WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

STEVE FREITAS, ***Applicant***

vs.

TOYOTA; TOKIO MARINE, ***Defendants***

Adjudication Number: ADJ12941269
Oakland District Office

OPINION AND ORDER DISMISSING PETITION FOR RECONSIDERATION GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant filed a Petition for Reconsideration (Petition) in response to the Amended Findings and Award (Amended F&O) dated July 16, 2026 in which the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant, while employed during the period of September 19, 1991 to August 19, 2019 as a delivery specialist, sustained injury arising out of and in the course of employment to the bilateral knees resulting in permanent total disability.

Defendant contends applicant has not rebutted the American Medical Association (AMA) Guides impairment rating, that the opinions of applicant's vocational expert (VE) are not substantial evidence, and that permanent total disability is not supported by substantial evidence.

Applicant filed an Answer, which is labeled in the alternative as a petition for reconsideration. The WCJ's Report and Recommendation (Report) recommends that defendant's Petition for Reconsideration be denied.

We have reviewed the allegations in the Petition, the Answer, and the contents of the Report. After review of the record and for the reasons discussed below, we will dismiss applicant's Petition for Reconsideration, grant defendant's Petition for Reconsideration, rescind the Amended F&O, and return the case to the trial level for further proceedings consistent with this decision.

I.

Petitions for reconsideration filed on or after July 14, 2026 are subject to Labor Code section 5909,[1] 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 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 10, 2026, and 60 days from the date of transmission is Friday, October 9, 2026. This decision is issued by or on Friday, October 9, 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.

Here, according to the proof of service for the Report, the Report was served on August 10, 2026, and the case was transmitted to the Appeals Board on August 10, 2026. Service of the Report and transmission of the case to the Appeals Board occurred on the same day. Thus, we

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

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 August 10, 2026.

II.

As found by the WCJ, applicant, while employed during the period of September 19, 1991 to August 19, 2019 as a delivery specialist, sustained injury arising out of and in the course of employment to the bilateral knees.

Panel Qualified Medical Evaluator (PQME) Brian Bernhardt, M.D., first reported in this case on July 6, 2020. (Exhibit 101, PQME Dr. Bernhardt, July 6, 2020.)

In a July 2, 2021 re-evaluation report, Dr. Bernhardt found the left knee was not permanent and stationary (P&S), the right knee was P&S, and there were work restrictions of occasional bending at the knees, no squatting, no climbing of ladders and occasional climbing of stairs, and no pushing/pulling >25 pounds. (Exhibit 102, PQME Dr. Bernhardt, July 2, 2020, p. 27.)

In his March 4, 2022 re-evaluation report, Dr. Bernhardt states the left knee was now P&S and the right knee remained P&S. (Exhibit 103, PQME Dr. Bernhardt, March 4, 2020, p. 9.) The impairment rating was 4% whole person impairment (WPI) for each knee due to partial medial and lateral meniscectomy surgeries and 8% WPI for each knee for arthritis with 2mm cartilage interval. Work restrictions were deferred and a functional capacity evaluation (FCE) was recommended to "assess and facilitate return to work." (*Id*. at pp. 13, 14.)

In the following August 8, 2022 supplemental report there was no change in opinion after review of additional records. (Exhibit 104, PQME Dr. Bernhardt, August 8, 2022.)

On December 20, 2022, a Functional Capacity Evaluation (FEC) Summary by Alireza Bagherian, DC, CCEP, QME, DAIPM, ABVE/F, issued, which included the following explanation:

> The FCE is a systemic method of objectively measuring [applicant's] physical ability to perform purposeful, meaningful or useful tasks on a safe and dependable basis. Function is the focus of this type of evaluation process because functional limitations translate the effect of impairment on disability. The evaluation process is patient specific and designed to measure the current level of function within the context of the physical demands associated with employment. The FCE aims to measure [applicant's] ability to perform functional or work related tasks and predicts the potential to sustain these tasks over a defined period of time.

(Exhibit 108, FEC, December 20, 2022, p. 2.) For work capacity, the FCE concluded with:

> [I]t is unlikely [applicant] would be able to return to the world of work with any reasonable degree of reliability and sustainability without some work restrictions. My assessment and recommendations for work restrictions by way of work activity and work posture tolerances are listed on page 16 of the data report.

(*Id*., at p. 9.) The attached data report at page 16 indicates restrictions were: no kneeling, balancing, crawling, static standing, or walking on uneven ground; infrequent stair climbing, walking, pushing, pulling, carrying both hands, or dynamic standing; and occasional sitting.

In his April 13, 2023 supplemental report, PQME Dr. Bernhardt reviewed additional records, including the December 20, 2020 FCE, and then stated, "my findings and opinions are unchanged." However, the doctor also stated:

> In my opinion, the Functional Capacity Evaluation demonstrates [applicant's] safe lifting capacity fails to meet the definition of sedentary work or sedentary employment, and it is unlikely, according to this report, that [applicant] would be able to return to work with any reasonable degree of reliability or sustainability without work restrictions, in which case this report can provide guidance for the employer to offer a modified return to work.

(Exhibit 105, PQME Dr. Bernhardt, April 13, 2023, p. 3.)

Then in his May 15, 2023 supplemental report, PQME Dr. Bernhardt stated:

> Upon careful review of the Functional Capacity Evaluation, I note that [applicant] is apparently precluded from static standing (never) and that he is only able to sit occasionally. Likewise, he is only able to perform dynamic standing activities infrequently, and he has significant limitations with regard to lifting, pushing, and pulling.
>
> The parties, including Dr. Bagherian, who performed the Functional Capacity Evaluation on December 20, 2022, should acknowledge that the applicant has bilateral knee injuries.
>
> To be sure, this compromise one's ability to perform kneeling, squatting, stooping, crawling, and climbing activities; and I note that the applicant is only able to perform stair climbing activities "infrequently."
>
> On the other hand, he should be able to perform any and all manner of sedentary activities, and he should be able to perform most activities with his upper extremities, as they are not in any way compromised, impaired, or disabled.
>
> In summary, I am unable to "blindly defer" to the Functional Capacity Evaluation, and my experience and education leave me to believe that the applicant is able to perform sedentary or semisedentary activities with moderate demands for physical

effort, utilizing his upper extremities only. I suppose the two vocational rehabilitation experts can utilize the adversarial system before the Trier to Fact to reach a logical conclusion in this case, but all parties must acknowledge this is a bilateral knee injury and that the applicant's spine and upper extremities remain non-compromised.

Hopefully, this clarifies my opinion, and I apologize for my April 13, 2023 opinion which suggested that the applicant was unable to perform sedentary employment.

(Exhibit 106, PQME Dr. Bernhardt, May 15, 2023, pp. 2-3.)

PQME Dr. Bernhardt was then deposed on July 7, 2023, during which the following exchanges occurred:

Q. Okay. And is it fair to say, that the knee pain can be affected by static positioning in a seated position?

A. It can, but I mean to cut to the chase, I mean in my opinion, I mean [applicant] is not unable to return to the workforce in the sense of, you know, I think that he would still be able to do work in a seated position, minimal demands, right. The truth is, you know, I wasn't clear in this -- and I apologize for that -- but, you know, he probably -- not probably, he should be able to lift like even 10 to 20 pounds and certainly can stand for a little while and sit for, I would say, at least a couple hours.

(Exhibit 107, Deposition PQME Dr. Bernhardt, July 7, 2023, 2023, p. 13, lns 13-25.) And then:

Q. Okay. So, in this case, I'm asking you to consider whether prophylactically based upon the reporting of Dr. Bagherian, there should be some restrictions as far as static seated capacity work?

A. I mean, I felt like, you know, I'm not going to be able to take a FCE verbatim. I think that it's part of the record that I'm going to use to make my decision. I think that [applicant] would be -- just from – even just from the time I spent with him, like I have no doubt that he can sit for, you know, three to four hours without much difficulty. Where he's going to have the most difficulty and where he should be precluded from having to do would be kneeling, squatting, crawling, stooping, bending, twisting, pivoting, walking on uneven surface, stairs are always going to be a challenge for him, and absolutely no ladders.

Q. Okay. So weightbearing activities for this gentleman is pretty much out of the picture for his future employment?

A. Right.
Q. Okay. So, you're envisioning he can do seated capacity work of some nature?

A. Yeah.

(*Id*. at p. 15, lns 1-23.) The doctor then stated applicant can perform work of, "[s]omething that's required sitting but not demand on his lower extremity of any sort." (*Id*. at p. 17, lns 1-2.)

There is a one page June 21, 2023 Work Restrictions note from Babak Jamasbi, M.D., that provided work restrictions stated as "Permanent and Stationary as per QME." (Exhibit 11, Babak Jamasbi, M.D., June 21, 2023.)

On March 26, 2024, applicant's VE Evan Oomecke, M. Ed., issued a report which included that "[i]nformation regarding functional limitations, work restrictions, whole person impairment, and apportionment is outlined in the body of the report." (Exhibit 28, VE Oomecke, March 26, 2024, p. 80.) And that:

> The opinions of Dr. Bernhardt as the pain management panel qualified medical evaluator, Dr. Bagherian as the functional capacity evaluator, and Dr. Jamasbi as the primary treating physician were considered for this analysis of medical labor market access, placeability, and sustainability.

The VE then reviews medical opinions but does not specify the work restrictions considered. (*Id.* at pp. 47- 56.) For example, VE Oomecke states:

> Therefore, it is not possible to provide a definitive opinion on labor market access in relation to Dr. Bernhardt's opinions because he has not provided clear and definitive opinions on work restrictions. He deferred his opinions on [applicant's] employability to a vocational expert.

(*Id*. at p. 54, emphasis omitted.) VE Oomecke also noted:

> Dr. Jamasbi did not provide an opinion on permanent work restrictions. Therefore, it is not possible to provide a definitive opinion on labor market access in relation to Dr. Jamasbi's opinions.

(*Id*. at p. 54, emphasis omitted.) VE Oomecke then states the FCE definition for "safe lifting capacity fails to meet the definition of sedentary employment. This is compatible with a reduced portion of sedentary jobs. Limitations of infrequent pushing, pulling, and carrying with both hands are compatible with a further reduced portion of sedentary jobs." (*Id*. at p. 55.) Ultimately, VE Oomecke concluded that the applicant "is not vocationally feasible and lacks the capacity to be amenable to rehabilitation for regular jobs in the open labor market, either full-time or part-time." (*Id*. at p. 82.)

Defense VE Scott Simons, M.S., reported on December 11, 2024. (Exhibit B, VE Simons, December 11, 2024; the associated record summary is separately identified as Exhibit C.) The defense VE identified various sources of work restrictions and concluded the applicant "is

amenable for rehabilitation via direct placement, educational retraining, and on-the-job training. Additionally, he is a good candidate for work-from-home and gig economy positions." (*Id*. at pp. 27-28, 23.)

VE Oomecke reviewed additional records and noted there was no change to "any of my analyses, conclusions, or opinions as expressed in my prior report or in this supplemental report." (Exhibit 29, VE Oomecke, March 3, 2025, p. 2.)

The defense VE Simons also reviewed additional records and stated, "I have no reason to modify any of my previous opinions." (Exhibit A, VE Simons, May 7, 2025, p. 13.)

Then on July 29, 2025, Dr. Jamasbi issued a one page "To whom it may concern" letter stating he was "in full agreement with Dr. Sarbjit Dhesi's report date of Jun 12, 2025 I am adopting his opinion as of my own." Included with the letter is the report of chiropractor Desai with work restrictions of:

> No kneeling, squatting, or stooping on no more than occasional basis. No climbing on no more than occasional to intermittent basis. Limitations include 35-pound lifting restriction. Standing is limited to no more than 4-6 per workday. Walking is limited no more than 3-5 hours on an 8-hour workday.

(Exhibit 4, Chiropractor Desai, June 12, 2025, p. 15, as included with the Babak Jamasbi, M.D., July 9, 2025 report.)[2] Chiropractor Desai provided three diagnoses which included one for each knee and obesity described as "pre-existing, longstanding, improved subsequent to the industrial injury." (*Id*. at p. 10.)

Then on October 7, 2025 Dr. Jamasbi issued a report after reviewing records that included:

> Upon further review of the work restrictions previously provided, and after careful consideration of Dr. Bagherian's comprehensive Functional Capacity Evaluation (FCE), it is clear that [applicant] suffers from significant, permanent disabilities. The FCE documents persistent bilateral knee pain, restricted mobility, and substantial limitations in weight-bearing, standing, walking, lifting, carrying, pushing, and pulling. These limitations are corroborated by objective testing, clinical judgment, and consistent patient effort throughout the evaluation. Dr. Bagherian concluded that [applicant's] residual functional capacity does not meet the criteria for even sedentary work, as he is unable to perform the minimal physical demands required for such employment reliably.
>
> Additionally, Mr. Oemcke's vocational rehabilitation evaluation found that, when considering the combined medical opinions and vocational factors, [applicant] has

[2] We note Exhibit 5 is a duplicate of Dr. Jamasbi's one page "To whom it may concern" letter, while Exhibit 27 is a duplicate of the June 12, 2025 chiropractor Desai report.

> 0% access to jobs in the open labor market. The evaluation highlights not only his physical limitations but also his diminished clerical aptitude, finger dexterity, and persistent pain, which interfere with daily activities and concentration. [Applicant's] own reports of pain, functional limitations, and lack of readiness to return to work further support these findings.
>
> Given the updated restrictions and objective findings provided by Dr. Bagherian and Mr. Oemcke, I concur with their assessments and adopt their opinions as my own regarding [applicant's] ability to return to gainful employment. The evidence demonstrates, to a reasonable degree of medical probability, that [applicant] is precluded from returning to any type of competitive employment in the open labor market. We are adopting these opinions as our own.

(Exhibit 2, Babak Jamasbi, M.D., October 7, 2025, pp. 15-16.)

There is also a November 3, 2025 treating report from Dr. Jamasbi that includes a past medical history of asthma and hypertension as well as a surgical history of bilateral carpal tunnel and ulnar releases in 1994. (Exhibit 1, Babak Jamasbi, M.D., November 3, 2025, p. 2.)[3]

The case was tried on April 9, 2026, and the parties stipulated that the applicant sustained an industrial injury to the knees. (Minutes of Hearing (MOH), April 9, 2026, p. 2, lns 8-12.) Issues include, *inter alia*, temporary disability, permanent and stationary date, permanent disability including applicant's claim for permanent total disability and apportionment, exhibits were admitted, and the matter was submitted without testimony.

A F&A issued on June 12, 2026, which was then superseded by the Amended F&A on July 16, 2026. (See Cal. Code Regs., tit. 8, § 10961.)

On July 29, 2026, defendant filed the Petition seeking reconsideration of the Amended F&A. The Petition incorporated "the arguments raised in the prior Petition for Reconsideration filed on 07/01/26, except as modified by the issuance of the Amended Findings and Award and Opinion on Decision." (Petition, p. 3, lns 4-6.)

On the next day, July 30, 2026, applicant filed an Amended Answer and Applicant's Petition for Reconsideration in the Alternative.

[3] This report is similar to prior Dr. Jamasbi reports dated October 6, 2025 (Exhibit 3), May 6, 2025 (Exhibit 6), October 9, 2024 (Exhibit 7), May 9, 2024 (Exhibit 8), January 9, 2024 (Exhibit 9), September 22, 2023 (Exhibit 10), and June 21, 2023 (Exhibit 12). Although also similar, applicant, was not permanent and stationary in the reports of May 10, 2023 (Exhibit 13), March 29, 2023 (Exhibit 14), and March 1, 2023 (Exhibit 15). We note that additional treating records cover August 25, 2020 through December 31, 2022 (Exhibits 16 – 26) and that excerpts of subpoenaed records cover various dates from 2000 through 2019 (Exhibits D and E).

Finally, on August 10, 2026, the WCJ filed a Report and Recommendation (Report) recommending the Petition be denied.

It is from the July 16, 2026 Amended F&A that defendant and applicant both seek reconsideration.

III.

1.

The State Legislature has set the foundation for establishing disability as 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).) Further, the Legislature has incorporated the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides) into the PDRS for evaluating physical injury or disfigurement. Section 4660.1 states in the relevant part:

> (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.)

The use and incorporation of the AMA Guides is acknowledged in the PDRS itself, with exception for claims of psychiatric impairment. (PDRS, p. 1-2; 1-12.)

The use of the AMA Guides, however, is rebuttable. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) Because the AMA Guides' incorporation into the PDRS is rebuttable, the first step in the assessment of disability, is to determine the impairment for the injured body part(s) under the AMA Guides. This allows a physician to determine if rebuttal of a strict rating AMA Guide impairment is necessary. If the physician finds the straight AMA Guides impairment to be lacking:

> [t]he physician should be free to acknowledge his or her reliance on standard texts or recent research data as a basis for his or her medical conclusions, and the WCJ

> should be permitted to hear that evidence. If the explanation fails to convince the WCJ or WCAB that departure from strict application of the applicable tables and measurements in the Guides is warranted in the current situation, the physician's opinion will properly be rejected.

(*Id*. at 829.)

When approaching rebuttal, another Court stated:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989].

(*Ogilvie v. Workers' Comp. Appeals Bd.*, (2011) 197 Cal.App.4th 1262, 1274, [76 Cal.Comp.Cases 624].) The Court explained that *LeBouf* is limited "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 such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education." (*Id*. at p. 1275, emphasis added.)

Therefore, one way to rebut the PDRS is to establish the effect work restrictions that are directly attributable to the injury have on future earnings. Such work restrictions, however, need to be established by substantial medical evidence. This is because decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 637 [35 Cal.Comp.Cases 16].)

Here, the WCJ described the PDRS rating as resulting in 48% permanent disability in the Amended Opinion, and 48% is therefore the PDRS prima facie level of disability.

The question before us then is: Do the medical expert work restrictions and resulting expert vocational opinions rebut the PDRS permanent disability?

To consider this question we turn to applicant's industrial work restrictions.

As early as July 2, 2021, PQME Dr. Bernhardt found work restrictions of occasional bending at the knees, no squatting, no climbing of ladders and occasional climbing of stairs, and no pushing/pulling >25 pounds. (Exhibit 102, at p. 27.) These work restrictions, however, were

issued before both of applicant's knees, and therefore the injury, were P&S. (*Ibid*.) As such, they therefore cannot be considered permanent work restrictions.

Once the applicant was P&S, PQME Dr. Bernhardt deferred work restrictions and recommended a FEC to "assess and facilitate return to work." (Exhibit 103, at p. 14.)

The FEC, as self-described, provided a measure of applicant's physical ability to perform tasks without apparently being limited solely to the effects of applicant's industrial injury. (Exhibit 108, FEC, December 20, 2022, p. 2.) Although the FEC found it unlikely applicant would be able to return to the world of work, this was based in part on infrequent "*pushing*, *pulling*, *carrying both hands*." (*Id*. at p. 9, and attached data report at p. 16, emphasis added.)

Although, as we will discuss further below, the record contains extensive discussion of the FEC's work restrictions, it does not appear there is expert medical opinion that is explicitly the source of these restrictions aside from the FEC itself. Expert opinion is necessary because "[w]here an issue is exclusively a matter of scientific medical knowledge, expert evidence is essential to sustain a [WCAB] finding; lay testimony or opinion in support of such a finding does not measure up to the standard of substantial evidence." (*Peter Kiewit Sons v. I.A.C.* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].)

Lay opinion might find it reasonable that the restrictions to pushing, pulling, and carrying with both hands are a result of applicant's surgical history of bilateral carpal tunnel and ulnar releases in 1994. (Exhibit 1, at p. 2.) Likewise, lay opinion might find it reasonable that the remaining postural limitations are from applicant's bilateral knee injury and not the result of applicant's history of asthma and hypertension. (*Ibid*.) Such lay opinion, however, is not substantial where "where the truth is occult and can be found only by resorting to the sciences." (*Peter Kiewit Sons*, *supra*, at p. 838.) An expert medical opinion is required to explain both the work restrictions and their specific source.

Therefore, it is clear the work restrictions in the FCE are not substantial evidence. The FCE does not explain if work restrictions are solely from the industrial injury or caused by some other vector. This impermissibly leaves the reader to speculate as to each work restriction's cause. In the absence of expert medical opinion clarifying the source of the work restrictions, the restrictions cannot be attributable to industrial injury on a substantial medical basis.

PQME Dr. Bernhardt did review the FCE before stating that "my findings and opinions are unchanged" and then noted how the FCE restrictions may be used to "provide guidance for the

employer to offer a modified return to work." (Exhibit 105, at p. 3.) The doctor appears to be looking at a possible return to work in a global sense. The doctor most notably does not address what, if any, of the work restrictions result from the industrial injury. Tellingly, PQME Dr. Bernhardt states in the following supplemental report:

> The parties, including Dr. Bagherian, who performed the Functional Capacity Evaluation on December 20, 2022, should acknowledge that the applicant has bilateral knee injuries.
>
> To be sure, this compromise one's ability to perform kneeling, squatting, stooping, crawling, and climbing activities; and I note that the applicant is only able to perform stair climbing activities "infrequently."
>
> On the other hand, he should be able to perform any and all manner of sedentary activities, and he should be able to perform most activities with his upper extremities, as they are not in any way compromised, impaired, or disabled.

The doctor goes on to note he is unable to blindly defer to the FCE but that "applicant is able to perform sedentary or semisedentary activities with moderate demands for physical effort, utilizing his upper extremities only." (Exhibit 106, at pp. 2-3.)

The doctor does not describe which of applicant's work restrictions in the FCE directly result from the industrial injury. The doctor reviewed his opinions at deposition before concluding that applicant can perform "[s]omething that's required sitting but not demand on his lower extremity of any sort." (Exhibit 107, at p. 17, lns 1-2.)

On this record, we are unclear what, if any, work restrictions are found by PQME Dr. Bernhardt and if he attributes those restrictions solely to industrial injury.

The other medical opinions of record are equally deficient regarding work restrictions. For example, treating physician Dr. Jamasbi did not take the opportunity to provide work restrictions in his June 21, 2023 report (Exhibit 11), and variously adopted other physicians' and applicant's VE's restrictions as his own, before concluding applicant is precluded from employment in the open labor market. (Exhibit 4, at p. 1; Exhibit 2, at pp. 15-16.)

From this scattershot approach it is impossible to determine if Dr. Jamasbi has an independent opinion on work restrictions and their cause, and if so, what that opinion may be.

Included in the opinions adopted by Dr. Jamasbi are the work restrictions provided by chiropractor Dhesi. (Exhibit 4.) It appears that these work restrictions have not been considered by the VEs and nor were they commented on by PQME Dr. Bernhardt since chiropractor Dhesi's

opinions were issued after the reporting was completed in this matter. Although chiropractor Dhesi's restrictions may well be appropriate, given the posture of this case we are unable to discern if these restrictions are based solely on the industrial injury or may be based in part on applicant's chiropractor Desai's diagnoses of obesity that was pre-existing, longstanding, and improved subsequent to the industrial injury. (*Id*. at p. 10.) After clarifying causation, the parties may wish to submit chiropractor Dhesi's work restriction to the VEs for consideration.

2.

As discussed above, it is unclear which of applicant's work restrictions are solely from the industrial injury. Substantial expert medical opinion of industrial work restrictions is a predicate to any meaningful expert vocational opinion in this case. Lacking this foundational predicate, the VE opinions from the beginning cannot be substantial evidence. Expert opinion is not substantial "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].

Here, the vocational experts appear to employ a magician's sleight of hand through verbose writing and misdirection to hide the missing valid work restrictions. (As discussed above, see: Exhibit 28, at pp. 47-56, 80, 82; Exhibit B, at pp. 27-28.) It is not the volume of, nor the quality of the words used, but the logical analysis of the facts presented that allows the trier of fact to determine if a vocational expert opinion is substantial. If the vocational expert is unable to identify the relevant work restrictions, they should immediately let the parties know so that the record may be developed.

Further, although we note the applicant has the burden of rebutting the PDRS presumption by a preponderance of the evidence (Lab. Code, §§3202.5, 5705), it is also true that decisions of the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb*, *supra*, at p. 281.)

Here the record contains a presumptively correct PDRS rating based on PQME Dr. Bernhardt's opinions. Dr. Bernhardt has, however, introduced some ambiguity into that PDRS rating.

Dr. Bernhardt stated applicant's bilateral knee injuries compromise his ability to perform kneeling, squatting, stooping, crawling, and climbing activities, and he is only able to perform stair climbing activities "infrequently," and that "I suppose the two vocational rehabilitation experts can

utilize the adversarial system before the Trier to Fact to reach a logical conclusion in this case." (Exhibit 106, at pp. 2-3.)

Then, during deposition the doctor stated, "he's going to have the most difficulty and where he should be precluded from having to do would be kneeling, squatting, crawling, stooping, bending, twisting, pivoting, walking on uneven surface, stairs are always going to be a challenge for him, and absolutely no ladders." Weight bearing was pretty much out of the picture for employment. (Exhibit 107, at p. 15, lns 1-23.) Finally, the doctor stated applicant can perform work of "[s]omething that's required sitting but not demand on his lower extremity of any sort." (*Id*. at p. 17, lns 1-2.)

Although PQME Dr. Bernhardt provided AMA Guides impairment, that was done in his second report and well before the extensive reporting and deposition discussion about work restrictions. We are unable to discern what work restrictions PQME Dr. Bernhardt actually opines are applicable, nor that such restrictions are solely a result of the industrial injury. Further, it is unclear if the subsequent reporting and testimony would in any way affect PQME Dr. Berhardt's previously described AMA Guides WPI assessment.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where additional discovery is needed. (*Kuykendall*, *supra*, page 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138 (Appeals Board en banc).)

If the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, the selection of an agreed medical evaluator (AME) by the parties should be considered. If none of the procedures outlined above is possible, the WCJ may resort to the appointment of a regular physician, as authorized by section 5701. (*McDuffie*, *supra*, at pp. 142-143.)

To allow for the further development of the record on both work restrictions and AMA Guides impairment, we will grant defendant's Petition for Reconsideration, rescind the Amended F&A, and return this case to the trial level for further proceedings consist with our opinion herein.

3.

In returning this matter we express no ultimate opinion on any of the issues raised, which, with rescission of the Amended F&A, remain undecided and deferred.

We further note that defendant, in the Second Petition, incorporated "the arguments raised in the prior Petition for Reconsideration filed on 07/01/26, except as modified by the issuance of the Amended Findings and Award and Opinion on Decision." (Second Petition, p. 3, lns 4-6.)

"*Every petition for reconsideration*, removal or disqualification *shall fairly state all of the material evidence relative to the point or points at issue*. Each contention shall be separately stated and clearly set forth. A *failure to fairly state all of the material evidence may be a basis for denying the petition*." (Cal. Code Regs., tit. 8, § 10945(a), emphasis added.) This mandate is for every petition and does not allow for the incorporation of any document or evidence, even the incorporation of a previously filed petition for reconsideration.

Defendant is cautioned that petition by incorporation is not tolerated, and in the future such incorporation may lead to summary dismissal.

Next, although applicant titled the Answer to include reconsideration in the alternative, in the petition itself applicant merely states:

> Should the Board Grant Defendant's Petition for Reconsideration, then Applicant would respectfully request Reconsideration be allowed regarding the Permanent and Stationary date, and the credit for defendant's overpayment of TD against PD. Dr. Jamasbi supports a later P&S date, which would obligate defendants to pay the remainder of 104 weeks of temporary disability and would offset the credit.

(Answer, p. 7, ln 25 to p. 8, ln3.)

"A petition for reconsideration, removal or disqualification *may be denied or dismissed if it is unsupported by specific references* to the record *and to the principles of law involved*." (Cal. Code Regs., tit. 8, § 10972, emphasis added; Lab. Code, § 5902.) Here, applicant's Petition is skeletal and subject to dismissal on that basis alone.

Applicant's request is more properly directed to the WCJ in the first instance.

Because we are rescinding the Amended F&A, applicant's Petition for Reconsideration is moot, and we dismiss it.

IV.

Following our independent review of the record occasioned by defendant's Petition, we are persuaded the record requires development on the issue of work restrictions and AMA Guides impairment.

Accordingly, we dismiss applicant's Petition for Reconsideration, grant defendant's Petition for Reconsideration, rescind the July 16, 2026 Amended F&A and return this case to the trial level for further proceedings consistent with our discussion herein.

For the foregoing reasons,

IT IS ORDERED that applicant's July 30, 2026 Petition for Reconsideration is **DISMISSED**.

IT IS FURTHER ORDERED that defendant's July 29, 2026 Petition for Reconsideration is **GRANTED**.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the June 16, 2026 Amended Findings and Award Order issued by the WCJ is **RESCINDED** and the case is **RETURNED** to the trial level for further proceedings consistent herewith.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

OCTOBER 9, 2026

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

STEVE FREITAS
BOXER & GERSON, LLP
PRINDLE, GOETZ, BARNES & REINHOLTZ LLP

PS/kl

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