WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JAMES BECHTOLD, *Applicant*

vs.

ORACLE AMERICA, INC.; SAFETY NATIONAL CASUALTY CORPORATION, administered by TRISTAR RISK MANAGEMENT, INC., *Defendants*

Adjudication Number: ADJ10522919
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant seeks reconsideration of the Findings, Award and Order (FA&O) issued on May 17, 2022, by the workers' compensation judge (WCJ). The WCJ found, in pertinent part, that applicant, while employed on November 27, 2013, as a field service engineer, sustained industrial injury to his lumbar spine, right shoulder, bladder incontinence and sexual dysfunction; and that applicant's injury caused permanent disability of 54%.

Applicant contends that his neurogenically induced sexual dysfunction impairment was caused directly by the industrial injury so that Labor Code section 4660.1(c)(1)[2] bar against compensation for an award of permanent impairment as a compensable consequence does not apply; and that the reporting of applicant's vocational evaluator, Frank Diaz, CDMS, was substantial evidence, supporting a finding of 100% permanent disability.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

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[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

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

We have considered the allegations in the Petition and the Answer and the contents of the WCJ's Report. Based on our review of the record, and for the reasons discussed below, as our Decision After Reconsideration, we will affirm the WCJ's May 17, 2022 FA&O, except that we will amend it to find that applicant is entitled to an award of 100% permanent disability without apportionment. We otherwise make no substantive changes to the decision**.**

BACKGROUND

The parties stipulated that applicant, while employed on November 27, 2013, as a field service engineer, sustained industrial injury to his lumbar spine and right shoulder and claims to have sustained industrial injury in the form of urinary incontinence and sexual dysfunction. (Minutes of Hearing and Summary of Evidence (MOH/SOE), 03/09/2022, 2:8-14.)

At the trial, the parties requested the WCJ adjudicate, among other issues, permanent disability. (MOH/SOE, 03/09/2022, 3:3-5.)

Applicant submitted into evidence the primary treating physician reports and deposition of Navin Mallavaram, M.D. (App. Exs. 10-48), as well as the vocational expert reports and depositions of Mr. Diaz. (App. Exs. 1-4.) Defendant submitted into evidence the Panel Qualified Medical Evaluation (PQME) reports and deposition of Michael Klassen, M.D. (Def. Exs. C-D), as well as the vocational expert reports of Scott Simon, M.S. (Def. Exs. A-B.)

Applicant testified on direct examination that he worked as a field service engineer starting in April 1994 where he packed, unpacked, and assembled sections of floors using large mechanic tools at various locations. (MOH/SOE, 03/09/2022, 6:17-18.) He sustained an industrial injury on November 27, 2013, when his tool bag caught and caused him to fall backward and hit his low back on a curb. (MOH/SOE, 03/09/2022, 6:35-37.) Following the injury, he experienced pain, could barely twist or bend, and never returned to work. (MOH/SOE, 03/09/2022, 7:1-4.) Regarding his physical capabilities, he has very limited activity due to his back pain, making tasks like showering difficult. (MOH/SOE, 03/09/2022, 7:8-9, 26-27.) Since undergoing surgery, he experiences urinary incontinence requiring multiple underwear changes daily, completely dry ejaculate, erectile dysfunction, and uncontrollable sweating, noting that most of these problems occurred after the surgery. (MOH/SOE, 03/09/2022, 7:11-17.) Now living with his family in Hawaii, he requires an adjustable bed 22 to 23 hours a day, cannot sit in a regular chair or recliner without pain, relies on his family for meals, and rarely leaves his house other than for short painful walks. (MOH/SOE, 03/09/2022, 7:29-37 to 8:1-10.) A functional restoration program proved too

arduous and he relies solely on Tylenol after enduring withdrawals from heavy opiates. (MOH/SOE, 03/09/2022, 7:19-24.) He does not believe he is able to work even on a part-time basis because his lack of sleep impairs any potential work and renders him unreliable for employment. (MOH/SOE, 03/09/2022, 8:30-33.) Before his injury on November 27, 2013, he led an active lifestyle, regularly golfing, playing tennis, and surfing. (MOH/SOE, 03/09/2022, 6:26-33, 8:25.)

On cross-examination, he acknowledged a history of preinjury back pain, prior opiate use, and a previous back injury from surfing 35 years ago. (MOH/SOE, 03/09/2022, 8:40-42 to 9:1-7; 9:19-25.) He also admitted writing to his physician just prior to the industrial injury that he had difficulty performing his job and performing activities like tying his shoes, lifting computers without pain, golfing and wiping himself. (MOH/SOE, 03/09/2022, 9:13-17.) However, on redirect examination, he clarified that, despite his preinjury pain, he remained capable of performing all of his job duties prior to the November 27, 2013 injury. (MOH/SOE, 03/09/2022, 10:3-6.)

On February 25, 2014, Dr. Mallavaram began treating applicant for his November 27, 2013 injury. He attempted two physical therapy sessions but failed to complete them due to significant pain and dysfunction. (App. Ex. 48, p. 1.) Treatment progressed and on September 24, 2014, Dr. Mallavaram reviewed a neurosurgical consultation report from Bruce McCormack, M.D., dated September 10, 2014, recommending an L5-S1 anterior interbody fusion. (App. Ex. 11, p. 2; App. Ex. 39, p. 1.) By October 22, 2014, applicant was status-post lumbar fusion. (App. Ex. 38, p. 1.) Postoperative recovery proved difficult and, on April 15, 2015, Dr. Mallavaram reported that applicant complained of an inability to ejaculate since the surgery causing him to be quite distressed and tearful during the encounter. Dr. Mallavaram also recorded physical limitations at that time including weakness with left hip flexion as well as left leg flexion and extension. (App. Ex. 29, p. 1.) On August 25, 2015, Dr. Mallavaram documented persistent ejaculatory problems since the surgery that had not resolved. He further noted applicant experienced worsening back and left leg pain since the fusion. (App. Ex. 21, p. 1.)

Applicant attempted a functional restoration program but, on January 6, 2016, he failed to complete the program due to unbearable pain. (App. Ex. 18, p. 1.) Because of this failure and the severe level of pain, Dr. Mallavaram determined applicant could not return to even sedentary work. (*Id.* at p. 2.) On January 12, 2016, Dr. Mallavaram classified the situation as catastrophic,

acknowledging applicant would not continue with the functional restoration program. (App. Ex. 17, p. 1.) In his report dated March 2, 2016, Dr. Mallavaram deemed applicant permanent and stationary and assessed 28% whole person impairment (WPI) without apportionment for the lumbar spine based on DRE Category V (AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), Table 15-3, p. 384.) Dr. Mallavaram's opinion relied on a complete loss of motion at the L5-S1 level following an unsuccessful surgical arthrodesis attempt. Furthermore, he documented significant left lower extremity impairment characterized by pain and sensory changes with anatomic distribution at the L5-S1 level as well as EMG findings and potential complex regional pain syndrome (CRPS). (App. Ex. 12, p. 3.)

During his deposition on April 30, 2018, Dr. Mallavaram confirmed applicant suffered a catastrophic decline after the surgery and remained incapable of sedentary work due to pain and physical limitations. (App. Ex. 11, pp. 12:21-25 to 13:1-4, 13:22-25 to 15:1-20.) Dr. Mallavaram explicitly agreed with QME Dr. Klassen regarding work restrictions such as no bending, no stooping, no standing for more than five minutes, no lifting, pushing, or pulling over three pounds, and the need for unscheduled breaks to lie down. Dr. Mallavaram concluded that applicant would not be able to perform any kind of work. (*Id.* at pp. 19:11-25 to 20:1.) Dr. Mallavaram confirmed that the inability to work and the broader work restrictions stemmed directly from the physical limitations, sensory deficits, and persistent pain following the unsuccessful lumbar fusion surgery. (*Id.* at pp. 11:4-25 to 12:1-20.) Dr. Mallavaram opined that applicant developed symptoms supporting a diagnosis of CRPS including swelling, discoloration, and hair loss on the left leg. (*Id.* at pp. 15:21-25 to 16:1:1-22.)

In his report dated July 20, 2016, PQME Dr. Klassen, after evaluating applicant in the field of orthopedic surgery, took a history that he reported urinary dribbling and a lack of sexual function since his surgery. (Def. Ex. D, pp. 2, 4, 6, 12.) PQME Dr. Klassen found these conditions to be industrial and recommended a urologic evaluation. (*Id.* at pp. 12, 15.) He observed applicant utilized a cane and exhibited an antalgic gait, concluding he possessed extreme physical restrictions that limited his ability to work. (*Id.* at pp. 4, 10, 14-15.) Specifically, PQME Dr. Klassen restricted applicant from repetitive bending or stooping, standing or sitting for more than five minutes in one position, and lifting, pushing, pulling, or carrying more than three pounds. (*Id.* at pp. 14-15.)

PQME Dr. Klassen calculated, for the right shoulder, 3% upper extremity (UE) impairment due to 140° of flexion (AMA Guides, Figure 16-40, p. 476), 2% UE impairment due to 140° of abduction (AMA Guides, Figure 16-43, p. 477), and 2% UE impairment due to 60° of internal rotation (AMA Guides, Figure 16-46, p. 479). This summed to 7% UE impairment and converted to 4% WPI without apportionment. (AMA Guides, Table 16-3, p. 439.) (*Id.* at pp. 13-14.)

For the lumbar spine, PQME Dr. Klassen stated that applicant was a DRE Category V with 28% WPI but elected instead to utilize the range of motion (ROM) method. PQME Dr. Klassen assigned 4% WPI due to 30° of forward flexion, 7% WPI due to 0° of extension (AMA Guides, Table 15-8, p. 407), 3% WPI due to 10° of left lateral bending, and 3% WPI due to 10° of right lateral bending (AMA Guides, Table 15-9, p. 409) summing to 17% WPI. He then added 12% WPI using Category IV (D) (AMA Guides, Table 15-7, p. 404) and 3% WPI add-on for pain. Using the Combined Values Chart (CVC) based on the formula A + B (1-A) (AMA Guides, p. 604) resulted in the following calculations:

1. Combine 17% and 12%: 17 + 12(1 - 0.17) = 17 + 9.96 = 27%

2. Combine 27% and 3% = 30% permanent disability

(*Id.* at p. 13.)

With respect to apportionment, PQME Dr. Klassen apportioned 15% of the lumbar disability to a previous injury and 85% to the November 27, 2013 injury since applicant had a previous epidural believed due to a herniated disc at L5-S1. (*Id.* at p. 14.) However, in PQME Dr. Klassen's September 23, 2016 supplemental report, he dramatically changed his opinion after a review of records and opined that 90% of the lumbar spine disability preexisted the date of injury and only 10% was due to the November 27, 2013 injury. (*Id.* at p. 3.)

During his November 30, 2017 deposition, PQME Dr. Klassen testified applicant requires unscheduled breaks and the ability to lie down during shifts, concluding that he possesses very limited options for employment and could reasonably work only four to five hours a day. (Def. Ex. C, pp. 43:22-25 to 44:1-4, 20-25.) PQME Dr. Klassen testified that, prior to the November 27, 2013 injury, applicant would have likely fit into DRE Lumbar Category III 13% WPI due to prior back pain, radiculopathy, and narcotic use. (*Id.* at pp. 17:18-25 to 18:1-13.) With regard to PQME Dr. Klassen's revised apportionment opinion, he maintained his opinion that 90% of the lumbar spine disability preexisted the November 27, 2013 injury. He justified the higher apportionment on the basis that applicant had a chronic history, utilized narcotics, failed two prior

epidurals, and was already considered a surgical candidate before the industrial injury pushed him over the edge to require surgery. (*Id.* at pp. 26:15-25 to 27:1-10.) Regarding sexual dysfunction, PQME Dr. Klassen noted medical records from 2006 indicating applicant experienced sexual side effects from psychotropic medications including Paxil taken prior to his November 27, 2013 injury. (*Id.* at p. 38:7-11.)

In his report dated June 26, 2017, PQME Dr. Kuyt evaluated applicant in urology and reviewed his medical history, including an anterior and posterior lumbar fusion at L5-S1 on October 7, 2014. (Def. Ex. F, p. 3.) PQME Dr. Kuyt reported applicant suffered a 50% loss of pre-injury voiding function and a 70% loss of pre-injury sexual function. (*Id.* at p. 20.) PQME Dr. Kuyt diagnosed applicant with "upper motor neuron bladder disease," which clinically presents as detrusor instability. The L4–S1 corticospinal tract lesion disrupts upper motor neuron modulation of S2-S4 lower motor neuron impulses, producing hyperactivity of the lower urinary tract, manifesting as urgency, daytime urge incontinence, and nocturia. (*Id.* at p. 17.)

Addressing concurrent sexual dysfunction, PQME Dr. Kuyt identified a shared neurologic mechanism. He noted that the bladder, pelvic floor, and erectile function all rely on common sacral nerve circuitry derived from the S2-S4 sacral nerve roots. (*Ibid*.) Since parasympathetic fibers controlling erectile function originate from these segments, the documented corticospinal tract injury at L4-S1 led to his neurologic sexual impairment. (*Id.* at pp. 17-18.)

PQME Dr. Kuyt explained this sexual dysfunction involves difficulty achieving and maintaining an erection alongside decreased sexual desire stemming from post-operative retrograde ejaculation and aggravated low back pain. (*Id.* at p. 18.) Retrograde ejaculation is a distinct surgical complication of the anterior lumbar interbody fusion at L5-S1, where dissection over the disc space can disrupt microscopic nerves controlling the ejaculatory valve, causing ejaculate to flow backward into the bladder. (*Id.* at pp. 4-5.) Finally, PQME Dr. Kuyt noted objective evidence supporting these impairments includes radiographic confirmation of a corticospinal tract injury, use of a right-hand cane for left lower extremity weakness, lumbar ROM limitation, and well-healed surgical scars. (*Id.* at p. 18.)

PQME Dr. Kuyt assigned 9% WPI without apportionment based on Class 1 neurologic bladder impairment where there is some degree of voluntary control but impaired by urgency or intermittent incontinence. (AMA Guides, Table 15-6(d), page 397). He also assigned 15% WPI without apportionment based on Class 2 neurologic sexual impairment where reflux sexual

functioning is possible, but there is no awareness. (AMA Guides, Table 15-6(f), page 397). (*Id.* at pp. 19-20.)

In his report dated April 24, 2019, Mr. Diaz, after evaluating applicant for vocational feasibility, outlined his physical capabilities noting that his restrictions of no lifting, carrying, pushing or pulling more than three pounds and from standing or sitting more than five minutes in one position at one time. He requires unscheduled breaks, needs to lie down and requires access to a bathroom facility within a two-minute walking distance. (App. Ex. 4, p. 8.) Regarding sexual dysfunction, Mr. Diaz noted that, per Dr. PQME Klassen's July 20, 2016 report, applicant has no sexual function with lack of ejaculation and, per PQME Dr. Kuyt's June 26, 2017, has 15% WPI due to neurologic sexual impairment. (*Id.* at pp. 20, 22.) Considering the synergistic effect of these physical urologic and sexual impairments, Mr. Diaz concluded that applicant does not possess the ability to sustain suitable gainful employment in the open labor market. (*Id.* at p. 14.) Mr. Diaz assessed the feasibility for vocational rehabilitation analyzing six methods of rehabilitation and determined that applicant's advanced age, chronic pain, need to lie down, and frequent bathroom needs render him unable to benefit from retraining or work at home accommodations resulting in a 100% loss of labor market access, including home-based work. (*Id.* at pp. 11-13.)

During his deposition on June 10, 2020, Mr. Diaz testified that, during the Skype evaluation, he personally observed applicant lying flat in a recliner confirming his significant physical limitations and inability to maintain standard seated postures. (App. Ex. 3, pp. 31:12-25 to 33:1-10.) Regarding feasibility of performing work at home occupations, Mr. Diaz referenced an extensive 80-hour labor market survey utilized to "shut th[e] door" on a defense vocational expert's assertion that applicant could simply transition to home-based employment. (*Id.* at pp. 49:6-18.) Mr. Diaz explained that applicant's specific functional limitations would not allow him to endure the demands of working at home. (*Id.* at p. 50:1-5.) Mr. Diaz also acknowledged that applicant's refusal to relocate from Hawaii effectively removed him from the labor market in the contiguous United States although this personal choice had no bearing on the vocational opinion because the medical documentation alone established the inability to work. (*Id.* at pp. 53:24-25 to 57:1-20.)

During his September 1, 2020 deposition, Mr. Diaz explained why he did not apportion for applicant's preexisting back pain and narcotic use, despite his denial those prior issues. (App. Ex. 2, pp. 89:8-22; 106:1-24; 107:22-25; 108:13-25 to 109:1-2, 9-24.) Mr. Diaz testified

that he evaluates disability rather than impairment, emphasizing that, regardless of any prior difficulties or medications, applicant actively performed his usual occupation until the industrial injury. (*Id.* at p. 117:15-24.) In addition, Mr. Diaz's opinion regarding the feasibility for vocational rehabilitation and his finding of a total loss of earning capacity relied primarily on the fact that applicant was working prior to the injury and stated he would have continued to work if the injury had not occurred. (*Id.* at p. 120:16-25.) Mr. Diaz testified that preexisting impairments that do not cause an inability to perform work do not warrant apportionment. (*Id.* at p. 133:9-21.)

In his supplemental report dated March 26, 2021, Mr. Diaz criticized Mr. Simon's assessment of applicant's physical capabilities pointing out that Mr. Simon erroneously categorized the pre-injury work capacity as light work when the requirement to lift up to 50 pounds actually constituted medium work. (App. Ex. 1, p. 5.) Mr. Diaz argued that Mr. Simon utilized the lowest possible sedentary setting in his vocational software while ignoring the fact that applicant's actual functioning is below sedentary due to his inability to lift more than three pounds or sit for more than five minutes per PQME Dr. Klassen. (*Id.* at p. 6.) Mr. Diaz highlighted that Mr. Simon completely failed to account for applicants' need to lie down, take unscheduled breaks, and remain within a two-minute walking distance to a restroom due to his urologic impairment. (*Id.* at p. 7.) Addressing the feasibility for vocational rehabilitation, Mr. Diaz stated that no employer could accommodate the synergistic effect of applicant's severe work restrictions. (*Id.* at p. 14.) Mr. Diaz reaffirmed his original opinion that applicant is not amenable to vocational rehabilitation and sustained a 100% loss of labor market access with no apportionment to preexisting factors and opined that Mr. Simon's labor market analysis finding the contrary conclusion was fundamentally flawed. (*Id.* at pp. 5, 13, 15.)

In his report dated December 4, 2020, Mr. Simon, after evaluating applicant for vocational feasibility, concluded that applicant sustained a 58% loss of labor market access but remained amenable to vocational rehabilitation. (Def. Ex. A, p. 22.) Relying on his superior cognitive abilities, including a 90th to 91st percentile score in critical problem solving, Mr. Simon outlined feasible vocational pathways such as customer service representative, administrative services manager, computer user support specialist, and cashier, all accommodating both the strict physical limitations and the necessity for immediate restroom access. (*Id.* at pp. 7, 14-16.) Mr. Simon further suggested that applicant is a prime candidate for direct placement, educational retraining,

on-the-job training, and home-based employment utilizing ergonomic workplace accommodation. (*Id.* at pp. 16-19.)

In his supplemental report dated July 9, 2021, Mr. Simon actively refuted the characterization by Mr. Diaz that applicant's employment as a field service engineer constituted medium exertional work, clarifying that the duties fell squarely within the light exertional level. (Def. Ex. B, p. 4.) Mr. Simon clarified that the occupational baseline was strictly within the light exertional range, noting applicant primarily serviced smaller robotic components and only rarely lifted items weighing up to 50 pounds, criticizing Mr. Diaz's contrary determination. (*Id.* at pp. 2, 8.) Furthermore, Mr. Simon defended his assessment of applicant's physical capabilities and rehabilitation feasibility, emphasizing that his advanced age does not negate his superior learning capacities or his extensive professional history. (*Id.* at p. 11.) Mr. Simon reiterated that he assumed a sedentary work capacity minimum to accommodate the complex medical and apportioned limitations stemming from the 2013 injury. (*Id.* at p. 3.) Ultimately, Mr. Simon concluded that Mr. Diaz's vocational evaluation relied on flawed assumptions regarding applicant's work history and outdated software databases. (*Id.* at p. 10.)

On May 17, 2022, the WCJ issued his FA&O, finding industrial injury in the form of bladder incontinence and sexual dysfunction and awarding 54% permanent disability. In his Opinion on Decision, he relied on Dr. Mallavaram's 28% WPI for the lumbar spine. In addition, the WCJ stated that, while section 4660.1(c)(1) bars adding 15% WPI for the sexual dysfunction, he added the 9% WPI for the bladder impairment to result in 54% permanent disability. (Opinion on Decision, pp. 8-9.) He rejected the vocational opinion of Mr. Diaz that applicant was unemployable in the open labor market as well as PQME Dr. Klassen's opinion apportioning 90% permanent disability to the lumbar spine to preexisting factors. (*Id.* at pp. 8, 12.) The WCJ did not award any permanent disability for the right shoulder.

It is from this FA&O that applicant seeks reconsideration.

DISCUSSION

I.

Permanent disability refers to the lasting, irreversible effects of an injury. It includes conditions that impair earning capacity, limit the normal use of a body part, or create a competitive disadvantage in the labor market. Permanent disability payments compensate workers for both

physical loss and the reduction, partial or total, of their future earning potential. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565].)

An employee may challenge the scheduled permanent disability rating by proving a calculation error or an omission of medical complications, or that the injury prevents rehabilitation and causes a greater loss of future earning capacity than the permanent disability rating schedule (PDRS) reflects. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1277 [76 Cal.Comp.Cases 624].) With respect to vocational evidence, where an employee's work restrictions due to industrial factors cause the loss of their ability to compete for jobs on the open labor market, this would result in a total loss of earning capacity and permanent total disability. (*Contra Costa County v. Workers' Comp. Appeals Board* (*Dahl*) (2015) 240 Cal.App.4th 746, 757 [80 Cal.Comp.Cases 1119]; *LeBouef v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587]; *Soormi v. Foster Farms* [2023 Cal. Wrk. Comp. P.D. LEXIS 170, *11-12] citing *Wilson v. Kohls Dep't Store* [2021 Cal. Wrk. Comp. P.D. LEXIS 322, *20–23.].)[3]

In *LeBoeuf*, the Supreme Court applied a standard of labor market reality stating that, "A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability." (*LeBouef*, *supra*, 34 Cal.3d at pp. 245-246.) The Court concluded, "This is to ensure that the permanent disability rating upon which an award is based accurately reflects both the permanent medical and vocational disabilities." (*Id.* at p. 243.)

Accordingly, to rebut the PDRS and establish permanent total disability, applicant must prove the following:

1) Applicant has received a work restriction(s), which requires substantial medical evidence.
2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires vocational expert evidence.
3) The work restriction(s) precludes applicant from competing on the open labor market,

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

which requires vocational expert evidence.

4) The cause of the work restriction(s) is 100% industrial, which requires substantial medical evidence.

(*Valdovinos v. Universal Site Services, Inc.* [2025 Cal. Wrk. Comp. P.D. LEXIS 76, *14].)

Section 4660.1(c)(1) states:

> Except as provided in paragraph (2), there shall be no increases in impairment ratings for sleep dysfunction, sexual dysfunction, or psychiatric disorder, or any combination thereof, arising out of a compensable physical injury. Nothing in this section shall limit the ability of an injured employee to obtain treatment for sleep dysfunction, sexual dysfunction, or psychiatric disorder, if any, that are a consequence of an industrial injury.

(Lab. Code, § 4660(c)(1).)

Section 4660.1(c)(1) does not preclude increases in impairment ratings when an industrial injury directly causes the sexual dysfunction disability. (*City of Los Angeles v. Workers' Comp. Appeals Bd.* (*Montenegro*) (2016), 81 Cal.Comp.Cases 611 (writ denied).) In *Montenegro*, the employee sustained an industrial injury in the form of prostate cancer, which required a radical prostatectomy. During the surgery, the operating physician sacrificed the cavernosal nerve due to scarring, which iatrogenically resulted in erectile dysfunction. The Appeals Board affirmed the WCJ's finding that section 4660.1(c)(1) did not bar the permanent disability rating for the employee's sexual dysfunction because the impairment was the direct result of a physical injury to the reproductive organs, specifically the removal of the prostate and seminal vesicle, rather than a derivative psychological or secondary effect of another physical injury. Because the prostate cancer was an occupational, industrially related condition, the operation needed to treat it was industrially required, making the surgical complications, including the nerve damage causing erectile dysfunction, industrially related and separately ratable as a direct injury. Because the prostate constitutes an internal accessory organ of the male reproductive system, its physical removal and the surgical severing of its associated nerves establish a direct anatomical injury that defies classification as a mere compensable consequence. Therefore, while section 4660.1(c)(1) serves as a broad bar against derivative impairments, it does not act as an absolute shield against liability for objective anatomical damage. When a required surgical procedure results in iatrogenic trauma to the reproductive system or its associated nerve pathways, the resulting sexual dysfunction is a direct, separately ratable physical injury.

The law requires the Appeals Board to base its decisions on 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 v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, a medical or vocational opinion must state its conclusions in terms of reasonable probability, avoid speculation, rely on pertinent facts and an adequate examination and history, and explain the reasoning supporting its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Medical and vocational reports do not constitute substantial evidence when they contain known errors or rely on facts that are no longer germane, inadequate medical histories or examinations, or incorrect legal theories. Likewise, a medical or vocational opinion cannot support the Appeals Board's findings if it rests on surmise, speculation, conjecture, or guesswork. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Accordingly, the Appeals Board may reweigh the evidence and reach a decision different from the WCJ's determination when other evidence of substantial probative value supports a contrary conclusion. (*Lamb*, *supra*, 11 Cal.3d at p. 281; *Garza*, *supra*, 3 Cal.3d at pp. 318-319.)

Finally, we further observe that 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. I.A.C.* (*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. I.A.C.* (*George*) (1954) 125 Cal.App. 2d 201, 203 [19 Cal.Comp.Cases 98].) Thus, once having granted reconsideration, 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. I.A.C.* (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.].)

Here, upon a thorough review of the evidentiary record, we find the comprehensive evaluation provided by PQME Dr. Klassen to be more persuasive and strictly reasoned than the

reporting of Dr. Mallavaram regarding objective measurements, work restrictions, and clinical findings. He utilized DRE Lumbar Category V to find 28% WPI. In contrast, PQME Dr. Klassen utilized a more methodically data-driven ROM method and ultimately found 30% WPI. Furthermore, he accurately assessed 4% WPI for the right shoulder derived from documented deficits in flexion, abduction, and internal rotation, which Dr. Mallavaram's reporting failed to assess. PQME Dr. Klassen's meticulous adherence to the AMA Guides in quantifying the right shoulder impairment provided ratable impairment that we cannot ignore, thereby constituting the requisite substantial medical evidence necessary to fashion an accurate and equitable award.

Turning to the exclusion of permanent disability for the sexual dysfunction, the primary inquiry under section 4660.1(c) remains focused on whether the specific impairment arises directly from the original industrial event or whether it is a secondary, compensable consequence of an injury to another body part. To overcome the statutory preclusion, the medical record must demonstrate that the sexual dysfunction constitutes a direct, contemporaneous injury resulting from the industrial injury, rather than a secondary manifestation flowing from the physical limitations or chronic pain of a separate musculoskeletal injury. In evaluating the clinical reality of this case, the WCJ incorrectly determined that section 4660.1(c)(1) disqualified applicant's permanent impairment related to sexual dysfunction under the legal premise that the condition was a compensable consequence of the lumbar spine pathology. PQME Dr. Kuyt provided the necessary neuroanatomical evidence linking applicant's genitourinary impairment directly to neurologic trauma. He diagnosed upper motor neuron bladder disease with detrusor instability resulting from a documented corticospinal tract lesion at L4-S1, which disrupted modulation of the S2-S4 lower motor neuron reflex arc. The critical factor establishing direct neurologic injury is the shared neuroanatomy of the sacral nerve roots. The bladder, pelvic floor, and erectile mechanisms all rely on the same S2-S4 sacral circuitry. Because the parasympathetic fibers controlling erectile function originate from these segments, the lumbar corticospinal tract lesion provides objective evidence that the sexual dysfunction is a primary neurogenic impairment.

Furthermore, PQME Dr. Kuyt detailed a distinct anatomical complication resulting from the surgical intervention itself. The anterior lumbar interbody fusion at L5-S1 inherently risks disrupting the sympathetic nerve plexus over the disc space, which coordinates the ejaculatory

valve. Injury to these microscopic nerves results in retrograde ejaculation, a direct structural consequence of the industrial surgery.

Taken together, objective trauma to the S2-S4 sacral nerve circuitry and surgical nerve disruption iatrogenically resulted in applicant's sexual dysfunction, establishing it as a primary neurologic injury, not a secondary consequence of back pain or psychogenic factors. Under section 4660.1(c)(1), impairments directly caused by an industrial mechanism or its necessary surgical treatment, and are rooted in primary neurologic tissue damage, are not categorized as secondary consequences or mere sleep, psychiatric, or sexual offshoots arising out of a separate musculoskeletal body part. Consequently, while section 4660.1(c)(1) would bar any rating increase for a purely psychogenic sexual dysfunction or one arising as a sole consequence of low back pain, its preclusion is legally inapplicable to a direct, structural neurogenic impairment where the neurologic system itself is an industrially injured body part and requires capturing it in applicant's final permanent disability calculation.

Turning to the vocational evidence, upon rigorous examination of the evidentiary record, the vocational assessment provided by Mr. Diaz constitutes substantial evidence inherently more persuasive than the findings of Mr. Simon. Mr. Diaz meticulously integrated the profound physical restrictions delineated by the medical evidence, specifically incorporating the strict limitations of lifting no more than three pounds, sitting or standing for no longer than five minutes, and the critical necessity for unscheduled breaks to lie down. Furthermore, Mr. Diaz personally observed applicant's inability to maintain standard seated postures during his evaluation and correctly noted applicant's requirement to remain within a two-minute walking distance of a restroom facility. By conducting and relying on an exhaustive 80-hour labor market survey, Mr. Diaz firmly established that the synergistic effect of applicant's orthopedic and neurogenic impairments precludes even home-based employment accommodations. Mr. Diaz effectively dismantles Mr. Simon's vocational pathways by demonstrating that Mr. Simon erroneously minimized the pre-injury occupational demands and fatally ignored the severe logistical constraints imposed by applicant's need to lie down and his urgent urologic requirements. Consequently, Mr. Diaz's conclusion that applicant has sustained a total loss of earning capacity without apportionment anchors securely in

the factual realities of his continuous pre-injury work history and his catastrophic post-surgical decline.

Finally, the WCJ expressly rejected the apportionment opinion of PQME Dr. Klassen, a decision defendant did not challenge. PQME Dr. Klassen attributed no portion of the right shoulder permanent disability to preexisting factors, and Mr. Diaz identified no basis for apportionment regarding applicant's unemployability. Where medical apportionment is legally deficient, as is the case with the lumbar spine and right shoulder, a vocational expert may properly conclude that applicant is unable to compete in the open labor market without apportionment. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894, 903 (Appeals Board en banc) (*Nunes I*).) Therefore, applicant is entitled to a 100% permanent disability award without apportionment.

Accordingly, as our Decision After Reconsideration, we affirm the WCJ's May 17, 2022 FA&O, except that we amend it to find applicant is entitled to 100% permanent disability without apportionment with the need for further medical treatment. We otherwise make no substantive changes to the decision.

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order issued by the WCJ on May 17, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

6. Applicant's injury caused 100% permanent disability.

7. There is a need for further medical treatment.

* * *

AWARD

AWARD is made in favor of James Bechtold, against Safety National Casualty Corporation, administered by Tristar Risk Management, Inc., as follows:

1. Permanent disability of 100%, with permanent disability indemnity benefits payable beginning on December 16, 2015, at the rate of $1,066.72 per week, less credit for benefits previously paid, less an attorney's fee in the amount of 15% of permanent disability indemnity awarded herein, to be adjusted by the parties with jurisdiction reserved to the WCJ in the event of a dispute.

2. Further medical treatment in accordance with Findings of Fact 7.

3. A reasonable attorney's fee in the amount of 15% of permanent disability indemnity awarded herein.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I DISSENT (See separate Concurring & Dissenting Opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 9, 2026

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

JAMES BECHTOLD
BOXER & GERSON, LLP
RTGR LAW, LLP

DLP/md

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

CONCURRING AND DISSENTING OPINION OF COMMISSIONER JOSÉ H. RAZO

I concur with my colleague's reliance on PQME Dr. Klassen's permanent disability opinions as well as including the sexual dysfunction in the permanent disability calculation. With respect to my colleague's reliance on Mr. Diaz's vocational opinion, for the reasons discussed below, I respectfully dissent.

My review of the vocational evidence compels the conclusion that Mr. Simon's evaluation represents the more scientifically rigorous and compelling assessment of the applicant's labor market access. Mr. Simon acutely recognized that applicant's profound physical limitations do not entirely extinguish his vocational feasibility when appropriately balanced against his superior cognitive faculties, notably his 90th to 91st percentile proficiency in critical problem solving. Rather than summarily dismissing applicant from the workforce, Mr. Simon constructed viable vocational pathways such as administrative services management and computer user support that realistically accommodate both the strict sedentary requirements and the necessity for immediate restroom access. Mr. Simon effectively refuted Mr. Diaz's foundational assumptions by accurately classifying applicant's pre-injury occupational baseline strictly within the light exertional range, noting that he primarily serviced smaller robotic components and only rarely lifted heavy items. Furthermore, Mr. Simon rightfully criticized Mr. Diaz for relying on outdated software databases and for failing to acknowledge that advanced age does not categorically negate an individual's robust learning capacity or extensive professional history. Therefore, Mr. Simon's conclusion that applicant remains amenable to educational retraining and home-based employment relying on a 58% loss of labor market access is firmly rooted in a holistic and pragmatic application of vocational rehabilitation principles.

Therefore, the permanent disability rating strings should be as follows:

LUMBAR – RANGE OF MOTION – SOFT TISSUE LESION
100% (15.03.02.02 - 30 - 42 - 370G - 45 - 49%) 49%
RIGHT SHOULDER – RANGE OF MOTION
100% (16.02.01.00 - 04 - 06 - 370G - 07 - 08%) 08%
BLADDER
100% (07.03.00.00 - 09 - 13 - 370F - 13 - 15%) 15%
REPRODUCTION SYSTEM
100% (07.05.00.00 - 15 - 21 - 370F - 21 - 24%) 24%
49 C 24 C 15 C 8 = 70% permanent disability

Accordingly, I respectfully dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 9, 2026

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

JAMES BECHTOLD
BOXER & GERSON, LLP
RTGR LAW, LLP

DLP/ md

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