

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

**JUAN LUNA, *Applicant***

**vs.**

**TESLA MOTORS, INC., PERMISSIBLY SELF-INSURED,  
administered by ZURICH NORTH AMERICA, *Defendants***

**Adjudication Numbers: ADJ18796354 ADJ18797375  
Oakland District Office**

**OPINION AND ORDER  
DENYING PETITION FOR  
RECONSIDERATION**

Defendant seeks reconsideration, and in the alternative removal of the Amended Findings and Orders (F&O) issued by a workers' compensation administrative law judge (WCJ) on December 2, 2025. In the F&O, the WCJ rescinded his October 22, 2025 decision in ADJ18796354 and ADJ18797375 and found in ADJ18796354 that applicant, while employed during the period ending December 1, 2023, as a tool and die specialist by defendant claims to have sustained injury arising out of and in the course of employment (AOE/COE) to various body parts; and that the record requires further development in the form of further reporting or deposition testimony by the qualified medical evaluator (QME) Ryan Derby, M.D., "as to whether the bilateral upper extremities are part of the single cumulative injury he finds." With respect to both cases, the WCJ ordered further discovery with the QME Dr. Derby "with respect to whether the single cumulative injury he finds includes the bilateral upper extremities, including carpal tunnel syndrome, and if so, how and why he believes that to be the case" and he suggested "a QME re-exam to determine if the applicant's other injuries, as found by the QME are currently P&S and ratable." Finally, he ordered that all other issues were deferred.

Defendant contends that the WCJ failed to make a finding with respect to ADJ18797375; that applicant sustained a single cumulative injury, although it "disputes the mechanism of the injury"; that the two cases are duplicative and ADJ18796354 should be dismissed; that the Labor

Code section 5412<sup>1</sup> date of injury is May 12, 2022; and that Dr. Derby should be replaced as the QME and his reporting struck.

We did not receive an answer from applicant. The WCJ issued a Report and Recommendation (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and in the alternative Removal, and the contents of the Report. Based on our review of the record, as discussed in the WCJ's Report, which we adopt and incorporate, and as discussed below, we will order that the F&O is corrected to add a heading over the Orders containing the case numbers and we will deny the Petition as one seeking reconsideration.

## I.

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

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

Here, according to Events, the case was transmitted to the Appeals Board on February 13, 2026, and 60 days from the date of transmission is April 14, 2026. This decision is issued by or on

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<sup>1</sup> All further references are to the Labor Code unless otherwise noted.

April 14, 2026, so that we have timely acted on the petition as required by Labor Code 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 February 13, 2026, and the case was transmitted to the Appeals Board on February 13, 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 February 13, 2026.

## II.

If a decision includes resolution of a “threshold” issue, then it is a “final” decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include, but are not limited to, the following: injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd. (Gaona)* (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or court of appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by a petition for reconsideration once a final decision issues.

Here, the WCJ's decision includes findings in ADJ18796354 regarding the threshold issues of employment and insurance coverage. In the Petition, defendant challenges the finding as to the date of injury and seeks to have ADJ18796354 dismissed. Accordingly, the WCJ's decision is a

final order subject to reconsideration rather than removal. Thus, we treat the Petition as one for Reconsideration, and we will deny the Petition as one seeking reconsideration.

However, the WCJ also ordered further development of the record by way of reporting or a deposition by QME Dr. Derby and suggested a reevaluation of applicant. Those orders are non-final interlocutory orders. In its Petition, defendant alleges that it has now received the updated reporting and that QME Dr. Derby should be replaced. We do not consider that issue as it is premature and must be raised in the first instance with the WCJ at the trial level since the reporting was received subsequent to the F&O.

### III.

We now turn to the other issues raised by defendant.

First, defendant contends that the WCJ failed to make a finding with respect to ADJ18797375. As stated by the WCJ in the Report:

All other issues, including findings regarding the date of cumulative injury under Labor Code 5412, and the injured body parts in the first case, ADJ18796354, and whether the stipulated specific injury in the second case, ADJ18797375, should be viewed as part of one cumulative injury, were deferred, pending this development of the record.

(Report, p. 2.)

We agree. Nonetheless, so that the record is clear, we will issue an order adding a heading containing both case numbers over the two orders. (*Toccalino v. Workers' Comp. Appeals Bd.* (1982) 128 Cal.App.3d 543, 558, [47 Cal.Comp.Cases 145] [Appeals Board may correct a clerical error at any time].)

Decisions of the WCJ and the Workers' Compensation 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 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 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).) Not all expert medical opinion constitutes substantial evidence.

*(Hegglin v. Workmen's Comp. Appeals Bd. (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93, 97]; Place v. Workmen's Comp. Appeals Bd. (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].)* To constitute substantial evidence, a medical opinion must be predicated on reasonable medical probability. *(Escobedo, supra, at p. 611.)* "Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture, or guess." *(Hegglin, supra, 4 Cal.3d 162.)* Whether a physician's opinion constitutes substantial evidence "must be determined by the material facts upon which his opinion was based and by the reasons given for his opinion." *(Ibid.)* Hence, it is permissible, and indeed encouraged in circumstances such as these, for the WCJ to order further development of the record and to order that all other issues are deferred if the record lacks substantial evidence to support a finding.

Next, defendant contends that applicant sustained a single cumulative injury, although it "disputes the mechanism of the injury"; that the two cases are duplicative and ADJ18796354 should be dismissed; and that the section 5412 date of injury is May 12, 2022. In addition to the analysis set forth in the WCJ's Report, we offer the following.

On May 5, 2025, the parties proceeded to trial. In ADJ18796354, they stipulated that applicant, while employed during the period through December 1, 2023, as a tool and die specialist by defendant, claimed injury to various body parts. As relevant herein, defendant raised the following issue:

Depending on the date of injury determined under Labor Code section 5412, whether this claim is barred by the statute of limitations and/or laches, on the theory the Applicant failed to report injuries to body parts which he knew were part of an industrial cumulative injury and that he had been treating for at the time of the cumulative trauma date of injury under section 5412.

In ADJ18797375, they stipulated that applicant, while employed on April 18, 2022, as a tool and die specialist by defendant, sustained injury to various body parts and claimed injury to various body parts. As relevant herein, defendant raised the following issue:

Whether this injury is a specific injury on April 18, 2022, as plead, and if not and it is a cumulative trauma, what is the date of that cumulative injury per Labor Code section 5412, in light of the specific facts and medical evidence in this case?

The parties stipulated that applicant's last day of work was December 1, 2023, and the WCJ found that the period of hazardous exposure was up to December 1, 2023. We see no reason to disturb that finding.

Defendant’s error is in “merging” the concept of two injuries with the concept of one injury to separate body parts. While defendant alleges that there is but a single cumulative injury, defendant’s argument is premised on the assumption that the analysis rests on whether and when applicant alleged injury to certain body parts at different times. This is legally incorrect. The determination of whether there are one or two injuries is based on an analysis of causation. That is, did the events of an injured worker’s employment cause injury?

And, as discussed below, the questions of whether there is a cumulative injury or a specific injury and whether there is one injury or multiple injuries are questions of fact. Thus, determination of whether applicant had a specific and/or cumulative injury and whether applicant had more than one injury requires substantial medical evidence, and the WCJ correctly concluded that the medical record required further development.

Nonetheless, because of defendant’s evident confusion, we will explain the applicable statutes and the principal cases addressing them.

A. Pleadings may be deemed amended according to proof:

WCAB Rule 10517 states that:

Pleadings shall be deemed amended to conform to the stipulations and statement of issues agreed to by the parties on the record. Pleadings may be amended by the Workers’ Compensation Appeals Board to conform to proof.

(Cal. Code Regs., tit. 8, § 10517.)

In our recent en banc opinion in *Perez v. Chicago Dogs* (2025) 90 Cal.Comp.Cases 830, 838 (“*Chicago Dogs*”), we held that: “In workers’ compensation proceedings, pleadings are liberally construed and may be amended to conform to proof.”

We reiterated that:

The workers’ compensation system “was intended to afford a simple and nontechnical path to relief.” [citation] Generally, “the informality of pleadings in workers’ compensation proceedings before the Board has been recognized.” [citation] “[I]t is an often-stated principle that the Act disfavors application of formalistic rules of procedure that would defeat an employee’s entitlement to rehabilitation benefits.” [citation] Courts have repeatedly rejected pleading technicalities as grounds for depriving the Board of jurisdiction. [citation] “Necessarily, failure to comply with the rules as to details is not jurisdictional.” [citation]

Therefore, in workers’ compensation proceedings, it is settled law that (1) pleadings may be informal. [citation]; (2) claims should be adjudicated based on substance

rather than form [citation] (3) pleadings should liberally construed so as not to defeat or undermine an injured employee's right to make a claim [citation]; and (4) technically deficient pleadings, if they give notice and are timely, normally do not deprive the Board of jurisdiction [citation].

(*Ibid.*)

B. The number of and the type of injuries is a question of fact and generally requires medical evidence:

An employee bears the burden of proving injury arising out of and in the course of employment (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.) An injury must be proximately caused by the employment in order to be compensable. (Lab. Code, § 3600(a)(3).) Proximate cause in workers' compensation requires that the employment be a contributing cause of the injury. (*Clark, supra*, 61 Cal.4th at pp. 297-298.)

The Supreme Court of California has long held that an employee need only show that the "proof of industrial causation is reasonably probable, although not certain or 'convincing.'" (*McAllister v. Workmen's Comp. Appeals Bd.* (1968) 69 Cal.2d 408, 413 [33 Cal.Comp.Cases 660].) "That burden manifestly does not require the applicant to prove causation by scientific certainty." (*Rosas v. Workers' Comp. Appeals Bd.* (1993) 16 Cal.App.4th 1692, 1701 [58 Cal.Comp.Cases 313].) Indeed, the perils of lay diagnosis of complaints as quotidian as low back pain were discussed by the court in *Pieter Kiewit Sons v. Industrial Acci. Comm. (McLaughlin)* (1965) 234 Cal.App.2d 831 [30 Cal.Comp.Cases 188]. Therein, applicant claimed a low back injury while working for Kiewit, the last of three employers for whom applicant had worked in four years. Despite applicant describing similar low back complaints arising out of all three employments, the IAC assessed liability to the terminal employer alone. In granting review of the IAC decision, however, the court found "[t]hat issue may run a gamut from the blatantly obvious to the scientifically obscure," and that expert testimony would be necessary. "Back disabilities in particular shout loudly for expert advice ... [i]n a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation." (*Id.* at pp. 839-840.) Accordingly, "the medical cause of an ailment is usually a scientific question, requiring a judgment based upon scientific knowledge and inaccessible to the unguided rudimentary capacities of lay arbiters." (*Id.* at p. 839.)

Section 3208.2 provides:

When disability, need for medical treatment, or death results from the combined effects of two or more injuries, either specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury, including, but not limited to, the apportionment between such injuries of liability for disability benefits, the cost of medical treatment, and any death benefit.

Section 5303 provides, in pertinent part:

There is but one cause of action for each injury coming within the provisions of this division.... [N]o injury, whether specific or cumulative, shall, for any purpose whatsoever, merge into or form a part of another injury; nor shall any award based on a cumulative injury include disability caused by any specific injury or by any other cumulative injury causing or contributing to the existing disability, need for medical treatment or death.

Section 3208.1 defines a “cumulative” injury 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. The date of a cumulative injury shall be the date determined under Section 5412.”

In turn, section 5412 states: “The date of injury in cases of ... cumulative injuries is that 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.” Therefore, in cumulative injury cases, there is no “date of injury” until there is a concurrence of both disability and knowledge. (*Bassett-McGregor v. Workers' Comp. Appeals Bd.* (1988) 205 Cal. App. 3d 1102, 1110 [53 Cal.Comp.Cases 502].)

The court of appeal has defined “disability” per section 5412 as “either compensable temporary disability or permanent disability,” noting that “medical treatment alone is not disability, but it may be evidence of compensable permanent disability, as may a need for splints and modified work. These are questions for the trier of fact to determine and may require expert medical opinion.” (*State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579]; see *Chavira v. Workers' Comp. Appeals Bd.* (1991) 235 Cal.App.3d 463, 473-474 [56 Cal.Comp.Cases 631].) Medical treatment alone is not “disability” for purposes of determining the date of a cumulative injury pursuant to section 5412, but it may be evidence of compensable permanent disability. (*Rodarte, supra*, 119 Cal.App.4th at p. 1005.) Likewise, modified work is not a sufficient basis for finding compensable temporary

disability, but it may be indicative of a compensable permanent disability, especially if the worker is permanently precluded from returning to their usual and customary job duties. (*Id.*) The existence of disability is a medical question beyond the bounds of ordinary knowledge, and, as such, will typically require medical evidence. (*City & County of San Francisco v. Industrial Acc. Com. (Murdock)* (1953) 117 Cal.App.2d 455 [18 Cal.Comp.Cases 103]; *Bstandig v. Workers' Comp. Appeals Bd.* (1977) 68 Cal.App.3d 988 [42 Cal.Comp.Cases 114].)

Regarding the “knowledge” component of section 5412, whether an employee knew or should have known their disability was industrially caused is a question of fact. (*City of Fresno v. Workers' Comp. Appeals Bd. (Johnson)* (1985) 163 Cal.App.3d 467, 471 [50 Cal.Comp.Cases 53].) Knowledge requires more than an uninformed belief. Because the existence of disability typically requires medical evidence, an “applicant will not be charged with knowledge that his disability is job related without medical advice to that effect unless the nature of the disability are such that applicant should have recognized the relationship between the known adverse factors involved in his employment and his disability.” (*Id.* at p. 473.) However, the burden of proving that the employee knew or should have known rests with the employer. This burden is not sustained merely by a showing that the employee knew they had some symptoms. (*Id.* at p. 471.)

It has long been the law that separate disabilities arising out of a single injury are rated together, even if those disabilities do not become permanent and stationary at the same time. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Morgan v. Workers' Comp. Appeals Bd.* (1978) 85 Cal.App.3d 710 [43 Cal.Comp.Cases 1116]; *Mihesuah v. Workers' Comp. Appeals Bd.* (1976) 55 Cal.App.3d 720 [41 Cal.Comp.Cases 81].) The general rule is that when an employee suffers contemporaneous injury to different body parts over an extended period of employment, the employee has suffered one cumulative injury. For example, in *Norton v. Workers' Comp. Appeals Bd.* (1980) 111 Cal.App.3d 618 [45 Cal.Comp.Cases 1098], a deputy sheriff suffered trauma to his back from July 22, 1968 through November 9, 1977, and trauma to his esophagus and stomach from 1974 to November 1977. The court found a single cumulative injury, stating among other things: “we conclude that the cumulative back injury and cumulative esophagus and stomach injury cannot be said to be truly successive injuries, they must be treated as contemporaneous and therefore rated as multiple factors of disability from one injury.” (*Id.* at p. 629.)

Similarly, in *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Hurley)* (1977) 70 Cal.App.3d 599 [42 Cal.Comp.Cases 481], a welder employed from April 30, 1959 to January 5, 1973 suffered trauma to his eyes due to the heat and flashes of the welding torches, to his ears due to the noises of the shop, and to his lungs due to exposure to dust and fumes he inhaled. The court found a single cumulative injury, stating among other things: "From all of the foregoing we conclude that Hurley suffered repetitive physically traumatic experiences extending throughout his employment, ... , the combined effect of which resulted in bodily injury, and permanent disability. (See Lab. Code, § 3208.1)." (*Id.* at p. 606.) The court further held that the disabilities had to be rated together because the various traumas the employee had suffered were not "separate and independent," but "instead suffered contemporaneously." (*Id.* at p. 605.)

The issue of how many cumulative injuries an employee sustained is a question of fact for the WCAB. (*Western Growers Ins. Co. v. Workers' Comp. Appeals Bd. (Austin)* (1993) 16 Cal.App.4th 227, 234-235 [58 Cal.Comp.Cases 323]; *Aetna Casualty & Surety Co. v. Workmen's Comp. Appeals Bd. (Coltharp)* (1973) 35 Cal.App.3d 329, 341 [38 Cal.Comp.Cases 720].) In *Coltharp*, the applicant's initial work duties, which he described as "heavy labor," caused cumulative trauma resulting in disability and a need for medical treatment, including back surgery. After the applicant returned to work, he was assigned "lighter work," but he still had to do some lifting as well as crawling through pipe. He said of his post-return work duties, "regardless of everything I did, it was aggravating on my back." A physician stated that applicant's post-return cumulative work activities were "the immediate precipitating factor that necessitated" another back surgery. Based on these facts, the *Coltharp* court found that the applicant had sustained two separate cumulative injuries, i.e., one before and one after the initial period of disability and need for treatment, and that to conclude, otherwise would violate the anti-merger provisions of sections 3208.2 and 5303.

In *Austin*, the applicant's increasing work responsibilities precipitated a major depression, resulting in temporary disability and a need for treatment, including psychiatric hospitalization. After receiving psychiatric treatment and being off work for a period of time, the applicant returned to work. However, when the applicant returned to work, he had not fully recovered from his depressive episode, he remained under a doctor's care and on medication, and he became progressively worse. It was the same stress that resulted in the initial hospitalization that further exacerbated applicant's problem after he returned to work. Based on these facts, the *Austin* court

concluded the applicant had only one continuous compensable injury because, unlike *Coltharp*, his two periods of temporary disability were linked by the continued need for medical treatment and the two periods were not “distinct.”

When the holdings of *Austin* and *Coltharp* are harmonized and read in conjunction with the section 3208.1 definition of “cumulative injury” and the anti-merger provisions of sections 3208.2 and 5303, the following principles are revealed:

(1) if, after returning to work from a period of industrially-caused disability and a need for medical treatment, the employee’s repetitive work activities again result in injurious trauma - i.e., if the employee’s occupational activities after returning to work from a period of temporary disability cause or contribute to a new period of temporary disability, to a new or an increased level of permanent disability, or to a new or increased need for medical treatment - then there are two separate and distinct cumulative injuries that cannot be merged into a single injury (Lab. Code, §§ 3208.1, 3208.2, 5303; *Coltharp, supra*, 35 Cal.App.3d at p. 342); and

(2) if, the employee’s occupational activities after returning to work from a period of industrially-caused disability are not injurious - i.e., if any new period of temporary disability, new or increased level of permanent disability, or new or increased need for medical treatment result solely from an exacerbation of the original injury - then there is only a single cumulative injury and no impermissible merger occurs. (Lab. Code, §§ 3208.1, 3208.2, 5303; *Austin, supra*, 16 Cal.App.4th at p. 235.)

#### IV.

Here, determination of whether applicant sustained a specific, cumulative, or multiple injuries requires medical evidence, so that the WCJ correctly deferred the issues and ordered development of the record. Without substantial medical evidence, it is premature to consider whether one of the cases is duplicative and/or whether the pleadings should be deemed amended according to proof. Since the WCJ found that applicant’s period of hazardous exposure is up to December 1, 2023 based on the parties’ stipulation, the issue of whether the case was timely filed is likely moot, since by definition a cumulative injury is up to the last date of hazardous exposure and pleadings may be amended according to proof. We again emphasize that determination of whether an injury is AOE/COE is analytically distinct from the question of injury to individual body parts. This is because the ultimate conclusion as to which body parts were injured during the

period of hazardous exposure will be based on the evidence, and not the allegations. We also note that if the subsequent medical evidence demonstrates that there is more than one cumulative injury, the date of that medical reporting would likely be the date of knowledge, which in turn determines the section 5412 date of injury.

Accordingly, we order that the F&O is corrected to add a heading over the Orders containing the case numbers and we deny the Petition for Reconsideration.

For the foregoing reasons,

**IT IS ORDERED** that Amended Findings and Orders (F&O) issued by a workers' compensation administrative law judge (WCJ) on December 2, 2025 is **CORRECTED** to add a heading containing ADJ18796354 and ADJ18797375 over the Orders.

**IT IS FURTHER ORDERED** that the Petition for Reconsideration/Removal is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

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

**/s/ KATHERINE WILLIAMS DODD, COMMISSIONER**



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

**April 14, 2026**

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

**JUAN LUNA  
PARK GUENTHART  
FRANCO MUNOZ  
WINTERSTEEN CASAREZ LAW CORPORATION**

**AS/oo**

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

**REPORT AND RECOMMENDATION ON DEFENDANT’S PETITION FOR  
RECONSIDERATION OR IN THE ALTERNATIVE, REMOVAL  
AND  
NOTICE OF TRANSMISSION TO THE RECON UNIT**

**INTRODUCTION**

By a timely and verified Petition for Reconsideration and in the Alternative, Removal, (Petition) e-filed on and dated December 29, 2025, defense counsel seeks reconsideration or removal of the Amended Findings & Orders with Opinion on Decision (Amended F&O) dated and served on December 2, 2025. That Amended F&O, pursuant to DWC Rule 10961, rescinded a prior Findings, Award & Orders with Opinion on Decision dated October 22, 2025, in response to defendant’s earlier Petition for Reconsideration dated November 17, 2025. That original FA&O did include findings as to the cumulative date of injury and what body parts were found to be industrial. In relevant part, the Amended F&O which superseded and replaced that earlier FA&O, and was much more limited, *only found that the medical record* needs to be developed with respect to Applicant’s claim of alleged cumulative injury through December 1, 2023, to his cervical spine, thoracic spine, lumbar spine, bilateral shoulders, and bilateral upper extremities, and primarily in the form of the bilateral carpal tunnel syndrome, with respect to the QME, Dr. Ryan Derby. All other issues, including findings regarding the date of cumulative injury under Labor Code 5412, and the injured body parts in the first case, ADJ18796354, and whether the stipulated specific injury in the second case, ADJ18797375, should be viewed as part of one cumulative injury, *were deferred*, pending this development of the record.

I apologize to all for the delay in submitting this Report & Recommendation. I note the amendment of Labor Code section 5909, effective as of July 2, 2024, and to be repealed as of July 1, 2026, indicates: ”(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.” The date of transmission of this case to the Board is the date of service of this Report and Recommendation.

Defendant’s second Petition dated December 29, 2025, generally alleges: 1. The Amended F&O was the result of the WCJ acting in excess of its powers; 2. The evidence does not justify the Findings of Fact; 3. The Findings of Fact do not support the Order; and 4. New material evidence has been discovered, i.e., a QME re-exam report by Dr. Derby dated December 23, 2025, which was not in existence at the time this matter was submitted. (*Id.* at p. 1.) More specifically, it argues

that the F&O is “facially invalid” and fails to satisfy the requirements of Labor Code section 5313, which has caused “irreparable harm to the defendant.” (*Id.* at p. 2.) It further argues the Amended F&O and the Opinion on Decision in ADJ18796354, are “materially inconsistent such that the entirety of the decision is “ambiguous, unactionable, and unenforceable by either party” and is silent as to the issues in ADJ18797375. (*Id.* at p. 3.) Finally, it argues that the evidence supports a single cumulative injury “with two temporary exacerbations subsumed within it” (*Id.* at pp. 4-6), and that the date of the cumulative injury in ADJ18797375, should be found to be May 12, 2022. (*Id.* at pp. 6-7.)

Applicant’s attorney has not to date filed Answers with respect to either defendant’s original Petition for Reconsideration or to the second and currently pending Petition.

### **BACKGROUND**

These two claims were tried together over the course of two days, May 5, 2025, and July 14, 2025. (See respective Minutes of Hearing and Summary of Evidence (MOH/SOE) for those two dates.) The Applicant was the only witness, and he testified on both days. (See MOH/SOE of 5/5/25 at pp. 7-12, and MOH/SOE of 7/14/25 at pp. 4-11.) In general, I found him to be credible, if not the ideal medical historian, particularly with respect to medical treatment that pre-dated his employment at Tesla, which began in approximately August of 2020. The matter was submitted on July 25, 2025 at 5:00 PM, at the parties’ joint request, to allow them to submit post-trial briefs. The issues for determination in the first case, ADJ18796354, a denied cumulative trauma claim through December 1, 2023, related to that Tesla employment, involving alleged injuries to the cervical spine, thoracic spine, lumbar spine, bilateral shoulders, bilateral arms, bilateral hands and fingers, bilateral wrists, and bilateral elbows were: 1. Injury AOE/COE; 2. If cumulative industrial injury is found, what body parts are industrial; 3. If cumulative industrial injury is found, the date of injury pursuant to Labor Code section 5412, based on the facts and medical evidence; and 4. Depending on the date of injury found, whether the claim is barred by the statute of limitations and/or laches. (MOH/SOE dated 5/5/25 at p. 2.) All other issues were deferred.

The issues for determination in the second case, ADJ18797375, a specific injury dating from April 18, 2022, which is accepted for right upper extremity, right trapezius and right shoulder, and for claimed but not currently accepted injuries to the lumbar spine, thoracic spine, and cervical spine, are: 1. Whether this is in fact a specific injury as originally plead by Applicant’s attorney,

or should be found to be a cumulative injury based on the medical evidence; and 2. Once the date of injury is determined, what body parts were injured AOE/COE. (MOH/SOE dated 5/5/25 at p. 3.)

The reporting QME, pain management specialist, Ryan Derby, M.D., issued 3 reports: an initial report dated August 19, 2024, a supplemental dated February 28, 2024, and a re-exam report dated April 15, 2025. (Joint Exhibit 101.) He was deposed on November 13, 2024. (Joint 102.) In his initial report dated August 19, 2024, he diagnosed: 1. Cervical radiculopathy with right sided severe foraminal stenosis at C7-T1, and on the left at C3-4 and C4-5, as noted in the MRI report dated January 26, 2024 (Joint 108, Derby report 8/19/24, as summarized at pp. 17-18); 2. Previous C5-7 anterior fusion; 3. Thoracic spine sprain with mild disc degeneration reported on 1/30/24 MRI; 4. Lumbar spine sprain; 5. Right shoulder subacromial deltoid bursitis; 6. Right shoulder strain/sprain; 7. Left shoulder subacromial deltoid bursitis; and 8. Left shoulder strain/sprain. (Joint 101, Derby report of 8/19/24 at p. 26.) He further opined that these injuries were not yet permanent and stationary/MMI. (*Id.*) He recommended a cervical epidural injection, referral to spine surgeon for evaluation and treatment, bilateral shoulder MRIs, a lumbar spine MRI, and recommended a re-exam in 6-9 months. (*Id.* at p. 27.)

In discussing the plead injuries, Dr. Derby found a specific injury to the cervical spine and right shoulder on April 18, 2022, stating “It is within reasonable medical probability that trying to forcefully loosen a large cylinder that was stuck involved excessive strain in a twisting motion of the [right] shoulder and cervical spine that generated instantaneous forces exceeding physiological limits resulting in injury. (*Id.* at p. 28.) This injury resulted in Zurich paying TTD from May 12, 2022 through June 10, 2022 at the rate of \$1,320.00 per week, and in the total amount of \$5,091.42. (MOH/SOE dated 7/14/25, Stipulation (a) at p. 2.) Per Dr. Derby, this injury was treated conservatively which resulted in “significant recovery,” and the Applicant was returned to work full duty after TTD ended. (Joint 101, Report of 8/19/24 at p. 24.)

Dr. Derby also found an industrial cumulative injury through December 1, 2023, *to the cervical, thoracic and lumbar spine*, and to the bilateral shoulders, due to his job duties as a tool and die specialist, which included continuous lifting of heavy machine parts and molds, hammering, and forcefully loosening stuck machine part molds. (*Id.* at p. 29.) There was no reference to or explicit finding of injury AOE/COE to the right shoulder on a cumulative basis. All

other issues were deferred, including work restrictions, which were left to the primary treating physician (PTP). (*Id.* at p. 30.)

In his supplemental report dated February 28, 2025 (Joint 101, Report of 2/28/25), Dr. Derby reviewed and summarized an additional 400 pages of records, including the previously requested MRI's of the shoulders and lumbar spine. (*Id.* at pp. 2-16.) His previous diagnoses were unchanged, and were supplemented with a new diagnosis of bilateral carpal tunnel syndrome based on EMG findings dating from 9/4/24. (*Id.* at p. 16.) In that report, he summarizes his prior report of August 19, 2024, as finding a cumulative injury to cervical, thoracic, and lumbar spine, as well as the bilateral shoulders and upper extremities. (*Id.* at pp. 16-17.) Additionally, he changed his prior opinion that there was a specific injury on April 18, 2022, and May 4, 2022, for that matter. Specifically, he now opined that:

“While the applicant has claimed specific injuries on April 18, 2022 and May 4, 2022, these incidents are more accurately characterized as exacerbations or flares of pain within the ongoing CT process rather than distinct injuries. The natural progression of cumulative trauma includes intermittent symptom aggravation that temporarily improves before ultimately becoming intolerable, which aligns with the applicant's reported history of gradual worsening despite periods of relief. Therefore, within reasonable medical probability, the applicant's claimed specific injuries are best understood as part of one continuous trauma rather than separate events.” (*Id.* at p. 17.)

He later indicates in the causation section, i.e., that his opinion there was only one cumulative injury and no specific injuries, remained unchanged, since that was not in fact, his prior opinion. (*Id.*) He notes that among the newly provided records were an upper extremity EMG/NCV study dated September 4, 2024, documenting bilateral cervical radiculopathy and moderate to severe bilateral carpal tunnel syndrome, and December 5, 2024 MRI's of the bilateral shoulders reportedly documenting “full-thickness rotator cuff tears and labral pathology,” which he comments further supports a finding of cumulative injury. (*Id.*) In discussing his one cumulative injury finding/opinion, he states with respect to the plead specific injury on April 18, 2022,

“[T]he incident appears to be the proverbial “straw that broke the camel's back” representing an acute exacerbation of an ongoing cumulative trauma process rather than a truly separate, standalone injury. Thus, within reasonable medical probability, the applicant's condition is best understood as the result of a single continuous cumulative trauma rather than distinct specific injuries. Additionally, the applicant initially improved with conservative treatment and returned to full

duty without restrictions, which aligns with a temporary exacerbation rather than a new injury.” (*Id.* at p. 18.)

Dr. Derby was deposed on November 13, 2024. (Joint 102.) The relevant highlights of that testimony are as follows. He does not have a first-hand recollection of how the Applicant described the nominal April 18, 2022, and May 4, 2022 specific injuries, but his report would have reflected the history he was provided. (*Id.* at pp. 7-9.) He reaffirmed his opinion that there was only one long cumulative injury, rather than specific distinct injuries. (*Id.* at p. 10.) When asked about whether there might be more than a single cumulative injury, Dr. Derby reaffirmed his prior one cumulative injury opinion, but hedged somewhat, and said he would have to talk with the Applicant in more detail. (*Id.* at p. 12.) He was aware of Applicant’s prior cervical fusion based on his history, but did not review medical records related to that surgery and/or know the context of that surgery. (*Id.* at pp. 12-13.)

He also reaffirmed his prior opinion that the body parts injured in the one cumulative injury he finds through December 1, 2023, were cervical spine, thoracic spine, lumbar spine, and bilateral shoulders. (*Id.* at p. 13.) He was asked about Applicant’s prior treatment for his neck and/or upper back he received at Spine Stop in 2018 and 2019 in Tennessee before he moved to California, but could not recall those specifics. (*Id.* at pp. 15-17.) He conceded that a review of the related medical records and whether the Applicant worked in construction before starting at Tesla, could potentially change his med/legal opinions. (*Id.* at p. 18.)

When asked if he believed the Applicant to be a good historian, Dr. Derby responded that he does not recall any inconsistent reporting and that he did not have any reason to think the Applicant was not a reliable historian. (*Id.* at p. 22.) He noted the Applicant had multiple flare-ups over time, and that Mr. Luna’s perception of whether there was one continuous cumulative injury, could have been “distorted” for that reason. He agreed that review of additional records and a re-exam would be necessary to address defendant’s question as to whether there might be more than one cumulative injury, and also to determine if the Applicant had reached MMI status. (*Id.* at p. 24.)

On cross-examination, he reaffirmed that his overall opinion that based on the current record there was only one continuous cumulative injury, remained unchanged. (*Id.* at p. 26.) He conceded that if he reviewed additional medical records, it was possible that any prior specific injuries and/or potential additional cumulative injuries that might be found, could be inextricably

intertwined, to the effect they could not be distinguished. (*Id.*) On re-direct, and later on re-cross, and re-re-cross, he reaffirmed his opinion that based on the record as it currently existed, there was only one injury, a cumulative injury through December 1, 2023. (*Id.* at pp. 32-33., 37, 40-41.)

Dr. Derby re-examined the Applicant on March 19, 2025, and issued a related report dated April 15, 2025. (Joint 101, Report of 4/15/25.) That 59-page report included a review and summary of 2,785 pages of medical records, many of which were referenced at the time of his deposition, and which he had not previously reviewed. (*Id.* at pp. 2, 7-45.) These included records related to an interim right carpal tunnel release with tenosynvectomy of the flexor tendon in the palm, and right submuscular ulnar nerve transposition performed by Dr. Basil Besh on January 22, 2025, and the transcript of his own deposition testimony on November 13, 2024. His diagnoses were unchanged from his initial report, but oddly, the bilateral carpal tunnel diagnosis which was part of his second report, and the later carpal tunnel surgery whose records which he also summarized, was not included and/or mentioned as part of the formal diagnosis in this final report. (*Id.* at p. 52.)

As part of this re-exam, he concludes the Applicant is not yet MMI, noting the then recent right carpal tunnel release and right sub-muscular nerve transposition surgery, which took place on January 22, 2025. (*Id.* at p. 53.) His prior opinion that there is only one cumulative injury through December 1, 2023, and no distinct standalone specific injuries appears unchanged, although much of the discussion appears to be repeated language pulled from his earlier reports. (*Id.* at pp. 52, 54-56.) His discussion of the new medical records and their significance can be found in the section under apportionment, where he notes Applicant's prior industrial injuries at Eagle Industries in 1999 and 2011, which related to a left middle finger injury and mid-back strain, and upper/right back/thoracic pain respectively. (*Id.* at pp. 56-57.) He references the cervical fusion surgery at C5-6 in 2017, which was intended to address "persistent neck, upper back, and right upper extremity pain" related to his employment at FPI Aviation. (*Id.* at p. 56.) He also notes the medical records reflect that post-neck surgery, chronic cervical spine symptoms persisted, including episodes of neck pain and radicular symptoms in 2020 and 2021, which included bilateral upper extremity numbness and tingling, and a diagnosis of left CTS by Kaiser in November of 2021. (*Id.* at pp. 56-57.) Records from Urgent Care in 2020 reflect treatment sought for right gluteal and right shoulder pain, with radicular symptoms in his right upper extremity. (*Id.* at p. 57.) Chiropractic treatment in the form of multiple sessions was noted between 2018 and

2019, for complains related to the cervical, thoracic, and lumbar spine, suggesting a pattern of ongoing spinal complaints predating the Tesla employment and claimed Tesla injuries. (*Id.*)

He concludes by stating “[T]he applicant has a well-documented history of cervical spine pathology, including prior surgery, recurrent thoracic spine complaints, upper extremity radicular symptoms, and carpal tunnel syndrome, all of which were present to varying degrees prior the claimed industrial injuries on April 18, 2022 and December 1, 2023. These preexisting conditions will likely warrant apportionment. When the applicant reaches a point of maximal medical improvement, I will provide the parties with my final opinion on apportionment and all other salient medical-legal issues.” (*Id.*)

As referenced in the Petition at p. 2, it appears that the QME Dr. Derby re-examined the Applicant on December 10, 2025, which resulted in a 31-page report dated December 23, 2025, which the defendant e-filed on December 29, 2025. Obviously, that report post-dates the submission in this matter, and is not part of the record for the current decision. That report notes that since his last exam, the Applicant underwent right elbow and right wrist surgery on January 22, 2025, right shoulder surgery on April 3, 2025, and was scheduled for left shoulder surgery on December 19, 2025. (*Id.* at pp. 4-5.) In light of those relatively recent surgeries, it also found that the Applicant was not yet P&S. (*Id.* at p. 24.) Again, however, that report is not in evidence with respect to the current F&O, which is the subject of the current Petition for Reconsideration.

### **DEFENDANT’S CLAIMS OF ERROR**

Defendant’s initial Petition for Reconsideration dated November 17, 2025, raised a number of valid points with respect to the initial Findings, Award and Orders (FA&O) which issued on October 22, 2025, which I concede had some problems, and which prompted me to issue the Amended Findings & Orders (F&O) which issued on December 2, 2025, and *rescinded all the substantive findings of the FA&O*, made a new finding that the record needed to be developed with respect to the cumulative injury claim in ADJ18796354, in the form of additional reporting and/or deposition testimony from the QME Dr. Derby, especially with respect to his apparent opinion (but that was not explicit and/or incompletely discussed), that the bilateral shoulders, and bilateral upper extremities, in the form of bilateral carpal tunnel syndrome and bilateral cubital tunnel syndrome are part of the single industrial cumulative injury he finds, and *deferred all other issues pending that development of the record.*

Defendant's second Petition for Reconsideration appears to assume that the prior substantive findings in the original FA&O remain in effect, but that is not the case. Most of its substantive arguments and claims of error relate to the prior and now rescinded findings that there was a cumulative trauma injury to certain body parts, with a legal date of injury through December 1, 2023, its findings for the specific body parts injured AOE/COE as to the specific injury dating from April 18, 2022. In short, the only substantive finding and order in the F&O dating from December 2, 2025, is that the record needs to be developed with respect to the cumulative injury, and that all other previously submitted issues are deferred pending that development.

An order to develop the record is a non-final order, which is not subject to a Petition for Reconsideration, but is subject to a Petition for Removal, and since defendant in its Petition plead it in the alternative, I will treat the current Petition as one for removal of the order to develop the record. Removal is an extraordinary remedy which will not be granted absent a showing that *substantial prejudice or irreparable harm will result if removal is not granted and that reconsideration will not be an adequate remedy after the issuance of a final order, decision or award.* (Cal. Code Regs., tit. 8, § 10955(a); *Cortez v. Workers' Comp. Appeals Bd.* (2006) 136 Cal.App.4th 596, 600, fn. 5 [71 Cal.Comp.Cases 155, 157, fn. 5]; *Kleeman v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 274, 281, fn. 2 [70 Cal.Comp.Cases 133, 136, fn. 2].)

Defense counsel alleges in the Petition that the defendant will suffer "irreparable harm" absent reconsideration or removal, seemingly arguing that because I deferred the issues and a ruling in ADJ18797375, i.e., the accepted specific injury dating from April 18, 2022, at least as to the right upper extremity, right trapezius, and right shoulder (additional claims of injury as part of that date of injury to the lumbar spine, thoracic spine, and cervical spine, was an issue for determination that was deferred pending development of the record, See MOH/SOE dated 5/5/25 at p. 3, Stipulation No. 1.), somehow there is an adverse decision pursuant to Labor Code section 5815, against the defendant who raised that issue. (Petition at pp. 2-3.) I fail to see or understand this argument. While that section of the Labor Code reads, "Any issue not so determined will be deemed decided adversely as to the party in whose interest such issue was raised." However, in this case *I explicitly deferred a finding on all issues*, including those submitted in ADJ18797375, pending the development of the record I found was necessary in ADJ18796354. This means the issues were not ignored or unaddressed by accident, but were explicitly deferred, which in my judgment renders this section inapplicable to this case on these facts. There was certainly no

intention on my part to intend any kind of adverse finding against the defendant in either case, when I ordered the record needed to be developed in the cumulative injury claim, due to ambiguous and/or incomplete reporting on the part of the QME, Dr. Derby on issues related to what exact parts of the bilateral upper extremities were industrial and part of the single cumulative injury he finds.

Assuming Labor Code section 5815 does not apply to and/or have an effect on this case, defense counsel in his Petition provides no other arguments and/or rationale as to how or why the F&O irreparably harms the defendant, and/or why a Petition for Reconsideration from a final F&A would not be an adequate remedy. I certainly do not perceive any irreparable harm, and all issues that will eventually be determined after the record has been developed, can be adequately addressed in a subsequent Petition for Reconsideration. There is no irreparable harm or prejudice to the defendant, and the F&O imposes no obligations or liabilities on the defendant beyond those that currently exist. In fact, as noted above, the balance of the Petition in essence relates to findings in the original FA&O that were rescinded in the subsequent F&O. To the extent that I re-used much of the Opinion on Decision in that F&A from the original FA&O, I apologize to the extent it was confusing or inconsistent with the issues being deferred and I should have more carefully edited and/or deleted those portions. In any event, the Opinion on Decision is not subject to Reconsideration and/or Removal; only the actual Findings and/or Awards and/or Orders are appealable.

### **RECOMMENDATION**

In sum, for the reasons explained above, I treat defendant's current Petition for Reconsideration and in the Alternative, Removal, as one for removal of the only substantive finding and order in the F&O dated December 2, 2025, which was that the record needed to be developed with the QME as to the cumulative trauma claim, with deferral of all other issues in the interim. Accordingly, it is subject to the standard of whether that finding and order irreparably harms the defendant and that a later Petition for Reconsideration after final findings would not be an adequate or sufficient remedy. As discussed above, I do not believe this order irreparably harms the defendant and/or that a later Petition for Reconsideration after a final Findings & Award, would not adequately protect the defendant's rights, and assuming that the Board treats defendant's Petition as one for Removal, I recommend that it be denied. Once the record has been developed,

the matter can be set for an MSC, and ultimately resubmitted, which I expect will include subsequent evidence, such as the QME re-exam report of Dr. Derby dated December 23, 2025, that was referenced in the Petition, and additional QME reports and/or deposition testimony addressing the shoulders and upper extremities and whether they are part of the single cumulative industrial injury he finds at Tesla.

**NOTICE OF TRANSMISSION TO THE APPEALS BOARD**

On February 13, 2026, this matter is transmitted to the Reconsideration Unit of the Appeals Board.

Dated: February 13, 2026

Thomas J. Russell, Jr.  
WORKERS' COMPENSATION  
ADMINISTRATIVE LAW JUDGE