

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

**JUAN DONAN, *Applicant***

**vs.**

**PERDUE FOODS, LLC; ZURICH AMERICAN INSURANCE COMPANY, administered  
by GALLAGHER BASSET SERVICES, *Defendant***

**Adjudication Numbers: ADJ18206391  
Santa Rosa District Office**

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

Applicant's attorney filed a Petition for Reconsideration (Petition) in response to the Findings and Order (F&O) dated November 3, 2025. In the F&O, the workers' compensation administrative law judge (WCJ) found in pertinent part that applicant "was employed for the period August 3, 1988 to November 8, 2022, as a supervisor" by defendant; that applicant did not sustain any injury arising out of and in the course of his employment (AOE/COE)<sup>1</sup>; that Panel Qualified Medical Examiner (PQME) Dr. McGahan's opinions are substantial and persuasive and that the reporting of a treating physician "is substantial but not persuasive."

Applicant contends that PQME Dr. McGahan's opinions are not substantial evidence, and that the issue of whether applicant sustained injury to his hearing was deferred at trial and should not have been determined in the F&O.

Defendant filed an Answer.

The WCJ's Report and Recommendation (Report) recommends reconsideration be granted only to allow further development of the record with respect to the claim of hearing loss and be otherwise denied.

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<sup>1</sup> Notably, there is no reference in the F&O to any claimed body parts or to any occupational code.

After our review of the record and for the reasons discussed below, we will grant the Petition for Reconsideration, rescind the November 3, 2025, Finding and Order, and return the matter to the WCJ for further proceedings consistent with this opinion.

## I.

Only the Appeals Board is statutorily authorized to issue a decision on a petition for reconsideration. (Lab. Code, §§ 112, 115, 5301, 5901, 5908.5, 5950; see Cal. Code Regs., tit. 8, §§ 10320, 10330.)<sup>2</sup> The Appeals Board must conduct de novo review as to the merits of the petition and review the entire proceedings in the case. (Lab. Code, §§ 5906, 5908; see Lab. Code, §§ 5301, 5315, 5701, 5911.) Once a final decision by the Appeals Board on the merits of the petition issues, the parties may seek review under section 5950, but appellate review is limited to review of the record certified by the Appeals Board. (Lab. Code, §§ 5901, 5951.)

It is well-settled that the Appeals Board has broad equitable powers. (*Kaiser Foundation Hospitals v. Workers' Compensation Appeals Board* (1978) 83 Cal.App.3d 413, 418 [43 Cal.Comp.Cases 785] citing *Bankers Indem. Ins. Co. v. I.A.C.* (1935) 4 Cal.2d 89, 94-98 [47 P.2d 719]; see *Truck Ins. Exchange v. Workers' Comp. Appeals Bd. (Kwok)* (2016) 2 Cal.App.5th 394, 401 [81 Cal.Comp.Cases 685]; *State Farm General Ins. Co. v. Workers' Comp. Appeals Bd. (Lutz)* (2013) 218 Cal.App.4th 258, 268 [78 Cal.Comp.Cases 758]; *Dyer v. Workers' Comp. Appeals Bd.* (1994) 22 Cal.App.4th 1376, 1382 [59 Cal.Comp.Cases 96].) It is an issue of fact whether an equitable doctrine such as laches applies. (*Kwok, supra*, 2 Cal.App.5th at p. 402.) The doctrine of equitable tolling applies to workers' compensation cases, and the analysis turns on the factual determination of whether an opposing party received notice and will suffer prejudice if equitable tolling is permitted. (*Elkins v. Derby* (1974) 12 Cal.3d 410, 412 [39 Cal.Comp.Cases 624].) As explained above, only the Appeals Board is empowered to make this factual determination.<sup>3</sup>

In *Shiple v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of

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<sup>2</sup> Unless otherwise stated, all further statutory references are to the Labor Code.

<sup>3</sup> Section 5952 sets forth the scope of appellate review, and states that: "Nothing in this section shall permit the court to hold a trial de novo, to take evidence, or to exercise its independent judgment on the evidence." (Lab. Code, § 5952; see Lab. Code, § 5953.)

Appeal reversed the Appeals Board’s decision holding that the time to act on applicant’s petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Pursuant to the holding in *Shiple*y allowing equitable tolling of the 60-day time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits.

“[I]t is a fundamental principle of due process that a party may not be deprived of a substantial right without notice....” (*Shiple*y, *supra*, 7 Cal.App.4th at p. 1108.) All parties to a workers’ compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers’ Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) “Due process requires notice and a meaningful opportunity to present evidence in regards to the issues.” (*Rea v. Workers’ Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers’ Comp. Appeals Bd.* (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is “deemed denied” due to an administrative irregularity and not through the fault of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen’s Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16].) Just as significantly, the parties’ ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra*, 68 Cal.2d 753; see also *Rea, supra*, 127 Cal.App.4th at p. 643.)

On December 11, 2024, the California Supreme Court granted review in *Mayor v. Workers’ Comp. Appeals Bd.* (2024) 104 Cal.App.5th 713 [2024 Cal.App. LEXIS 531]. One issue granted for review is the same issue present in this case, i.e., whether section 5909 is subject to equitable tolling. The Supreme Court noted the conflict present in the published decisions of the Courts of Appeal, and in its order granting review of *Mayor*, stated as follows:

Pending review, the opinion of the Court of Appeal, which is currently published at 104 Cal.App.5th 1297, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (See *Standing Order Exercising Authority Under California Rules of*

*Court, Rule 8.1115 (e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion, Administrative Order 2021-04-21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)*

(Order Granting Petition for Review, S287261, December 11, 2024.)

Like the Court in *Shiple*, “we are not convinced that the burden of the system’s inadequacies should fall on [a party].” (*Shiple*, *supra*, 7 Cal.App.4th at p. 1108.) The touchstone of the workers’ compensation system is our constitutional mandate to “accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character.” (Cal. Const., art. XIV, § 4.) “Substantial justice” is not a euphemism for inadequate justice. Instead, it is an exhortation that the workers’ compensation system must focus on the *substance* of justice, rather than on the arcana or minutiae of its administration. (See Lab. Code, § 4709 [“No informality in any proceeding . . . shall invalidate any order, decision, award, or rule made and filed as specified in this division.”].) When a litigant is deprived of their due process rights based upon the administrative errors of a third party, for which they bear no blame and over whom they have no control, substantial justice cannot be compatible with such a draconian result.

In keeping with the WCAB’s constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB. The Appeals Board has relied on the *Shiple* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency, and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of a petition protects every litigant’s right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

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. (Former Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

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

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

(Lab. Code, § 5909.)

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

Here, the WCJ issued the F&O on November 3, 2025. According to Events, applicant timely filed the Petition on November 19, 2025. According to Events, the case was transmitted to the Appeals Board on January 12, 2026, and 60 days from the date of transmission is Friday, March 13, 2026.

However, for reasons that are not entirely clear from the record, the Appeals Board did not actually receive notice of and review the petition until March 3, 2026. Thus, the Appeals Board failed to act on the petition within 60 days, through no fault of the parties.

Under the circumstances, the requirements for equitable tolling have been satisfied in this case. Consequently, we apply the doctrine of equitable tolling pursuant to *Shipley* to this case.

Accordingly, our time to act on applicant’s Petition was equitably tolled until 60 days after March 3, 2026, which is Saturday, May 2, 2026. The time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b).) Here, May 2, 2026, is a Saturday which by operation of law means this decision is due by the next business day, which is Monday, May 4, 2026.

This decision issued by or on May 4, 2026, so that we have timely acted on the Petition.

## II.

Applicant, while employed by defendant for the cumulative period ending November 8, 2022, as a supervisor, claimed to have sustained injury arising out of and in the course of employment to various body parts.

In order to aid in understanding our decision we provide the following limited summary of the record here.<sup>4</sup>

On December 5, 2023, PQME Patrick McGahan, M.D., issued a six-page report after examining the applicant on November 29, 2023. The doctor used a Spanish language interpreter and reviewed only 67 pages of medical records which appears to consist almost entirely of applicant's deposition. The doctor notes "[h]e has worked for 34 years as a production supervisor at Perdue Foods." (Exhibit A, PQME Dr. McGahan, December 5, 2023, p. 2.)<sup>5</sup> The doctor states:

At this point, I have not received any medical records. In the absence of new information, it is my professional opinion that there is no evidence of a cumulative trauma industrial injury. Mr. Donan appears to have been working full duty without restrictions as of November 8, 2022, which was his last day of work. There is no evidence that he needed medical treatment or work restrictions due to an industrial injury at the time of his last day of work on November 8, 2022.

(Exhibit A, PQME Dr. McGahan, December 5, 2023, pp. 5-6.)

On March 30, 2024, PQME Dr. McGahan issued a supplemental report after reviewing 46 pages of medical records and states: "At this point, there remains insufficient evidence to conclude that [applicant] sustained an industrial injury." (Exhibit B, PQME Dr. McGahan, March 30, 2024, p. 5.)

On July 27, 2024, PQME Dr. McGahan issued another supplemental report after reviewing additional medical records before concluding: "In my professional opinion, he can return to work full duty without restrictions." (Exhibit C, PQME Dr. McGahan, July 27, 2024, p. 19.) PQME Dr. McGahan further stated:

I have reviewed records from 2014 until 2022. Mr. Donan has a history of right knee pain, right shoulder pain, and right elbow pain in 2014. In 2017, he had complaints of low back pain. In 2018, he had complaints of low back pain after doing yard work. In 2018, he has complaints of bilateral hand pain. In 2019, he had complaints of low back pain and did acupuncture for low back pain. In 2021, he reported bilateral hand pain, right shoulder pain, and low back pain. In 2022, he reports bilateral shoulder pain, bilateral hand pain, and right knee pain. In my review of the medical records, these pains were not consistently attributed to his

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<sup>4</sup> The evidentiary record is chaotic and contains significant flotsam which made review burdensome.

<sup>5</sup> Further complicating the record is the fact this matter was previously tried on May 21, 2024, and documentary Exhibits A and B were admitted into evidence. (Minutes of Hearing and Orders, May 21, 2024, p. 2, ln 31, to p. 3, 1.) As part of the current trial *different documents were also admitted as Exhibits A and B*. (MOH, August 5, 2025, p. 4, lns 21-25, 45-46.) "Each medical report, medical-legal report, medical record, or other paper or record having a different author/provider and/or a different date is a separate "document" and must be listed as a separate exhibit". (Cal. Code Regs., tit. 8, § 10759(c), emphasis added.)

work. In addition, there were no workers' compensation claims filed to my knowledge.

Mr. Donan is a 62-year-old man. In his age group, orthopedic complaints are common. In my professional opinion, Mr. Donan's orthopedic complaints are more likely related to age-related degenerative changes than an industrial injury. There is no clear connection in the medical records connecting his orthopedic complaints and his industrial injury. In addition, his orthopedic complaints do not appear to constitute industrial injuries. Mr. Donan's orthopedic complaints do not clearly meet the criteria for an industrial injury. The report of pain in and of itself does not constitute an industrial injury. In addition, it is my understanding that Mr. Donan was working full duty without restrictions at the time of his right shoulder surgery on November 10, 2022. In the absence of new information, I would continue to opine that his orthopedic complaints should be considered non-industrial in nature.

With respect to his auditory and hearing loss complaints, I would defer to a QME of the appropriate speciality.

(Exhibit C, PQME Dr. McGahan, July 27, 2024, pp. 20-21, 22.)

PQME Dr. McGahan was deposed with the following exchanges illustrative of his reasoning:

Q. Okay. And the same question for his lumbar spine. For the 30 plus years that he worked at Perdue Foods, none of the repetitive work that he did there, none of the standing that he did there was contributory in any sense on an industrial basis to the applicant's lower back; is that correct?

A. Again, as I had said previously, there's certainly the possibility his work has contributed in some way to his musculoskeletal issues but based on my interview with him and review of the evidence, I didn't find sufficient medical evidence to substantiate those claims and so certainly anything is a possibility. In this case, at least my understanding is there's not a presumption of a cumulative trauma injury and there's not significant evidence to connect his musculoskeletal complaints to his work.

(Exhibit H, deposition PQME Dr. McGahan, February 26, 2025, p. 21, lns 6-21.)

With respect to the bilateral hands:

Q. And you're indicating that not even 1 percent of applicant's repetitive work over 30 years caused any injury, not 1 percent of his work caused injury to his right shoulder; is that correct, not 1 percent?

A. Again, as I sit here, it would be impossible to say if there was any contribution but based on my review of the medical records, there wasn't substantial evidence that connected his need for shoulder surgery to his work. And there is, you know, in orthopedic literature a prevalence of shoulder surgery for a variety of reasons

and in my understanding with industrial injuries, there needs to be some medical evidence to connect the industrial injury to the work, except in cases such as a duty belt presumption or other presumptive cases. But in general, I wouldn't – it's my understanding there's not a presumption of a shoulder injury even with the manual labor.

Q. And that, again for the left shoulder, not even 1 percent of the applicant's repetitive work over 30 years caused any disability on an industrial basis. Is that your opinion still today?

A. Again, I would say that's not exactly how I would categorize it. Again, it's a little more nuanced than that in terms of what constitutes an industrial injury.

Q. So what in your mind constitutes an industrial injury? You've indicated in your reporting, especially in your July 27th, 2024 report that applicant can return to work without any restrictions even though you find he has disability to his right shoulder, with disability to his left shoulder. He's got disability to his low back. He has disability to his right knee. But again for causation, you indicate that not even 1 percent of applicant's repetitive work over 30 years was contributory; is that correct? That's what you put in your report, so I just want to make sure that I have down correctly what you've stated?

A. Yeah, I would just, I would defer to the report regarding my reasoning.

Q. And so, again, it not even rises to the level of 1 percent contribution for any of applicant's disabilities that you've noted?

A. Again, I would say similar to my prior answer.

(Exhibit H, deposition PQME Dr. McGahan, February 26, 2025, p. 22, ln 7, to p. 24, ln 25.)

And finally:

Q. And that you did not fully question the applicant regarding his job duties but you have a vague recollection that he worked as a supervisor and on the line at Perdue Foods, correct?

MS. NELSON-MUNSON: Misstates testimony.

THE WITNESS: I'm sorry. What was the question?

MR. HEGWER: Could you please repeat it back?

(Record read back.)

THE WITNESS: Correct.

(Exhibit H, deposition PQME Dr. McGahan, February 26, 2025, p. 27, lns 4-12.)

Finally on May 12, 2025, PQME Dr. McGahan, issued a supplemental report after reviewing 42 pages of medical records with no change to his prior opinions on causation. (Exhibit D, PQME Dr. McGahan, May 12, 2025, p. 2.)

On April 29, 2025, treating physician Jennifer Devries, M.D., was deposed revealing she went to medical school at UC San Diego, got her master's in public health at UCLA, completed training in family medicine, and has been practicing medicine for six years. (Exhibit 1, deposition, Jennifer Devries, M.D., April 29, 2025, p. 5, lns 3-16.) The doctor did not use an interpreter when treating applicant as she speaks Spanish and had been treating applicant for one year. (Exhibit 1, deposition, Jennifer Devries, M.D., April 29, 2025, p. 6, lns 8-12, 16-19.) The doctor agreed applicant suffered a cumulative injury to multiple body parts. (Exhibit 1, deposition, Jennifer Devries, M.D., April 29, 2025, p. 13, lns 2-22.) She was mildly familiar with the California Workers' Compensation system. (Exhibit 1, deposition, Jennifer Devries, M.D., April 29, 2025, p. 14, ln 23, to p. 15, ln 1.)

The record also contains an undated job description for "Production Supervisor," which is apparently for Perdue Foods generally. (Exhibit E.)

At trial on August 5, 2025, it was stipulated that applicant, while employed for the period August 3, 1988 to November 8, 2022, as a supervisor at Petaluma, California, by Perdue Foods, LLC, claimed to have sustained injury arising out of and in the course of employment to his bilateral shoulders, back, ears, arm, knees and neck, and that the body parts listed may not be inclusive of all injuries. It was further stipulated that "Discovery remains open with respect to AOE/COE and all other issues." (Minutes of Hearing and Summary of Evidence (MOH), August 5, 2025, p. 2, lns 16-21; 43-44.) Issues included injury AOE/COE, "Parts of body injured: Ears, back, arms knee, shoulder, et cetera"; occupational group number; "Whether the reporting of Panel QME Dr. McGahan is substantial evidence"; and "Whether the reporting of Panel QME Dr. Cartwright is substantial medical evidence regarding injury AOE/COE." (MOH, August 5, 2025, p. 3, lns 1-35.) Exhibits 2 through 4, A through D, and F through H were admitted into evidence while exhibits 1, 5, 6, and E were marked for identification with ruling on admissibility to be made at time of decision.<sup>6</sup> (MOH, August 5, 2025, p. 3, ln 42, to p. 5, ln 1.)

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<sup>6</sup> In the F&O, all exhibits marked for identification were admitted.

Applicant testified in relevant part as follows. He went to school through eighth grade in Mexico, has no high school diploma and no GED. He was hired on August 3, 1988, and has not worked anywhere else. (MOH, August 5, 2025, p. 5, lns 12-13; 21-22.) He developed pain in his neck while working at Perdue Foods. It happened gradually as time went by. He believes that his job duties increased his neck pain. He also believes that his job duties increased his shoulder and elbow pain, as well as pain in his hands, low back and knees. (MOH, August 5, 2025, p. 8, lns 9-13.) Applicant testified to his repetitive job duties over the course of 34 years employment at a chicken processing plant, but with limited reference to activity dates or overall chronology. (MOH, August 5, 2025, pp. 5-10.)

On November 3, 2025, the WCJ issued the F&O.

In the Opinion on Decision, the WCJ states “Dr. McGahan found that the applicant had physical complaints, but that these were due entirely to the natural progression of the aging process. He found no industrial causation.” (F&O, Opinion on Decision, p. 1.) When considering the industrial opinion of the treating physician, the WCJ states “that opinion came from a doctor who admitted to being only ‘mildly familiar’ with Workers’ Compensation [deposition reference] and who has never served as a primary treating doctor or as a QME, and never taken any classes or continuing education credits concerning Workers’ Compensation. [deposition reference]. Accordingly, the court finds the opinion of Dr. McGahan more persuasive.” (Opinion on Decision, p. 2.) In a footnote the WCJ states that “[i]njury to hearing appears to have been the subject of a medical-legal evaluation by Dr. Cartwright, although no reporting was offered into evidence. It does not appear that discovery regarding hearing loss was completed.” (F&O, Opinion on Decision, p. 3.) He makes no reference to the parties’ trial stipulation that discovery remains open on the issue of AOE/COE.

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

### III.

We 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 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.

1.

Applicant asserts the WCJ erred by “not analyzing applicant’s exhibits 2-5.” (Petition, p. 4, ln 7.)

Here the WCJ explains in the Report that these exhibits “were reviewed by the court, along with all of the subpoenaed records. They did not figure into the court’s rationale and so were not mentioned. The court found the report of the medical legal evaluator to be the most important and persuasive.” (Report, p. 3.) The WCJ then goes on to explain:

[T]he records indicate that applicant sustained numerous injuries over the course of his employment. The employer’s records show fairly minor injuries, after which applicant returned to full duties. In addition, the medical records subpoenaed show applicant received treatment for various conditions on a non-industrial basis.

(Report, p. 3.)

We observe that “[i]t is the responsibility of the parties and the WCJ to ensure that the record of the proceedings contains at a minimum, the issues submitted for decision, the admissions and stipulations of the parties, and the admitted evidence.” (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 475 (Appeals Board en banc).) As required by section 5313 and explained in *Hamilton*, “the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision.” (*Id.* at p. 475.)

Although we discern the WCJ did not meet the responsibility of meaningfully referring to the evidence in the opinion on decision, nor of clearly designating the evidence that forms the basis of the decision, we do not provide further discussion in light of our rescission of the F&O on other compelling grounds.

2.

In this case the WCJ relied on the expert medical opinions of PQME Dr. McGahan to find the applicant did not sustain a cumulative injury.

A cumulative injury is defined as one “occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment,” and the date of a cumulative injury shall be the date determined under section 5412. (Lab. Code, § 3208.1.)

Employer liability, however, is limited to those employers who employed the employee during the one year “immediately preceding either the date of injury, as determined pursuant to Section 5412, or the last date on which the employee was employed in an occupation exposing him or her to the hazards of the occupational disease or cumulative injury, whichever occurs first.” (Lab. Code, § 5500.5(a).)

Section 5412 states: “The date of injury in cases of occupational diseases or cumulative injuries is the date upon which the employee first suffered disability therefrom and either knew, or in the exercise of reasonable diligence should have known, that such disability was caused by his present or prior employment.” (Lab. Code, § 5412.) Thus, the date of injury per section 5412 is a specific day and may or may not be the same day as the end date of industrial exposure and the end date of the one year liability period established by section 5500.5.

The default use of a one-year cumulative exposure has become common throughout the workers’ compensation community without regard to its relevance to a particular case. This appears to result from conflation of the concise maximum one-year liability limitation contained in section 5500.5 for cumulative injuries with the more liquid definition of cumulative injury “occurring as repetitive mentally or physically traumatic activities extending over a period of time.” (Section 3208.1.) We note that unlike the liability period, which is at most one year, a cumulative injury may occur over the course of decades as alleged here, a single day, or any time frame in between.

“The number and nature of the injuries suffered are questions of fact for the WCJ or the WCAB.” (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234 [58 Cal.Comp.Cases 323].) While the Appeals Board decides the issue of whether a cumulative injury exists, substantial medical evidence, however, must support the finding of industrial injury. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620 (Appeals Board en banc).) “Further, a medical report is not substantial evidence unless it sets forth the reasoning behind the physician’s opinion, not merely his or her conclusions.” (*Id.* at p. 621.)

Here it is undisputed that applicant engaged in repetitive manual labor over 34 years of employment at a chicken processing plant. Although he advanced to a supervisory position, he was still required to engage in repetitive manual labor as part of his job duties.

From the outset, and apparently without having reviewed any medical records, PQME Dr. McGahan concluded that despite applicant’s extensive work history there was no evidence of a

cumulative industrial injury. This was because applicant had been working full duty without restrictions, and there was no evidence that he needed medical treatment or work restrictions due to an industrial injury at the time of his last day of work on November 8, 2022. (Exhibit A, PQME Dr. McGahan, December 5, 2023, pp. 5-6.)

This analysis misses the mark as a cumulative injury is one “occurring as repetitive mentally or physically traumatic activities extending over a period of time, the combined effect of which causes any disability or need for medical treatment.” (Lab. Code, § 3208.1.) There is no requirement that disability or need for treatment be evident in the medical records on a specific day. Under the standard applied by PQME Dr. McGahan, there would be no need for expert medical opinion as the trier of fact would simply be called upon to determine if there was existing medical evidence that medical treatment or work restrictions were due to an industrial injury at the time of the last day of work. Such is not the case.

As the Court of Appeal explained in *Peter Kiewit Sons v. I.A.C.* (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188], “[e]xpert testimony is necessary where the truth is occult and can be found only by resorting to the sciences.” Evaluating whether repetitive physically traumatic activities extending over a period of time combined to cause any disability or need for medical treatment is not subject to lay interpretation. This is why PQME Dr. McGahan was solicited to provide expert medical opinion. Unfortunately, PQME Dr. McGahan does not properly evaluate the record in providing opinions nor rehabilitate his opinions.

For example, in a supplemental report PQME Dr. McGahan reviews medical records with complaints of pain from 2014 until 2022 only to conclude that “*these pains were not consistently attributed to his work. In addition, there were no workers' compensation claims filed to my knowledge.*” (Exhibit C, PQME Dr. McGahan, July 27, 2024, pp. 20-21, emphasis added.) Instead of providing independent expert medical opinion based on record review, the doctor relies on the absence of prior medical opinion and claim filing to deny injury.

The doctor does explain that applicant is a 62-year-old man and in his age group orthopedic complaints are common, and his orthopedic complaints are more likely related to age-related degenerative changes than an industrial injury. The doctor also states, however, “*There is no clear connection in the medical records connecting his orthopedic complaints and his industrial injury.*” (Exhibit C, PQME Dr. McGahan, July 27, 2024, p. 21.) The doctor abdicates his responsibility to independently review the record.

In deposition, PQME Dr. McGahan consistently referenced the lack of a presumption of injury for manual labor. (Exhibit H, deposition PQME Dr. McGahan, February 26, 2025, p. 21, lns 6-10; p. 23, lns 19-24.) It appears that PQME Dr. McGahan may have created a new and higher standard for cumulative injury claims based on manual labor that is only eased by application of a presumption of injury. Perhaps most telling is the deposition exchange which occurred as follows:

Q. And that you did not fully question the applicant regarding his job duties but you have a vague recollection that he worked as a supervisor and on the line at Perdue Foods, correct?

MS. NELSON-MUNSON: Misstates testimony.

THE WITNESS: I'm sorry. What was the question?

MR. HEGWER: Could you please repeat it back?

(Record read back.)

THE WITNESS: Correct.

(Exhibit H, deposition PQME Dr. McGahan, February 26, 2025, p. 27, lns 4-12.)

It is clear that in formulating his opinions, PQME Dr. McGahan did not take a full history of applicant's repetitive job duties.

As noted above, PQME Dr. McGahan also states "there were no workers' compensation claims filed to my knowledge." (Exhibit C, PQME Dr. McGahan, July 27, 2024, p. 21.) This despite the fact the record refers to multiple claims, and includes a January 19, 1999 Employee's Claim for Workers' Compensation Benefits (DWC Form 1), claiming a January 15, 1999 back injury. (Exhibit 4, PDF p. 34.) This is not an inconsequential error.

A decision must be based on admitted evidence in the record and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310].) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Heggin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

Here, PQME Dr. McGahan's expert medical opinions are based on inadequate medical history and an incorrect legal theory and therefore are not substantial.

In the face of the employment history of repetitive manual labor for over 34 years, no matter the outcome on the contested issue of injury, expert medical opinion that fully considers such history is necessary. At present there are no substantial medical opinions on causation of cumulative injury.

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

Where it is determined that the medical record requires further development, the preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. If the supplemental opinions of the previously reporting physicians do not or cannot cure the need for development of the medical record, the selection of an agreed medical evaluator (AME) by the parties should be considered. If none of the procedures outlined above is possible, the WCJ may resort to the appointment of a regular physician, as authorized by section 5701. ((*McDuffie*, supra, pages 142-143.)

We will therefore rescind the F&O to allow the record to be developed.<sup>7</sup> Given that PQME Dr. McGahan's opinions may not be capable of remediation, the parties are strongly encouraged to consider use of an AME. If they cannot reach such an agreement, the WCJ should consider appointment of a regular physician.

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<sup>7</sup> The parties agree that the issue of hearing loss was not submitted at trial. However, since we are rescinding the entire F&O, we do not separately defer the issue.

3.

Although we have considered this matter pursuant to *Shipley* as discussed above, we confirm, as an additional ground for our consideration of this matter, our continuing jurisdiction per section 5803.

As noted above, at trial the parties stipulated that “[d]iscovery remains open with respect to AOE/COE and all other issues.” (MOH, August 5, 2025, p. 2, lns 43-44, emphasis added.) This stipulation is not further discussed by the parties nor the WCJ.

Stipulations further the public policies of settling disputes and expediting trials and a stipulation of the parties may not be set aside by the Board absent a finding of good cause. (Lab. Code, § 5702; *County of Sacramento v. Workers' Comp. Appeals Bd. (Weatherall)* (2000) 77 Cal. App.4th 1114, 1119 [65 Cal.Comp.Cases 1].)

Here there is no discussion of this stipulation on discovery and certainly no “good cause” presented to set it aside. Considering this stipulation that “[d]iscovery remains open with respect to AOE/COE and all other issues,” it is apparent that the part of the F&O finding that applicant did not sustain any industrial injury without identification of any body parts, it can be treated as an interim order subject to revision as may be warranted by further discovery. The F&O in these respects is therefore subject to the continuing jurisdiction of the WCAB.

“Labor Code section 5803 vests broad powers in the WCAB to ‘rescind, alter, or amend’ an order of the WCAB for ‘good cause’ pursuant to a petition filed by a real party in interest within five years of the date of injury.” (*Fidelity & Cas. Co. v. Workers' Comp. Appeals Bd. (Harris)* 103 Cal.App.3d 1001, 1012 [45 Cal.Comp.Cases 381].) “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.” (Lab. Code, § 5803, emphasis added.)

Here, the claim is for cumulative injury through November 8, 2022, and applicant’s Petition was filed November 19, 2025. Although the WCAB may take action at “any time” per section 5803 within the time limits of section 5804, we note here the Petition was filed well within the jurisdictional period of five years from injury contained in section 5804. The parties had constructive notice through the Petition that the F&O was challenged and were provided with an opportunity to be heard on the issues raised.

We conclude that the lack of substantial evidence supporting the F&O, and the stipulation that “[d]iscovery remains open with respect to AOE/COE and all other issues” allowing for further proceeding before a final order issues, also provides “good cause” to rescind the F&O.

#### IV.

Following our independent review of the record, and for the reasons stated above, we grant applicant’s November 19, 2025 Petition for Reconsideration, rescind the November 3, 2025 Findings and Order, and return the matter to the WCJ for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** that applicant’s November 19, 2025 Petition for Reconsideration is **GRANTED**.

**IT IS FURTHER ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the November 3, 2025 Findings and Order issued by the WCJ is **RESCINDED** and the matter is **RETURNED** to the WCJ for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**/s/ PAUL F. KELLY, COMMISSIONER**



**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**May 4, 2026**

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

**JUAN DONAN  
WYMAN & HEGWER  
LAUGHLIN FALBO LEVY & MORESI**

**PS/oo**

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