigue, difficulty with attention and concentration, depression, chronic pain, and neck and back pain." (Exhibit 1, Kevin Yoo, MD, June 18, 2024, page 2.)

Defendant's vocational expert, Howard Goldfarb, M.A., C.R.C., issued a February 13, 2025, Vocational Assessment Report. "It is this counselor's professional opinion that Ms. Swift is employable, trainable and placeable and has the ability to engage in earning capacity from a physical capacity only." However, "from a psychological perspective, Ms. Swift would not be amenable to vocational rehabilitation services and would not be able to engage in any work activity at any skilled, semi-skilled, or unskilled work levels in the open labor market." (Exhibit A, Howard Goldfarb, M.A., C.R.C., February 13, 2025, pages 64-65.)

B.

The relevant non-medical exhibits and pleadings start with the applicant filing a declaration of readiness to proceed (DOR) to Mandatory Settlement Conference (MSC) dated July 22, 2024, in ADJ9097135 (MF), ADJ9097288, and ADJ9099801.

Defendant filed a timely objection stating the "parties have directly met and conferred on the case status at this time. Discovery is still ongoing, and the parties will Jointly Request that the hearing be taken off calendar." The objection was filed in ADJ9097135 only. Applicant disputed any agreement to taking the cases off calendar. (Exhibit 17.)

At an October 31, 2024, mandatory settlement conference (MSC) for all three cases applicant requested trial and defendant again requested the cases taken off the calendar. The cases

were continued with comments of "AA prepared PTCS – Ready to set for trial; Def requests OTOC, sent documents to VR expert 10/14 waiting for his report."

The parties signed and filed a Pre-Trial Conference Statement dated December 19, 2024, in all three cases which again included defendant's objections to proceeding to trial.

On December 19, 2024, MSC was again held in all three cases which were continued with comments of: "AA set for trial; JT PTCS filed discovery open on VR issues; trial to det if can go forward" and "Def objects to going forward." The case was set for trial.

Defendant then filed a petition for automatic reassignment of the trial judge noting the claim was previously set for trial on penalty issues but had been settled before testimony was taken or evidence submitted. This petition was denied on January 2, 2025.

On January 7, 2025, defendant filed a petition for removal essentially arguing that due process allowed defendant "to complete discovery, including obtaining its VRE report and clarifying issues with the unsubstantial Neurosurgeon AME report. Further, the DOR is defective and gives improper notice. Applicant failed to include all relevant claims on the DOR, and Applicant added issues to the Pre-Trial Conference Statement that were not referenced on the DOR." (Petition for Removal, page 4, lines 16-21.)

Applicant filed an answer and the WCJ issued a report, both recommending the petition for removal be denied.

The three cases were tried on February 26, 2025, and consolidated with ADJ9097135 ordered to be the master file (MF). (Minutes of Hearing, Order of Consolidation (First MOH), February 26, 2025, page 2, lines 6-10.)

The MOH stated that the stated facts and issues superseded those written in the prior pre-trial conference statement. (First MOH, page 2, lines 2-4.) The parties stipulated in ADJ9097135 (MF) the applicant sustained injury on October 29, 2008, to her neck, back, spine and psyche; in ADJ9097288 on July 21, 2009, sustained injury to her low back and psyche; and in ADJ9099801 on July 19, 2012, sustained injury to her low back. The relevant issues in all three claims were earnings and permanent disability. (First MOH, page 2, line 12, to page 5, line 11.) Issues of penalty were deferred. Defendant objected to proceeding on the grounds that discovery was continuing. (First MOH, page 5, lines 11-17.) Exhibits were admitted and discovery remained open on average weekly wage. (First MOH, page 5, lines 19-25, through page 7, line 15.) Trial was continued.

On June 10, 2025, the cases again came on for trial. (Minutes of Hearing, Summary of Evidence, and Orders (Second MOH), June 10, 2025, page 1, lines 23-24.) Defendant State Fund stipulated to withdraw their Petition for Removal. (Second MOH, page 2, lines 3-4.) Applicant's Exhibit 20 was admitted. (Second MOH, page 2, lines 3-4.)

Applicant testified with limited recollection of prior events. (Second MOH, page 3, lines 3-20.) "She still gets headaches about three times a week. They last about a couple of hours. When she gets the headache, she is incapacitated and has to lie down. She also cannot tolerate noise and light." (Second MOH, page 3, lines 23-25.) "Regarding her back, it is getting worse. It is hard to stand and walk long distances. She can stand about 30 to 45 minutes before she has to lie down. She can walk for 25 to 30 minutes, but after that she has to lie down for a couple of hours. With regard to sitting, she can sit for approximately 45 minutes before her back hurts and then she needs to lie down for a couple of hours, at least." (Second MOH, page 4, lines 1-6.)

On September 4, 2025, we issued our Opinion and Order Dismissing Petition for Removal.

On October 9, 2025, the WCJ issued the Joint FA&O. In the FA&O wage records were admitted into evidence as Applicant's Exhibit 20. (FA&O, page 5.) There has been no objection to the admission of this evidence.

Defendant filed a Petition for Reconsideration on October 27, 2025, while applicant, after having a post FA&O petition to change start date of permanent total disability denied, filed a Petition for Reconsideration on November 4, 2025.

Applicant filed an Answer to Petition for Reconsideration on November 12, 2025.

On November 12, 2025, the WCJ issued a Report recommending applicant's Petition be denied, that defendant's Petition be considered to the extent the average weekly wage should be amended to $1,292.41from $1,344.65, and that findings should be amended to state penalties are deferred.

On November 21, 2025, applicant filed the Supplemental Petition.

III.

The FA&O was served on October 9, 2025, with the proof of service showing service by mail on lien claimant Anthem Blue Cross at a post office box in Texas.

Defendant's Petition was filed on October 27, 2025, and applicant's Petition was filed on November 4, 2025.

A party has 20 days after the service of any final order, decision, or award to seek reconsideration by filing a petition with the district office having venue. (LC § 5903; Cal. Code Regs., tit. 8, § 10940(a).) The time to act is extended depending on the location of service.

> When any document is served by *mail, fax, e-mail or any method other than personal service*, the period of time for exercising or performing any right or duty to act or respond shall be extended by:
>
> (1) Five calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record being served is within California;
>
> (2) *Ten calendar days from the date of service, if the place of address and the place of mailing of the party, attorney or other agent of record being served is outside of California* but within the United States.

(Cal. Code Regs., tit. 8, § 10605(a)(1)-(2), emphasis added.) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600.)

To observe due process for all parties, we interpret WCAB Rule 10605 as extending the time to file for all parties being served. Here the FA&O was served by mail to an out of state address and therefore the twenty-day limit to act is extended by ten days for a total of thirty days from service of the FA&O. The FA&O was served on October 9, 2025, and thirty days from that date is Saturday, November 8, 2025, a weekend, which results in the deadline to act being extended to the next business day of Monday, November 10, 2025. Both Petitions were filed before November 10, 2025, and are timely.

IV.

We note a grant of reconsideration has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com.* (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]) and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com.* (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

A.

Defendant alleges a denial of due process despite having filed a timely objection by: 1) not being allowed to have "the AME'S, Dr. Yoo and Dr. Morris review and comment on Defendant's

VRE report", 2) being "denied the request that all relevant claims be addressed at trial", and 3) by not being "provided notice that the Petition for Labor Code 5814 and Labor Code 4650 penalties would be an issue for trial." (Defendant's Petition, page 6, lines 13-15; page 7, lines 19-21; page 8, lines 6-7; page 8, line 25 to page 9, line 1.)

We therefore first review this matter to assess if defendant was denied due process.

Defendant's sole objections in the First MOH was that "discovery was not complete" and that ADJ9099802, ADJ7270379, and ADJ2752713 were not on calendar. Yet, defendant provides no explanation as to why those objections meant that the trial should not proceed.

To the extent that defendants may be seen as complaining the WCJ failed to address specific issues, we are not persuaded. Defendants state "the WCJ failed to address issues 6,7, 8 & 9," but provides no further details. (Defendant's Petition, page 4, lines 3-4.) We have carefully reviewed the record and note there are only five issues for trial listed in ADJ9097135 (MF), four issues in ADJ9097288, and four issues in ADJ9099801. (First MOH, February 26, 2025, page 3, page 4, and page 5.)

In light of the paucity of information regarding this contention by defendant, it appears this statement was made in error. To the extent defendants are asserting the WCJ failed to determine an issue defendant raised but that is unidentified at trial and is unidentified in defendant's Petition, that issue remains undecided.

1.

Parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) A fair hearing is "one of 'the rudiments of fair play' assured to every litigant...." (*Id*. at p. 158.) As stated by the Supreme Court of California in *Carstens v. Pillsbury* (1916) 172 Cal. 572, "the commission...must find facts and declare and enforce rights and liabilities, -- in short, it acts as a court, and it must observe the mandate of the constitution of the United States that this cannot be done except after due process of law." (*Id*. at p. 577.) A fair hearing includes, but is not limited to, the opportunity to offer evidence in rebuttal. (See *Gangwish v. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

Here, applicant filed a Declaration of Readiness to Proceed (DOR) dated July 22, 2024, in three cases: injury on October 29, 2008, to the neck, back, spine and psyche (ADJ9097135); injury

on July 21, 2009, to the low back and psyche (ADJ9097288), and injury on July 19, 2012, to the low back (ADJ9099801).

Defendant timely filed an objection to DOR dated July 29, 2024, but only in ADJ9097135 the October 29, 2008, injury. The objection states "[d]iscovery is still ongoing, and the parties will Jointly Request that the hearing be taken off calendar." It appears no joint request to take the case off calendar was filed and, indeed, there was no agreement to do so.

At the October 31, 2024, MSC, the case was continued with comments including in part "Def requests OTOC, sent documents to VR expert 10/14 waiting for his report."

On December 19, 2024, the case was set for trial with comments including in part "JT PTCS filed discovery open on VR issues" . . . "Def objects to going forward."

Thereafter the first day of trial occurred February 26, 2025.

At the time the DOR was filed applicant's injuries were all well over a decade old. Defendant does not explain why it could not complete discovery prior to applicant filing the DOR, and why specifically they did not have the opportunity to have "AME'S, Dr. Yoo and Dr. Morris review and comment on Defendant's VRE report of Howard Goldfarb dated 2/13/2025." (Defendant's Petition, page 7, lines 20-21.) This is especially concerning given that discovery was left open on vocational issues at both the October and December conferences.

It appears defendant's position is most clearly articulated when defendant states "Applicant was able to send their VRE report to the AME, Dr. Yoo for review and comment, and Defense should have been afforded the same opportunity especially because the WCJ relied upon Dr. Yoo findings when issuing her opinion." (Defendant's Petition, page 7, lines 22-25.) In essence defendants are saying they did it, so we should too. This is not persuasive argument.

Almost a year before filing the DOR dated July 22, 2024, applicant obtained a vocational opinion that applicant was "not amendable to vocational rehabilitation" in the form of reporting from Laura Wilson, MBA, dated August 1, 2023. This report was served on defendant by the vocational expert and would appear to have placed defendants on notice of the reasonable need to conduct vocational discovery if so desired.

As noted above, the settlement conference of October 31, 2024, was continued in part because defendants had not sent documents to their vocational expert until October 14, 2024, and defendants were waiting for the vocational expert's report. At the December 19, 2024, conference the cases were set for trial however discovery remained open on vocational issues. Before trial

defendants received the vocational report from their expert, Howard Goldfrab, M.A., C.R.C, dated February 13, 2025, which they wished to circulate to the medical examiners.

The problem for defendants is that due process requires participation by the litigants. Due process is not a shield to cover a party's failure to timely conduct discovery. This is because due process only guarantees "*the opportunity* to offer evidence in rebuttal." (*Gangwish*, *supra*, page 1295.) Here, defendants clearly had the opportunity to obtain expert vocational evidence and to circulate the evidence to the medical examiners. As the applicant obtained expert vocational evidence in August of 2023, defendants were clearly aware of the issue before the DOR was filed in July 2024, and yet defendants apparently did nothing until October of 2024. Any delay in obtaining evidence was not a result of due process denied but instead appears to be solely from defendant's failure to timely conduct discovery.

That applicant was significantly impaired and potentially "not amenable to vocational rehabilitation" appears in the record as early as the March 25, 2021, within the functional capacity form completed by Dr. Yoo. The doctor found that applicant is reasonably expected to sustain competitive work three hours each day, will be "off task" up to 15% of the time in an 8-hour day, and will miss work about four days per month. (Exhibit 3, pages 1, 4, and 6.) If there was any doubt about the issue of amenability of vocational rehabilitation being present, the June 21, 2021, supplemental report of Dr. Pfieffer finding "*She is entirely unable to work*" should have dispelled such doubt. (Exhibit 12, page 2, emphasis added.)

"[A] claims administrator must conduct a reasonable and timely investigation upon receiving notice or knowledge of an injury or claim for a workers' compensation benefit." (Cal. Code Reg., tit. 8, § 10109(a).) "The claims administrator may not restrict its investigation to the specific benefit claimed if the nature of the claim suggests that other benefits might also be due." (Cal. Code Reg., tit. 8, § 10109(b)(2).) Indeed, the "duty to investigate requires further investigation if the claims administrator receives later information, not covered in an earlier investigation, which might affect benefits due." (Cal. Code Reg., tit. 8, § 10109(c).)

Here, defendant had an affirmative duty to timely investigate applicant's benefits and were on notice of applicant's potential inability to work no later than the June 21, 2021, the date of supplemental report of Dr. Pfieffer, Ph.D. (Exhibit 12.) Defendant has failed to establish they were denied due process in conducting discovery, and if anything, it appears defendant was afforded additional time to conduct discovery despite a lack of diligence.

Simply stated, defendant was long on notice of the issues in these cases and could have actively addressed the perceived errors presented in their Petition *by the simple expedient of conducting timely discovery*. Defendant was afforded due process.

2.

Next, defendant asserts a denial of due process because they were "denied the request that all relevant claims be addressed at trial." (Defendant's Petition, page 8, lines 6-7.) Although not explicitly stated in argument, it appears defendant seeks to include for trial three additional cases of applicant: ADJ2752713 for June 9, 2005, heart/psyche injury, ADJ9099802 for November 19, 2012, internal organs injury, and ADJ7270379 for November 6, 2009, internal organs injury. (Defendant's Petition, page 2, lines 25-27.)

Defendant cites no authority, nor are we aware of any, for their implied proposition that all of applicant's pending cases must be tried together. On the contrary, each case is individually considered. (Lab. Code §§ 3208.2 and 5303.) Specifically, an applicant is not required to obtain permanent and stationary reports in all of applicant's cases before proceeding in a case that is ripe. To hold otherwise would delay the prompt provision of benefits when due, which is the bedrock principle of the compensation system. The Appeals Board is to "accomplish substantial justice *in all cases expeditiously, inexpensively, and without incumbrance of any character*". (Cal Const, Art. XIV § 4, emphasis added.)

It appears defendant complains the vocational experts reviewed six of applicant's cases and only three of the cases reviewed were tried. We fail to see how this complaint implicates a denial of due process, as it in no way interfered with defendant's ability to present evidence. To the extent these asserted facts may affect the substantial nature of vocational reporting, we will address such concerns below.

Finally, we have remaining defendant's speculation that defendant has "been prejudiced by not including all relevant claims and are now subjected to additional awards for body parts that are included in both of the VRE reports" and that applicant may file for another award and "possibly receive additional PD" as a "windfall." (Defendants' Petition, page 8, line 16-22.) Such speculation does not provide any foundation to consider a due process violation. We remind defendant that there are mechanisms in place to prevent improper recovery such as sections 4663 and 4664.

Defendant has failed to establish a due process violation.

3.

Defendants next assert a due process violation in that they were not "provided notice that the Petition for Labor Code 5814 and Labor Code 4650 penalties would be an issue for trial." (Defendants' Petition, page 8 lines 25-27, page 9, line 1.)

This complaint apparently stems from a clerical error in the FA&O where in the findings of fact the WCJ provides findings that 5814 and 4650 penalties are to be adjusted by the parties with the WCAB to retain Jurisdiction in case of any dispute. (FA&O, pages 4, 5.) This clerical error leads to the impression there was a finding as to sections 5814 and 4650 with only the amount owed to be adjusted.

The minutes from the first day of trial are clear, however, that these issues were deferred:

> **LET THE MINUTES REFLECT** that the Court is going to defer all issues of penalty to another hearing. The 5814 and 4650 penalties on these three case numbers being tried are deferred.

(First MOH, February 26, 2025, page 5, lines 11-13, emphasis in original.) In the Report the WCJ conceded the error and noted these findings of fact "should be amended to simply state that they are deferred." (Report, page 7.)

We therefore grant reconsideration to amend the relevant findings of fact to confirm these issues are deferred.

B.

Defendant contends the finding of permanent total disability based on inability to compete in the open labor market and preclusion from vocational rehabilitation is error. (Defendant's Petition, page 9, lines 9-19.)

Permanent disability in workers' compensation cases is determined using the Permanent Disability Ratings Schedule (PDRS), which is prima facie evidence of applicant's level of permanent disability. (Lab. Code, §§ 4660(c), 4660.1(d).) However, the PDRS is rebuttable. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) As the Court stated in *Guzman*:

> Section 4660, subdivision (b)(1), recognizes the variety and unpredictability of medical situations by requiring *incorporation* of the descriptions, measurements, and corresponding percentages in the Guides for each impairment, not their mechanical application without regard to how accurately and completely they reflect the actual impairment sustained by the patient.

(*Guzman*, *supra,* page 822, emphasis in the original.)

The starting place for determining disability for physical injuries is Section 4660.1 which applies to injuries occurring on or after January 1, 2013, and states as relevant here:

> (a) In determining the percentages of permanent partial or permanent total disability, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and the employee's age at the time of injury.
>
> (b) For purposes of this section, the "nature of the physical injury or disfigurement" shall incorporate the descriptions and measurements of physical impairments and the corresponding percentages of impairments published in the American Medical Association (AMA) Guides to the Evaluation of Permanent Impairment (5th Edition) with the employee's whole person impairment, as provided in the Guides, multiplied by an adjustment factor of 1.4.

(Lab. Code, § 4660.1(a) and (b), emphasis added.)

Therefore, physical injuries are evaluated under the AMA Guides.

Unlike physical injuries, psychiatric impairments are evaluated using the Global Assessment of Function (GAF) scale, with the GAF score converted to whole person impairment. (2005 PDRS, pages 1-12 to 1-16.)

Here, the WCJ provided string ratings pursuant to the PDRS for physical injury under the AMA Guides and for psychiatric injury using the GAF scale which resulted in 60% as follows:

> Neck -15.01-8 [5] 10--311G-19-20
>
> Back –15.01-13[5] 17-311G-12-13 (+3 for pain)
>
> Psych-14.01-18[8] 25-311J-36-38
>
> CVT: 38 c 20 c 13 c 13 57 + 3 = 60 %

(FA&O, Joint Opinion on Decision, page 10.) The parties do not dispute this rating.

The contested question before us is, therefore, has applicant rebutted the PDRS?

The First District Court of Appeal in *Ogilvie v. Workers' Compensation Appeals Board* (2011) 197 Cal.App.4th 1262, [76 Cal.Comp.Cases 624], has held there are three permissible methods by which a scheduled rating may be rebutted:

> First, the court concluded that the Legislature left unchanged the case law allowing "the schedule to be rebutted when a party can show a factual error in the application of a formula or the preparation of the schedule." (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1273.) Second, the Legislature also left intact the cases, including *LeBoeuf*, recognizing "that a scheduled rating has been effectively rebutted … 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." (*Ogilvie*, *supra*, 197 Cal.App.4th at p. 1274.) The court interpreted LeBoeuf and its progeny as limited in application "to cases where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not due to nonindustrial factors." (*Id*. at pp. 1274–1275.) Third and finally, the court held "[a] scheduled rating may be rebutted when a claimant can demonstrate that the nature or severity of the claimant's injury is not captured within the sampling of disabled workers that was used to compute the adjustment factor."

(*Id*. at p. 1276; see *Contra Costa County v. Workers' Compensation Appeals Board* (2015) (*Dahl*) 240 Cal.App.4th 746, 751, [80 Cal.Comp.Cases 1119]; see also *Department of Corrections & Rehabilitation v. Workers' Compensation Appeals Board* (2018) (*Fitzpatrick*) 27 Cal.App.5th 607, 622, [83 Cal.Comp.Cases 1680] [where the Third District Court of Appeals confirmed there are only three methods to rebut a scheduled rating and the language in section 4662(b) that permanent total disability may be found "in accordance with the fact" does not provide "a second independent path to permanent total disability findings separate from section 4660."].)

The WCJ found applicant is "permanently and totally disabled. There is no apportionment of the award." (FA&O, ADJ9097135, page 3, finding 2.) The WCJ further found for ADJ9097288 and ADJ9099801 that "Permanent Disability, Apportionment and Future Medical Care are subsumed into Findings of Fact in ADJ9097135(MF) date of injury October 29, 2008." In support of these findings the WCJ concludes "Based on the reports of Dr. Yoo and Laura Wilson the applicant is totally permanently disabled. This is based on the physical limitations, including but not limited to needing to lie down for approximately 10 minutes for every three hours of continuous work (Dr. Yoo report May 6, 2024 (App. Ex. 2), as well as the report of Dr. Howard Goldfarb and the reports and RFC by Dr. Pfeiffer." (FA&O, Opinion on Decision, page 11.)

In the Report, the WCJ confirmed the medical and vocational reports rebutted the PDRS because the reports "support a finding that the applicant was not vocationally feasible, and thus, permanently and totally disabled." (Report, page 8.)

We therefore analyze the present cases to determine if the PDRS has been rebutted. Specifically, we review if the applicant's injuries impair her vocational rehabilitation, and if for that reason, her diminished future earning capacity is greater than reflected in the scheduled rating. (*LeBoeuf v. Workers' Compensation Appeals Board* 34 Cal.3d 234, 243 [48 Cal.Comp.Cases 587].)

In his March 29, 2020, report for the October 29, 2008 date of injury, Dr. Yoo found there was no apportionment of impairment and applicant had significant industrial work restrictions

including "cannot bend, lift, twist/turn repetitively or sit and stand for extended period of time greater than 1 hour."

On March 25, 2021, Dr. Yoo completed the functional capacity form and found applicant could reasonably be expected to sustain competitive work three hours each day. (Exhibit 3.) He stated that applicant would have side effects from her medications, that she would be "off task" up to 15% of the time in an 8-hour day; that applicant would need to lie down or recline from work activity during the workday to relieve or control pain; and that she would miss work about four days per month.

On June 21, 2021, Dr. Pfieffer stated that applicant "*suffers with moderate to severe levels of psychological sequelae from her work injuries*," and "[s]*he is entirely unable to work*. (Exhibit 12, emphasis added.)

On July 28, 2023, Dr. Pfeiffer found that applicant was "Markedly Limited" in multiple areas including the ability to make simple work-related decisions, to complete a normal workday and workweek without interruptions from psychologically based symptoms, and to perform at a consistent pace without an unreasonable number and length of rest periods. (Exhibit 10.)

Although applicant's vocational expert lists six cases in the heading of her vocational evaluation report, applicant was found unsuitable for rehabilitation based on medical reporting for the cases tried. In the August 1, 2023 report, when assessing applicant's physical residual functional capacity and employability in the open labor market, the expert relied solely on the opinions of Dr. Kevin Yoo for the three cases tried to state:

> I have reviewed the residual functional capacity by Agreed Medical Examiner Dr. Kevin Yoo where he indicated that Ms. Swift cannot reasonably be expected to sustain competitive work eight hours a day and could only reasonably be expected to sustain competitive work if occasionally and medically compatible workers identified three hours per day. Ms. Swift could only sit, stand, walk, or drive up to two hours out of an eight-hour day. *It is my opinion that an employer in an open labor market would not be able to accommodate these limitations*.

(Exhibit 16, emphasis added.) For the psychiatric residual functional capacity and employability in the open labor market, applicant's expert relied on the opinions of Dr. Stephen Pfeiffer, stating:

> Dr. Pfeiffer is of the opinion that Ms. Swift suffers a moderate impairment to carry out detailed instructions, maintaining attention and concentration for extended periods of time, performing activities within a schedule, maintaining regular attendance to be punctual within customary tolerances, sustaining an ordinary routine without special supervision, work in coordination with the proximity to

> others without being distracted by them, make simple work-related decisions and complete a normal workday and workweek without interruption from psychologically based symptoms and to perform a consistent pace without an unreasonable number and length of rest periods. *It is my opinion that an employer in the open labor market would be unable to accommodate these limitations*.

(Exhibit 16, emphasis added.)

> She concludes:
>
> After careful review and consideration of Ms. Swift's physical and emotional work limitations, the dosage of medications that she is currently taking, and its side effects, along with her transferable skills, determined by SkillTRAN it is my professional opinion that solely based on her industrial related impairments and her industrial physical limitations that were provided in the medical reports of Dr. Stephen M. Pfeiffer, Dr. Gerald H. Markovitz, Dr. Susan Sprau, Dr. Kevin Yoo, and Dr. Raphael Morris, Ms. Swift is not amenable to vocational rehabilitation. Ms. Swift is not able to sustain gainful employment and therefore she is not able to compete in the open labor market. As a direct result of her industrial-related impairments provided by considering her pre-injury capacity and abilities, *Ms. Swift has at present no consistent and stable future earning capacity*.

(Exhibit 16, page 34, emphasis added.)

After applicant's vocational expert issued her report, Dr. Kevin Yoo wrote "[*u*]*pon reviewing the applicant's industrial injury, I do agree that the work restrictions placed on Ms. Swift will likely preclude her from regaining meaningful employment*." (Exhibit 2, both emphasis added.)

Finally, after again reviewing applicant's vocational expert's report, Dr. Kevin Yoo stated "I do agree with Ms. Wilson's report as the applicant is unlikely able to find gainful employment and is 100% disabled. She has residual symptoms, including severe headaches, fatigue, difficulty with attention and concentration, depression, chronic pain, and neck and back pain." (Exhibit 1.)

Here, the substantial evidence of record supports the finding that applicant is not amenable to vocational rehabilitation, has no consistent and stable future earning capacity, and, therefore, has rebutted the PDRS resulting in industrial permanent total disability. This is because applicant has no future earning capacity and this finding is not reflected in the employee's scheduled rating.

An expert vocational opinion must follow medical apportionment. (*Nunes v. State of California Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Bd. en banc).) Here, however, and as more fully discussed below, there is no apportionment of industrial disability.

We agree with the WCJ that to the extent defendant seeks to rely on other medical reporting to defeat rebuttal of the PDRS, such reporting is clearly stale as having occurred more than a decade prior to trial. (Exhibits B, C, D, E and F.) For the issues in these cases the reports are not substantial evidence.

"Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].

We also agree that the reporting of defendant's vocational expert is not substantial evidence as to his ultimate conclusions. Vocational expert Mr. Goldfarb reviewed the medical record in his February 13, 2025, report and noted under "Vocational Conclusions" that "[i]t is up to the rehabilitation counselor to take the restrictions and medical impairments as noted by the medical experts and relate them to the world of work," and then finds applicant has "the capacity to engage in Semisedentary and Sedentary work activity at the semi-skilled and unskilled work levels." (Exhibit A.) Unfortunately, there is no explanation in the report of how the medical record supports semisedentary and sedentary work activity. The finding of an ability for applicant to engage in semisedentary and sedentary work activity miraculously appears whole cloth with no discussion of the medical opinions of record such as in Dr. Yoo's March 29, 2020 report that applicant "cannot bend, lift, twist/turn repetitively or sit and stand for extended period of time greater than 1 hour."

Perhaps more illustrative of vocational expert Goldfarb's questionable methodology is the acknowledgement that *from a psychological perspective* that applicant "*would not be amenable to vocational rehabilitation services and would not be able to engage in any work activity* at any skilled, semi-skilled, or unskilled work levels in the open labor market." (Exhibit A, emphasis added.) Despite this concession, the vocational expert then goes on to state in the "Summary" that applicant "can sustain work activity and is able to engage in earning capacity given her work restrictions *from a physical perspective only*," with no mention whatsoever of psychiatric injury. (Exhibit A.) These conclusions are curious when defendant has stipulated to psychiatric injury. Further, they are notable for actually supporting applicant being permanently totally disabled for industrial psychiatric reasons alone.

Such evasive and unsupported reasoning in this case makes the opinions of vocational expert Howard Goldfarb erroneous, inadequate and based on surmise, speculation, conjecture or guess. (*Hegglin*, *supra*, 169.) Such opinions are not substantial evidence as to whether applicant is amenable to vocational rehabilitation.

The substantial expert and medical opinion of record supports finding the PDRS rebutted, that applicant is not amenable to vocational rehabilitation, and that applicant is permanently totally disabled.

C.

1.

In his report of March 29, 2020, Dr. Yoo addresses the October 29, 2008, injury which is described as occurring:

> On October 29, 2008, [applicant] was working at Centinela State Prison and injured her back when she was pulling a cart and felt a "pop" in her back. She filed a claim and remained off work during which time she was followed by Dr. Korsh. The patient underwent MRI imaging, pain management, modification of activities, as well as lumbar epidural steroid injections. She had one injection which was helpful but the second injection was not. On October 31, 2009, the patient was at work, when she was working at the copier, when she opened the tray to place more paper. She apparently fell and sustained another back injury. In 2012, the patient experienced another copier related incident when she pulled out and it was overloaded with copy paper.

(Exhibit 4.)

After considering this history, the doctor concludes "100% of permanent disability is apportioned to the industrial injury of 10/29/2008." (Exhibit 4.) The doctor does not subsequently address or change apportionment of applicant's physical impairments. The medical evidence establishes that the physical impairment is caused by the applicant's October 29, 2008, injury ADJ9097135 (MF).

For the psychiatric impairment, Dr. Pfeiffer found apportionment as, "1) Industrial - Psychological Injuries while employed by CDC-R - 90%, 2) Non-Industrial - Current role as primary caretaker of 4 grandchildren - 10%," and then concluded "I believe the multiple injuries Ms. Swift sustained while employed by CDC-R are impossible to separate with respect to apportionment to each individual injury." (Exhibit 9, emphasis in original.)

The burden of proving apportionment of permanent disability falls on the employer because it is the employer that benefits from apportionment. (*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, 612 (Appeals Bd. en banc).)

In *Escobedo* the Appeals Board also held that (1) section 4663 requires the reporting physician to make an apportionment determination; (2) apportionment to other factors allows apportionment to causation, including pathology, prior conditions, and retroactive work restrictions; (3) applicant holds the initial burden to prove industrial injury and also has the added burden of establishing the approximate percentage of permanent disability directly related to the industrial injury; (4) defendant has the burden of establishing the approximate permanent disability caused by other factors; and (5) a medical report addressing apportionment may not be relied upon unless it constitutes substantial evidence. (*Escobedo*, *supra*, at p. 607.)

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. Furthermore, if a physician opines that a percentage of disability is caused by a degenerative disease, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Id*. at pp. 620-621.)

Here, physical impairment is not apportioned as it is 100% caused by the October 29, 2008, injury ADJ9097135 (MF).

For psychiatric impairment, however, Dr. Pfeiffer finds 10% apportionment to applicant's non-industrial role as primary caretaker of four grandchildren. This apportionment opinion, however, fails to set forth reasoning in support of its conclusions and therefore defendants fail in meeting their burden to establish psychiatric apportionment. This is because the doctor does not explain apportionment in light of his finding the "responsibility also contributes to her sense of meaning derived from serving the children as well as benefitting to from the love that emanates from the role of parent that she is now integrally involved in their lives." (Exhibit 9.) Dr. Pfieffer's apportionment determination is not substantial. (*Escobedo*, *supra*, at p. 607.)

Here, the WCJ properly found no apportionment, including no psychiatric apportionment.

2.

In the limited circumstances where the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability, the employer has failed to meet its burden of proof and a combined award of permanent disability may be justified. (*Benson*, *supra*, 170 Cal.App.4th at p. 1560; and see: *U.S. Fire Ins. Co. v Workers' Compensation Appeals Board* (2018) (*Herrera*) 83 Cal.Comp.Cases 1829 (writ denied) [combined award proper when certain aspects of permanent disability could not be parceled out]; *Zurich N. Am. v. Workers' Compensation Appeals Board* (2013) (*Driver*) 78 Cal.Comp.Cases 515 (writ denied) [apportionment impossible when physicians could not parcel out applicant's successive injuries].)

Here, the physical disability is caused solely by the October 29, 2008 injury, and Dr. Pfieffer found the multiple psychiatric injuries applicant sustained are impossible to separate with respect to apportionment of psychiatric disability. (Exhibit 9.) The parties stipulated to neck, back, spine *and psyche injury* occurring October 29, 2008. Where, as here, the evaluating physician cannot parcel out, with reasonable medical probability, the approximate percentages to which each distinct industrial injury causally contributed to the employee's overall permanent disability a combined award is appropriate. (*Benson*, *supra*, at page 1560.) As it is clear the physical disability occurred as a result of the October 29, 2008, injury and the psychiatric disability, which is not able to be parceled out, was at least caused in part by the same October 29, 2008, injury ADJ9097135 (MF).

A single award of permanent disability is appropriate.

D.

Applicant, in her Petition, asserts that the permanent disability payment start date is not the permanent and stationary date but is December 30, 2008. (Applicant's Petition, page 4, lines 3-5.) In the FA&O the WCJ found applicant to be permanent and stationary for all body parts on June 20, 2021. The WCJ listed the permanent and stationary date of June 20, 2021, as the start date for permanent total disability payments in the Commutation Request form attached to the FA&O.

The Appeals Board has held:

> (1) When a defendant stops paying temporary disability indemnity pursuant to section 4656(c) before an injured worker is determined to be permanent and stationary, the defendant shall commence paying permanent disability indemnity

based on a reasonable estimate of the injured worker's ultimate level of permanent disability.

(2) When an injured worker who is receiving permanent partial disability payments pursuant to section 4650(b)(1) becomes permanent and stationary and is determined to be permanently totally disabled, *the defendant shall pay permanent total disability indemnity retroactive to the date its statutory obligation to pay temporary disability indemnity terminated*.

(*Brower v. David Jones Constr.,* (2014) 79 Cal.Comp.Cases 550, 552 (Appeals Bd. en banc), emphasis added.)

As discussed above, permanent total disability is owed in AD9097135 (MF) for the physical and psychiatric disability and in ADJ9097288 for the stipulated psychiatric portion of the disability. Although the parties stipulate to low back injury in ADJ9099801, no physical disability was found for this injury. Therefore, retroactive permanent total indemnity is owed from the date the obligation to pay temporary disability indemnity terminated in AD9097135 (MF) and ADJ9097288. (*Brower*, *supra*, at page 552.)

In AD9097135 (MF), industrial disability leave (IDL) was paid in lieu of temporary disability during the period of December 23, 2008, to December 30, 2008, February 5, 2009, through February 23, 2009, and on May 28, 2009. Permanent disability indemnity was paid beginning on February 6, 2009. In ADJ9097288, IDL was paid in lieu of temporary disability during the period of June 1, 2010, to October 20, 2010, and temporary disability indemnity was paid from October 21, 2010 to October 19, 2011. Permanent disability indemnity was paid beginning on October 20, 2011.

Here, based on the last day of payment of temporary disability indemnity on October 19, 2011, payment of permanent disability indemnity began on October 20, 2011. Thus, under *Brower*, payment of applicant's total permanent disability indemnity should commence on October 20, 2011.

E.

In the FA&O the WCJ found that applicant's earnings were $1,344.65 per week. These earnings were based on wage records and resulting calculation of $5,782.00 earnings per month divided by 4.33 average weeks in a month yielding the average weekly wage of $1,344.65. (FA&O, Opinion on Decision, pages 11-12.)

In their Petition, the defendants challenge this finding contending that the average weekly wage is determined as of the date of injury. (Defendant's Petition, page 14, lines 17-19.)

In the Report, the WCJ recommended that the monthly wage of $5,782.00 should be multiplied by 12 and then divided by 52 weeks to arrive at a weekly wage rate of $1,292.41 and not $1,344.65. (Report, page 12.)

When calculating average earnings for benefit purposes section 4453 provides in relevant part:

> (1) Where the employment is for 30 or more hours a week and for five or more working days a week, the average weekly earnings shall be the number of working days a week times the daily earnings at the time of the injury.
>
> ***
>
> (4) Where the employment is for less than 30 hours per week, *or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied*, the average weekly earnings shall be taken at 100 percent of the sum which reasonably represents the average weekly earning capacity of the injured employee at the time of his or her injury, due consideration being given to his or her actual earnings from all sources and employments.

(Lab. Code, §§ 4453(c)(1) and (c)(4), emphasis added.)[4]

Although it might appear there is demarcation in approach between employment for 30 hours per week and employment for less than 30 hours per week, it is clear by the phrase "or where for any reason the foregoing methods of arriving at the average weekly earnings cannot reasonably and fairly be applied" that the inquiry is broader and more complex.

The California Supreme Court has explained:

> Earning capacity is not locked into a straitjacket of the actual earnings of the worker at the date of injury; the term contemplates his general over-all capability and productivity; the term envisages a dynamic, not a static, test and cannot be compressed into earnings at a given moment of time. The term does not cut "capacity" to the procrustean bed of the earnings at the date of injury. A comparison of the first three subdivisions of section 4453 with the fourth shows that the Legislature deliberately established earning capacity as the test for the fourth subdivision as distinguished from the actual earnings for the other three subdivisions.

[4] Subsection two of section 4453(c) involves work for two or more employers while subsection three addresses work at an irregular rate, neither of which applies to the case at hand. (Lab. Code, §§ 4453(c)(2) and (c)(3).)

(*Goytia v. Workers' Comp. Appeals Bd.* (1970) 1 Cal.3d 889, 894, [35 Cal.Comp.Cases 27].)[5]

"Capacity to earn money necessarily contemplates *all the surrounding circumstances and conditions disclosed by the evidence* which may indicate one's usual and ordinary ability to earn wages, including his physical ability, his natural talents, his training, his opportunity to secure employment, and the condition of his health [citation]." (*Goytia*, *supra*, page 896, emphasis added.)

Turning to the case at hand, the wage statement clearly establishes applicant was earning $4,976.00 per month effective December 1, 2007, before the first injury and rising to $5,782.00 per month effective July 1, 2017. It appears that defendants did not submit any wage information and the partial information provided through wage statement was obtained by applicant via subpoena. The wage statement is incomplete as a payroll record and only shows sporadic monthly wage information.

Although it appears applicant was employed for 30 or more hours a week and for five or more working days a week, there is insufficient information in the record to calculate the number of working days a week times the daily earnings at the time of the injury. Acknowledging that earning capacity is not locked into a straitjacket, contemplates the workers' general over-all capability and productivity, and cannot be compressed into earnings at a given moment of time, we are not chained to the procrustean bed of the earnings at the date of injury. (*Goytia*, *supra*, 894.)

On this record it is clear the applicant had actual earning capacity of $5,782.00 per month. As the wage statement presents earnings in solitary and intermittent amounts, we see no error in the WCJ's original wage calculation of $5,782.00 earnings per month divided by 4.33 average weeks in a month yielding an average weekly wage of $1,344.65.

V.

Following our independent review of the record, and for the reasons stated above, we grant defendant's Petition and grant applicant's Petition. We affirm the decision, except that we amend

[5] In *Goytia*, *supra*, the Supreme Court considered a predecessor version of current section 4453 which, as relevant here, is the same as the current section. The reorganized current statute does not impact the *Goytia* analysis. For clarity, it is noted after the Supreme Court's decision in *Goytia*, and after further proceedings at the trial level, the case again came before the Supreme Court with the court remanding again to have applicant's post-injury earnings considered in keeping with its' original decision. (*Goytia v. Workers' Comp. Appeals Bd*. (1970) 6 Cal.3d 660 [37 Cal. Comp. Cases 104].)

it to defer the issues of penalties under sections 4650 and 5814 and to award payment of permanent disability indemnity payments beginning on October 20, 2011 (Award). Upon return to the trial level, the parties shall obtain a new DEU commutation based on the start date of payment of October 20, 2011. To correct clerical error, we amend finding 10 in ADJ9099801 "Permanent Disability, Apportionment and Future Medical Care are subsumed into Findings of Fact in ADJ9097135(MF) date of injury October 29, 20" to add the last two digits representing the full year 2008. (FA&O, page 5, finding 10.)

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the October 9, 2025, Joint Findings, Award and Order is **GRANTED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the October 9, 2025, Joint Findings, Award and Order is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the October 9, 2025, Joint Findings, Award and Order is **AFFIRMED IN PART**, and **AMENDED IN PART** as follows:

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II

FINDINGS OF FACT- ADJ9097135 MF

-0-

3. Said injury caused permanent disability of 100% payments subject to reduction for permanent disability already advanced, and attorneys' fees.

-0-

5. The reasonable value of the services rendered by applicant's attorney is 18% of the amount awarded.

-0-

II

FINDINGS OF FACT- ADJ9097288

-0-

3. The issues of Labor Code section 5814 and 4650 penalties are deferred.

-0-

II

FINDINGS OF FACT- ADJ9099801

-0-

9. The issues of Labor Code sections 5814 and 4650 penalties are deferred.

10. Permanent Disability, Apportionment and Future Medical Care are subsumed into Findings of Fact in ADJ9097135(MF) date of injury October 29, 2008.

***

JOINT AWARD ADJ9097135(MF); ADJ9097288; AND ADJ9099801

AWARD IS HEREBY MADE in favor of SHARON SWIFT against CALIFORNIA DEPARTMENT OF CORRECTIONS AND REHABILITATION CENTINELA STATE PRISON as follows:

A) Permanent disability at 100%, less credit for advances previously made on each of the three case numbers and attorneys' fees. Payment of permanent disability indemnity shall commence retroactive to October 20, 2011.

B) Further medical treatment for the neck, back and psyche.

C) It is found that a reasonable attorney's fee to be 18% of the amount awarded and shall be commuted from the side of the Award.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ PAUL F. KELLY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

January 12, 2026

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

SHARON SWIFT
LAW OFFICE OF PHILIP COHEN
STATE COMPENSATINO INSURANCE FUND

PS/oo

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