WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GABRIEL ROGERS, *Applicant*

vs.

STATE OF CALIFORNIA DEPARTMENT OF CORRECTIONS (POMONA); administered by STATE COMPENSATION INSURANCE FUND, *Defendants*

Adjudication Number: ADJ12129088
Marina del Rey District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of the Findings of Fact, Orders, Awards issued by the workers' compensation administrative law judge (WCJ) on April 23, 2026.[1] Therein, the WCJ found that, while employed as a parole agent during the period February 18, 1991 through November 20, 2018, applicant sustained injury arising out of and in the course of employment (AOE/COE) to the cervical-spine, lumbar spine, bilateral carpal tunnel, bilateral shoulders, bilateral knees, upper GI, ear/hearing and psyche. The WCJ further found that the injury herein caused 100% permanent disability.

Defendant contends that the WCJ erred in admitting the November 18, 2025 primary treating physician (PTP) report of Jonathan Nishanoff, M.D., in finding applicant's psychiatric injury industrially caused, and in finding applicant 100% permanently disabled.[2]

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[1] Defendant's Petition for Reconsideration purports to seek reconsideration of the Amended Findings and Award (Amended F&A) issued on April 29, 2026. However, the Amended F&A made no substantive or material change involving the exercise of judicial discretion regarding the amount of benefits owed and, therefore, did not trigger a new 20-day filing period. (See *Nestle Ice Cream Co., LLC v. Workers' Comp. Appeals Bd. (Ryerson)* (2007) 146 Cal.App.4th 1104 [72 Cal.Comp.Cases 13].) Here, the filing period began with the issuance of the original F&A on April 23, 2026. Nevertheless, defendant's Petition for Reconsideration, filed on May 15, 2026, was timely as to the original F&A. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, 10605(a)(1).)

[2] Defendant initially also raised the issue of credit for overpayment of temporary disability. However, defendant withdrew that issue in supplemental pleading, which we accept for filing. (Cal. Code Regs., tit. 8, § 10964.)

Applicant filed an Answer. The WCJ issued a Report and Recommendation on Petition for Removal[3] (Report) recommending that the Petition for Reconsideration be denied.

We have considered the Petition for Reconsideration, and the contents of the Report, and we have reviewed the record in this matter. Based upon our preliminary review of the record, we will grant the Petition for Reconsideration. Our order granting the Petition for Reconsideration is not a final order, and we will order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law. Once a final decision after reconsideration is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code[4] section 5950 et seq.

I.

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

> (a) A petition for reconsideration is deemed to have been denied by the appeals board unless it is acted upon within 60 days from the date a trial judge transmits a case to the appeals board.
>
> (b)
>
> (1) When a trial judge transmits a case to the appeals board, the trial judge shall provide notice to the parties of the case and the appeals board.
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> (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."

[3] Inclusion of the work "Removal" in the caption of the WCJ's Report is an obvious clerical error.
[4] All further statutory references are to the Labor Code, unless otherwise noted.

Here, according to Events, the case was transmitted to the Appeals Board on June 5, 2026 and 60 days from the date of transmission is August 4, 2026. This decision is issued by or on July 31, 2026, so that we have timely acted on the petition as required by section 5909(a).

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

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on June 5, 2026, and the case was transmitted to the Appeals Board on June 5, 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 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 June 5, 2026.

II.

The WCJ provided the following discussion in the Report:

> **CASE HISTORY**
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> This case was first set for a Mandatory Settlement Conference (MSC) on 11/04/2019. Due to a variety of reasons the matter was rescheduled many times and was taken off calendar and again placed back on the court's calendar. The last MSC was on 10/10/2023.
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> The case was first set for Trial on 11/20/2023 and again, for a variety of reasons the case was continued and taken off and placed back on the trial calendar multiple times. Ultimately the record was opened on 01/18/2024, exhibits were entered and the first day of testimony took place. A second day of trial testimony (and correction of exhibits, as well as modification of the trial issues) occurred on 09/18/25. The final day of trial took place on 02/03/2026.
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> It should also be noted that before this matter was finally submitted, the En Banc decision of Vigil (Sammy v. Kern County (June 10, 2024) 89 Cal. Comp. Cases 686 was issued and the Agreed Medical Examiner on this case, Dr. Isaac Schmid, died (02/07/2025, date per Applicant's Answer).

PETITIONER CONTENTIONS

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Psychiatric Injury Claim Threshold of Compensability

Petitioner claims that threshold of compensability (51%) for the psychiatric claim was not met because pursuant to Panel Qualified Medical Examiner Dr. Allen Lee, some of the psychiatric injury (35%) arose from conduct by the applicant's supervisor Jamal Rowe, while the applicant was an employee and some arose *after* the applicant was no longer an employee of The California Department of Corrections and Rehabilitation (CDCR).

The applicant testified credibly that after his employment with CDCR ended, he worked for a company called Securas who contracted with CDCR (and with DAPO, a division of CDCR). According to applicant's credible testimony his former CDCR supervisor, Mr. Rowe, attempted to get his new boss at Securas, Greg Utterback, to terminate his employment with Securas.

While a portion of the conduct by Mr. Rowe continued after the applicant was no longer a CDCR employee, that conduct was linked to and arose from applicant's employment with CDCR and should be considered industrial.

If, however, the continued post-employment mistreatment by Mr. Rowe is not considered to be industrial, then it is necessary that the parties return the matter to Dr. Lee to have the doctor determine what portion of the 35% causation arises from Mr. Rowe's conduct during applicant's employment with CDCR and what portion arises from Mr. Rowe's conduct after the applicant's employment.

So long as at least 16% of applicant's psychiatric injury was caused by Mr. Rowe's conduct during applicant's employment with CDCR, the applicant will have met the threshold of compensability for the psychiatric claim. (16% treatment by Mr. Rowe (hypothetically) plus 25% from orthopedic injury plus 10% exposure to the dangerous work = 51% causation).

PD ratings / whole person impairment given by medical experts

Defendant contends multiple errors with the opinions of orthopedic Agreed Medical Examiner (AME) Dr. Isaac Schmidt.

1. Right shoulder – Defendant claims that under AMA guides the doctor cannot give an impairment for weakness in the presence of decreased range of motion (ROM). And that an Award for prior ROM overlaps with the current ROM.
2. Left shoulder – Defendant claims that the impairment should be 6 % rather than 8%.

3. Bilateral knees – Defendant claims that the doctor did not adequately justify the increase in impairment from 5% to 15%.
4. Bilateral wrists – Defendant claims that the doctor miscalculated the impairment of the wrists under the AMA guides.

Dr. Schmidt was the orthopedic Agreed Medical Examiner on this case. The parties offered into evidence, eight reports from Dr. Schmidt. His last report was dated 12/26/2023. The trial record did not begin until 01/18/2024. Had the defendant considered the reporting of this AME to be defective in so many ways, it would have been proper to advise the court and to correct these errors before offering the reporting into evidence. Defendant only complains about the methods used by Dr. Schmidt to assess the applicant's permanent disability after they are unhappy with the Findings and Award.

Defendant also claims that internist AME Graham Woolf erred by not considering overlap between the upper GI disability caused by a prior claim with the current claim. However, as stated in the F&A, Dr. Woolf provided an opinion that accounted for the prior GI disability. He opined that 30% of the 9% whole person impairment was attributed to the prior injury. Therefore, contrary to the petitioner's contention, Dr. Woolf did consider the overlap between the two injuries and adjusted his impairment opinion accordingly. Because the applicant was found to be 100% permanently disabled solely based on his neck and upper extremities, the additional permanent disability for the GI disability is moot.

Defendant also claims that ENT Dr. Robert Ruder should not have given any impairment for tinnitus where there is no hearing loss, and that any additional impairment overlapped with the psychiatric impairment. While this argument has some merit, because the applicant was found to be 100% permanently disabled solely based on his neck and upper extremities, the additional permanent disability for the hearing / tinnitus disability is moot.

Defendant claims that the PQME AME Allen Lee did not consider overlap of the prior psyche disability with the current psyche disability. This is not correct. Dr. Lee provided an opinion that the prior disability should be subtracted from the current disability. But again, as the applicant was determined to be 100% permanently disabled solely for the impairment for his neck and upper extremities, the additional impairment arising from the psychiatric claim is moot.

It is noted that the medical reports from doctors Schmidt, Woolf, Lee and Ruder were joint exhibits and that doctors Schmidt and Woolf were agreed medical examiners. If the petitioner took issue with these medical opinions the time to raise those issues was prior to offering them into evidence.

Petitioner had ample opportunity prior to trial to clarify and correct the many enumerated "problems" with the doctors' opinions prior to offering them into

evidence. Defendant did not clarify the problems that they had with the opinions expressed by these doctors and proceeded with the evidence as it was at the time of trial. By offering these medical opinions into evidence and not raising the alleged errors made by the physicians, the defendant essentially stipulated to the opinions offered by the doctors regarding permanent impairment.

Adding of permanent disabilities under Vigil and admission of the medical opinion of Dr. Jonathan Nissanoff.

AME Isaac Schmidt provided the opinion that the permanent impairment for the applicant's lumbar spine and bilateral knees should be added (rather than combined under the CVC) to properly reflect the applicant's disability.

The doctor also opined that the permanent impairment for the applicant's cervical spine, left arm carpal tunnel syndrome, left shoulder and right carpal tunnel syndrome should be added (rather than combined under the CVC) to properly reflect the applicant's disability.

As stated in the F&A, if the applicant's cervical spine, left arm carpal tunnel syndrome, left shoulder and right carpal tunnel syndrome are added together, those disabilities alone result in the applicant being 100% permanently disabled, without consideration of any additional permanent impairment for the psyche, GI, hearing and other orthopedic body parts.

Dr. Schmidt's opinion regarding the addition of permanent impairment was issued under the Kite[] case because that was the current law at the time his opinion was procured. However, before the case was submitted at trial the *Vigil*[] case was issued changing the standards for using addition rather than combined values when assessing permanent disability.

Unfortunately, it was impossible to update Dr. Schmidt's opinion under the standards outlined in *Vigil* because Dr. Schmidt had died.

Whether or not the permanent impairment should be added or combined was an issue that had been long standing in this matter. The *Vigil* case was issued on 06/10/24 *after* trial on this case had already begun. When the *Vigil* decision was issued, both parties knew or should have known that a supplemental medical opinion on this issue would be needed. The death of AME Schmidt M.D. did not render the issue moot.

Defendant did not offer any evidence that they attempted to augment the record after the findings in the *Vigil* case. With Dr. Schmidt being deceased, applicant turned to the primary treating physician Dr. Jonathan Nissanoff to address the addition of permanent disability under *Vigil*.

Defendant objected to the admissibility of Dr. Nissanoff's report, and the parties were asked to provide post-trial briefs on the issue. Defendant contended *solely* that the Nissanoff report should not be admitted because it was procured after the close of discovery at the mandatory settlement conference (MSC) on 10/10/2023. Defendant did not claim prejudice and did not seek leave to obtain additional discovery. Defendant simply did not want the report to be admitted.

The court can reopen discovery when good cause is shown. A change in the law on the issues before the court, constitutes good cause to reopen discovery so that the record can be amended to comply with the new law. (Fitzpatrick v. Department of Corrections & Rehabilitation, 2020 Cal. Wrk.Comp. P.D. LEXIS 444.)

Therefore, the admission of the report from Dr. Nissanoff was for good cause on issues that had been long standing on this case and due to both a change in the law and the death of the existing medical expert on the case.

SUMMARY

The applicant was found to be 100% permanently disabled based on the combined reporting from AME Isaac Schmidt and PTP Jonathan Nissanoff. The permanent impairment for the cervical spine, left arm carpal tunnel syndrome, left shoulder and right carpal tunnel syndrome when added under *Vigil* result in a finding of 100% permanent impairment. Once the applicant reached 100% permanent impairment, any additional impairment from other body parts becomes irrelevant as to the level of permanent disability.

The addition of permanent impairment vs. use of combined values is justified by the combination of the reporting of AME Isaac Schmidt and PTP Jonathan Nissanoff. The admission of Dr. Nissanoff's reporting is justified based on the change in the law from *Kite* to *Vigil* (establishing the need to amend the record under the new law) and the inability to return to AME Schmidt (due to his death).

Defendant knew that the issue of addition of permanent impairments was a long-standing issue on this case and did not make efforts to procure any new discovery to comply with the change in the law. Defendant complained only that the new report was procured after the MSC and made no argument that they were entitled to additional discovery.

Defendant takes issue with the impairments provided by the various doctors yet during discovery, failed to address the many alleged "flaws" in the medical opinions and then offered the reports as joint exhibits.

Defendant claims that the applicant failed to meet the threshold for psychiatric injury because the continued mistreatment of the applicant by his supervisor Mr. Rowe continued after his formal employment ended. At best this argument gives

rise to development of the record with the doctor to determine what percentage of on-the-job mistreatment vs. subsequent mistreatment contributed to the cause of the psychiatric injury. However, continued post-employment mistreatment by Mr. Rowe is more appropriately considered industrial.

Whether or not there is a current issue with the temporary disability benefits due to the applicant, the wages paid and whether there has been some subsequent agreement between the parties rendering the issues moot is unknown. Further clarification of these issues is appropriate.

(Report, at pp. 1-8, emphasis in original, footnotes omitted.)

III.

We highlight the following legal principles that may be relevant to our review of this matter:

An employee bears the burden of proving injury AOE/COE by a preponderance of the evidence. (*South Coast Framing v. Workers' Comp. Appeals Bd. (Clark)* (2015) 61 Cal.4th 291, 297–298, 302 [80 Cal.Comp.Cases 489]; Lab. Code, §§ 3600(a), 3202.5.)

As relevant here, section 3208.3(b) provides:

(a) A psychiatric injury shall be compensable if it is a mental disorder which causes disability or need for medical treatment, and it is diagnosed pursuant to procedures promulgated under paragraph (4) of subdivision (j) of Section 139.2 or, until these procedures are promulgated, it is diagnosed using the terminology and criteria of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Third Edition-Revised, or the terminology and diagnostic criteria of other psychiatric diagnostic manuals generally approved and accepted nationally by practitioners in the field of psychiatric medicine.

(b)

(1) In order to establish that a psychiatric injury is compensable, an employee shall demonstrate by a preponderance of the evidence that actual events of employment were predominant as to all causes combined of the psychiatric injury.

(2) Notwithstanding paragraph (1), in the case of employees whose injuries resulted from being a victim of a violent act or from direct exposure to a significant violent act, the employee shall be required to demonstrate by a preponderance of the evidence that actual events of employment were a substantial cause of the injury.

(3) For the purposes of this section, "substantial cause" means at least 35 to 40 percent of the causation from all sources combined.

> **(c)** It is the intent of the Legislature in enacting this section to establish a new and higher threshold of compensability for psychiatric injury under this division.
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> **(d)** Notwithstanding any other provision of this division, no compensation shall be paid pursuant to this division for a psychiatric injury related to a claim against an employer unless the employee has been employed by that employer for at least six months. The six months of employment need not be continuous. This subdivision shall not apply if the psychiatric injury is caused by a sudden and extraordinary employment condition. Nothing in this subdivision shall be construed to authorize an employee, or the employee's dependents, to bring an action at law or equity for damages against the employer for a psychiatric injury, where those rights would not exist pursuant to the exclusive remedy doctrine set forth in Section 3602 in the absence of the amendment of this section by the act adding this subdivision.
>
> (Lab. Code, § 3208.3 (a) - (d).)

"Predominant as to all causes" for purposes of section 3208.3(b)(1) has been interpreted to mean more than 50 percent of the psychiatric injury was caused by actual events of employment. (*Dep't of Corr. v. Workers' Comp. Appeals Bd. (Garcia)*, 76 Cal.App.4th 810, 816, 64 Cal.Comp.Cases 1356].)

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza, supra*; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) "The term 'substantial evidence' means evidence which, if true, has probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion … It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd. (Bolton)* (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence "… a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).)

Here, it appears from our preliminary review that the record may not be complete regarding causation of the psychiatric injury. Taking into account the statutory time constraints for acting on the petition, and based upon our initial review of the record, we believe reconsideration must

be granted to allow sufficient opportunity to further study the factual and legal issues in this case. We believe that this action is necessary to give us a complete understanding of the record and to enable us to issue a just and reasoned decision. Reconsideration is therefore granted for this purpose and for such further proceedings as we may hereafter determine to be appropriate.

IV.

In addition, under our broad grant of authority, our jurisdiction over this matter is continuing.

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].) Thus, once reconsideration has been granted, the Appeals Board has the full power to make new and different findings on issues presented for determination at the trial level, even with respect to issues not raised in the petition for reconsideration before it. (See Lab. Code, §§ 5907, 5908, 5908.5; see also *Gonzales v. Industrial Acci. Com*. (1958) 50 Cal.2d 360, 364.) ["[t]here is no provision in chapter 7, dealing with proceedings for reconsideration and judicial review, limiting the time within which the commission may make its decision on reconsideration, and in the absence of a statutory authority limitation none will be implied."]; see generally Lab. Code, § 5803 ["The WCAB has continuing jurisdiction over its orders, decisions, and awards. . . . At any time, upon notice and after an opportunity to be heard is given to the parties in interest, the appeals board may rescind, alter, or amend any order, decision, or award, good cause appearing therefor.].)

"The WCAB . . . is a constitutional court; hence, its final decisions are given res judicata effect." (*Azadigian v. Workers' Comp. Appeals Bd*. (1992) 7 Cal.App.4th 372, 374 [57 Cal.Comp.Cases 391; see *Dow Chemical Co. v. Workmen's Comp. App. Bd*. (1967) 67 Cal.2d 483, 491 [32 Cal.Comp.Cases 431]; *Dakins v. Board of Pension Commissioners* (1982) 134 Cal.App.3d 374, 381 [184 Cal.Rptr. 576]; *Solari v. Atlas-Universal Service, Inc.* (1963) 215 Cal.App.2d 587, 593 [30 Cal.Rptr. 407].) A "final" order has been defined as one that either "determines any substantive right or liability of those involved in the case" (*Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180; *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d

528, 534-535 [45 Cal.Comp.Cases 410]; *Kaiser Foundation Hospitals v. Workers' Comp. Appeals Bd*. (*Kramer*) (1978) 82 Cal.App.3d 39, 45 [43 Cal.Comp.Cases 661]), or determines a "threshold" issue that is fundamental to the claim for benefits. Interlocutory procedural or evidentiary decisions, entered in the midst of the workers' compensation proceedings, are not considered "final" orders. (*Maranian v. Workers' Comp*. *Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1070, 1075 [65 Cal.Comp.Cases 650].) ["interim orders, which do not decide a threshold issue, such as intermediate procedural or evidentiary decisions, are not 'final' "]; *Rymer, supra,* at p. 1180 ["[t]he term ['final'] does not include intermediate procedural orders or discovery orders"]; *Kramer, supra*, at p. 45 ["[t]he term ['final'] does not include intermediate procedural orders"].)

Section 5901 states in relevant part that:

> No cause of action arising out of any final order, decision or award made and filed by the appeals board or a workers' compensation judge shall accrue in any court to any person until and unless the appeals board on its own motion sets aside the final order, decision, or award and removes the proceeding to itself or if the person files a petition for reconsideration, and the reconsideration is granted or denied. …

Thus, this is not a final decision on the merits of the Petition for Reconsideration, and we will order that issuance of the final decision after reconsideration is deferred. Once a final decision is issued by the Appeals Board, any aggrieved person may timely seek a writ of review pursuant to Labor Code sections 5950 et seq.

V.

Accordingly, we grant defendant's Petition for Reconsideration, and order that a final decision after reconsideration is deferred pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED that a final decision after reconsideration is **DEFERRED** pending further review of the merits of the Petition for Reconsideration and further consideration of the entire record in light of the applicable statutory and decisional law.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 4, 2026

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

GABRIEL ROGERS
MALLERY & STERN
STATE COMPENSATION INSURANCE FUND

PAG/cm

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