

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

VICTOR WASHINGTON, *Applicant*

vs.

**GATE GOURMET COMPANY; ZURICH AMERICAN INSURANCE COMPANY,
*Defendants***

**Adjudication Number: ADJ17517591
Oakland District Office**

**OPINION AND ORDER
DENYING PETITION FOR
RECONSIDERATION**

Defendant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings and Award of November 14, 2025, wherein it was found that while employed on June 26, 2021 as a handyman, applicant sustained industrial injury to his right knee, right leg, left hip, and low back causing permanent total (100%) disability. as a maintenance technician, applicant sustained industrial injury to the right hand, right arm, and psyche, causing permanent total (100%) disability. In finding permanent total disability, the WCJ relied on the reporting of vocational expert Frank P. Diaz, who opined that applicant's industrial injury precluded applicant from vocational rehabilitation or from employment in the open labor market.

Defendant contends that the WCJ erred in finding permanent total (100%) disability. We have received an Answer and the WCJ has filed a Report and Recommendation on Petition for Reconsideration (Report).

As explained below, for the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below, we will deny the defendant's Petition.

Preliminarily, we note that former Labor Code section 5909 provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Lab. Code, § 5909.) Effective July 2, 2024, Labor Code section 5909 was amended to state in relevant part that:

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

(b)

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

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

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

Here, according to Events, the case was transmitted to the Appeals Board on January 2, 2026 and 60 days from the date of transmission is March 3, 2026. This decision is issued by or on March 3, 2026, so we have timely acted on the petition as required by Labor Code section 5909(a).

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

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

Turning to the merits, we will deny the defendant’s Petition for the reasons stated by the WCJ in the Report, which we adopt, incorporate, and quote below:

**REPORT AND RECOMMENDATION
ON PETITION FOR RECONSIDERATION
NOTICE OF TRANSMISSION OF PETITION FOR
RECONSIDERATION TO WCAB**

Findings and Award issued in this case on November 14, 2025. Defendant filed a timely Petition for Reconsideration on December 3, 2025. Applicant filed a response to the Petition for Reconsideration on December 19, 2025.

Notice is hereby given that the petition for reconsideration is transmitted to the Workers' Compensation Appeals Board on January 2, 2026.

STATEMENT OF FACTS

On June 26, 2021, applicant, Victor Washington, was painting on a platform that was approximately 5 feet above ground, when he fell off the platform, injuring his right knee.

On the day of trial applicant attempted to testify. Since he appeared to be in excruciating pain and had difficulty testifying, I obtained the history of injury along with the history of his past and current complaints from the medical records that were submitted by the parties for my review.

Applicant was taken to an emergency room on the day of the accident where he was diagnosed with a right quadriceps tendon rupture. He was placed in a knee immobilizer and was provided with crutches to use. Applicant was released to return to modified work which consisted of a job that was seated work only.

Applicant was eventually diagnosed with a full thickness tear of the quadriceps tendon with a 2.5 cm of tendon retraction.

Applicant had his first knee surgery sometime in February of 2022. The applicant told the evaluating physician, Dr. Anderson, that the February surgery did improve his symptoms. Unfortunately, because of re-tearing, applicant needed a second surgery. The second surgery was performed on May 4, 2023. It was a quadriseptalsty.

Due to chronic use of crutches, applicant developed lumbar spine pain along with bilateral numbness in his hands.

Applicant continues to suffer with right knee pain, knee giving away/buckling along with low back pain.

Applicant was eventually diagnosed with patella baja indicating quad tendon

failure and a subluxed patella. The final diagnosis issued by Dr. Anderson was quadriceps tendon rupture chronic with secondary patellar malalignment and patella baja. Dr. Anderson's secondary diagnosis was compensatory low back pain due to chronic use of knee immobilizer and abnormal gait.

Dr. Anderson noted in his last report that applicant has difficulty urinating, defecating, bathing, dressing, standing, sitting, reclining, walking, climbing stair, grasping and lifting. Applicant during his direct testimony also testified to the difficulties he had with these daily activities.

In his final report, Dr. Anderson permanently restricted applicant from squatting, kneeling, stair climbing, standing and walking for more than an hour at a time. From sitting for longer than 15-30 minutes at a time in an hour without moving, from lifting more than 5-10 lbs. and from pushing and pulling from more than 10-15 lbs.

Dr. Anderson from a medical perspective stated that applicant is unable to return to work at this time.

Applicant was evaluated by Frank Diaz, vocational counsellor. Defendant did not obtain a report from a vocational counselor to counter Mr. Diaz's findings.

Mr. Diaz used a 7 method analysis to determine whether applicant was employable in the open labor market:

Methods #1 and #2: Mr. Washington's employer has been unable to offer permanent modified or alternative work.

Method #3 and #4: Given Mr. Washington's work history, prior to his industrial injury on June 26, 2021, Mr. Washington demonstrated the ability to perform Semi-Skilled work. However, given the synergistic (additive) effect of the functional limitations as set forth by Dr. Anderson in conjunction with his objective findings of pain, Mr. Washington does not retain the functional capacity to utilize his skills in the competitive open labor market. The synergistic (additive) effect of the functional limitations as set forth by Dr. Anderson in conjunction with his objective findings of pain render Mr. Washington unable to return to work in either a direct placement or on the job training or mode of rehabilitation.

Method #5: Vocational rehabilitation retraining plans would provide Mr. Washington with new or enhanced skills for new types of work. However, it is clear to this Consultant that the synergistic (additive) effect of the functional limitations as set forth by Dr. Anderson in conjunction with his objective findings of pain render Mr. Washington with an inability to benefit from a vocational training program. Mr. Washington may be able to participate in some vocational training programs, but his ability to compete in the open labor market,

in all vocational probability, has been eliminated In all vocational probability, in order to successfully complete a vocational training program Mr. Washington would require accommodations that include permission for late class arrivals, early class departures, extra time for assignments and tests, and excessive absences. However, arriving late for work, leaving early from work, being provided extra time in order to complete work tasks, and having excessive absences are not reasonable accommodations in the competitive open labor market. I am of the opinion that Mr. Washington's amenability to rehabilitation is akin to the case of an individual returning to work in a sheltered workshop environment. Mr. Washington may be able to take a few classes with the aid of Disabled Student Services (DSS); however, even if Mr. Washington were to successfully complete a vocational training program he would still be unable to return to work in any position in the competitive open labor market

Method #6: Self-employment is one of the most rigorous, high-risk types of plans. At the very least a market analysis, competition location, pricing, income/revenue projection, and an evaluation of the plan to be developed, implemented, and maintained over time is required. In my opinion and considering the disabling effects of Mr. Washington's industrial conditions, it would be futile to spend the limited available resources to conduct such an evaluation.

Method #7: Based on our research, Mr. Washington would need to have prior experience, skills, and education to obtain a work-at-home job from reputable companies like Apple or Amazon.

To summarize, I am of the opinion that work-at-home positions may be a viable opportunity for some individuals should they be able to find a legitimate position, sustain consistent and regular hours, be trained in the usage of computers and internet, and spend extensive time weeding through a multitude of scams on the internet. However, I am of the opinion that such a position is not suitable for Mr. Washington.

In conclusion, Mr. Diaz states:

When considering Mr. Washington's individualized work history, the medical opinions, impairments, and the synergistic (additive) effect of the functional limitations as set forth by Dr. Anderson in conjunction with his objective findings of pain, the results of the transferable skills analysis, the results of vocational testing, accommodations that may be available to Mr. Washington in the competitive open labor market, and Mr. Washington's amenableness to vocational rehabilitation, I come the vocational opinion that Mr. Washington, in all vocational probability, has incurred a one hundred percent (100%) loss of labor market access.

In addition to reading the medical reports and the report of Mr. Diaz I also

observed the applicant during trial. He had difficulty with his mobility. He was in extreme amounts of pain and needed to lay down on the ground before the trial proceedings could begin. Once on the ground, he needed assistance from both counsel to stand up.

Putting all of this together, the only conclusion I could reach was the finding that applicant is permanently totally disabled.

Defendant has filed a petition for reconsideration from my finding of permanent total disability for Mr. Washington. In its petition defendant has argued that the reports of the panel qualified medical examiner, Dr. Anderson and the report of Frank Diaz are not substantial medical evidence. Defendant has also argued that their due process rights were violated because they were not provided with an opportunity to obtain a rebuttal vocational report.

DISCUSSION

Rebuttal vocational report:

Defendant argues that their right to due process was violated because they were not allowed to obtain a vocational evaluator's report to rebut the report of Mr. Diaz.

Applicant's response to defendant's petition for reconsideration in detail explains what occurred as it pertains to defendant's attempt to obtain a vocational report. Refer to pages 3-4 of Applicant's Response to the Petition for Reconsideration.

I cannot comment on what occurred at prior hearings, since I have no documentary evidence other than the fact that the August 5, 2025 mandatory settlement conference was continued to September 16, 2025, to allow defendant an opportunity to obtain a vocational report.

On September 16, 2025, the parties, setting this matter for trial before the undersigned, completed a pretrial conference statement. There is nothing in the pretrial conference statement that indicates defendant was objecting to the matter being set for trial.

The pretrial conference statement is silent on defendant's desire to obtain a rebuttal vocational report and no report is listed as a proposed exhibit.

Defendant never filed a petition for removal from the mandatory settlement conference judges' decision to close discovery and set the case for trial.

On the day of trial, November 6, 2025, defendant did not object to the trial

proceeding forward and made no request for additional time to obtain a vocational report.

The first time I became aware of the fact that defendant wanted to obtain a vocational report was on the day I read the petition for reconsideration.

An issue not raised at trial cannot be raised on appeal for the first time.

Is Dr. Anderson's report substantial medical evidence?

To be substantial 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.

As I indicated in my decision, I relied on the medical report to summarize applicant's history of injury and medical history. Since applicant was in no physical shape to testify on the day of trial.

Dr. Anderson evaluated the applicant and issued 4 reports. Dr. Anderson's reports indicate that he conducted a thorough examination, obtained pertinent information from the applicant and issued reports in which the doctor in detail explained the how and why of their conclusion. Not only did Dr. Anderson issue a ratable report, Dr. Anderson in detail discussed the limitations on applicant's daily activities of living.

Dr. Anderson's final conclusion was that from a medical perspective applicant could not return to the open labor market in any capacity.

If there are any medical reports that Dr. Anderson failed to review, defendant had multiple opportunities to bring this to Dr. Anderson's attention. Defendant could have also deposed Dr. Anderson which they chose not to do.

Not liking a report does not make the report not substantial medical evidence.

Is Frank Diaz's report substantial evidence?

Based on my reading of defendant's petition for reconsideration, defendant's issue with Frank Diaz's report is more of a technical argument than an actual substantial evidence argument. Defendant in its petition argues that Mr. Diaz's report cannot be relied upon because someone in his office conducted the vocational testing and the interview instead of Mr. Diaz himself. Applicant's response to the petition for reconsideration beautifully addresses this issue and guides the court to look at Title 8 California Code of Regulations Section 10685 (b) which spells out what requirements must be met by a vocational evaluator in their reporting.

Title 8 California Code of Regulations Section 10685

“(b) A vocational expert's written report shall meet the following requirements:

(1) The report shall contain a declaration by the vocational expert signing the report stating: “I declare under penalty of perjury that the information contained in this report and its attachments, if any, is true and correct to the best of my knowledge, except as to information that I have indicated I received from others. As to that information, I declare under penalty of perjury that the information accurately describes the information provided to me and, except as noted herein, that I believe it to be true. I further declare under penalty of perjury that there has not been a violation of Labor Code section 139.32.” The foregoing declaration shall be dated and signed by the vocational expert and shall indicate the county wherein it was signed.

(2) The report shall disclose the qualifications of the vocational expert signing the report, which may be satisfied by attaching a curriculum vitae.

(3) Except as provided in subdivision (b)(4), the body of the report shall contain a statement, above the declaration under penalty of perjury, that: “No person, other than the vocational expert signing the report, has participated in the non-clerical preparation of the report, including all of the following:

(i) Taking a history from the employee;

(ii) Reviewing and summarizing medical and/or non-medical records; and

(iii) Composing and drafting the conclusions of the report.”

(4) Notwithstanding subdivision (b)(3), it is permissible for a person or persons, other than the vocational expert signing the report, to prepare an initial outline of the employee's history and/or to excerpt prior medical and non-medical records. If this is done, however, the vocational expert signing the report:

(A) Shall review the excerpts and the entire outline and shall make additional inquiries and examinations as are necessary and appropriate to identify and determine the relevant issues;

(B) Shall include in the statement required by subdivision (b)(3) that, as applicable, an initial outline of the employee's history and/or an excerpt of the employee's prior medical and non-medical records were prepared by

another person or persons and that the vocational expert signing the report has reviewed any such excerpts and/or outline and has made any additional inquiries and examinations necessary and appropriate to identify and determine the relevant issues; and

(C) Shall comply with subdivision (b)(5), below.

(5) The report shall disclose the name(s) and qualifications of each person who performed any services in connection with the report, including diagnostic studies, other than its clerical preparation.”

Mr. Diaz’s report complies with regulatory requirements.

Much like the medical evaluator, Mr. Diaz spent an exorbitant amount of time obtaining a history from applicant which includes a history of injury, medical history and work history. Mr. Diaz issued a detailed report in which he explained why he found applicant to be permanently totally disabled.

Conclusion:

I relied upon the medical evaluator’s report, Mr. Diaz’s report was well as applicant’s presentation in court to conclude that applicant was permanently totally disabled.

I found Mr. Washington to be credible. In the 20 years that I have been on the bench, Mr. Washington is the most disabled individual I have personally observed during trial. I have no doubt in my mind that he is unable to perform any work in the open labor market.

RECOMMENDATION

I recommend that the petition for reconsideration be denied.

For the foregoing reasons,

IT IS ORDERED that Defendant's Petition for Reconsideration of the Findings and Award of November 14, 2025 is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 3, 2026

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

**VICTOR WASHINGTON
BOXER & GERSON
ALBERT AND MACKENZIE**

DW/oo

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