WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARTIN PEREZ, *Applicant*

vs.

HARRIS REBAR; BITCO INS. / OLD REPUBLIC GENERAL INSURANCE CORPORATION, administered by GALLAGHER BASSETT, *Defendants*

Adjudication Number: ADJ13594888
San Jose District Office

OPINION AND ORDERS GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration of the "Third Amended Arbitrator's Findings and Award" (F&A) issued on January 30, 2026, by the Ironworkers Workers' Compensation Alternative Dispute Resolution Program arbitrator (WCA).[1] The arbitrator found, in pertinent part, that applicant sustained an industrial cumulative injury through the period ending on October 1, 2017, to his neck, thoracic spine, lumbar spine, bilateral shoulders, bilateral upper extremities, bilateral hands, bilateral wrists, bilateral knees, bilateral feet, bilateral ankles, and psyche. The arbitrator further found that applicant's injury caused applicant to sustain 94% permanent partial disability and that 100% of applicant's disability was industrially caused, without apportionment. The arbitrator found that applicant was amenable to vocational rehabilitation and that he could compete in the open labor market, and thus, applicant failed to rebut the Permanent Disability Ratings Schedule (PDRS) and was not permanently totally disabled.

Applicant contends that the arbitrator erred in excluding consideration of vocational reporting, which included psychological work restrictions because impairment based upon such

[1] Applicant filed multiple petitions for reconsideration from the various Findings and Awards, which the arbitrator amended two times. We will treat these petitions as consolidated into a single petition from the Third Amended F&A.

restrictions is not excluded by Labor Code[2] section 4660.1(c). Applicant further contends that the arbitrator considered "impermissible factors" in not relying upon the vocational reporting including impermissible vocational apportionment. Applicant further contends that he is permanently and totally disabled because he is not capable of vocational rehabilitation on an industrial basis and not capable of competing for employment on the open labor market.

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

We have considered the allegations of the Petition for Reconsideration, the Answer, and the contents of the arbitrator's Report. Based on our review of the record we will grant applicant's petition for reconsideration and as our Decision After Reconsideration, we will rescind the January 30, 2026 Third Amended F&A, and substitute a new F&A, which finds that applicant is permanently and totally disabled and orders that Defendant's Exhibit E is admitted into evidence.

FACTS

Applicant worked as an ironworker for Harris Rebar during the cumulative period ending on October 1, 2017, when he sustained an industrial injury to his cervical spine, thoracic spine, lumbar spine, bilateral shoulders, bilateral upper extremities, bilateral hands, bilateral wrists, bilateral knees, bilateral feet, bilateral ankles, and to his psyche. (Third Amended Arbitrator's Findings and Award, January 30, 2026, p. 1, lines 17-22.)

While multiple issues were listed for trial, the sole issue on reconsideration is applicant's level of permanent disability and specifically, whether the WCA erred in failing to find that applicant is permanently totally disabled. (Transcript of Proceedings, October 29, 2025, p. 6, lines 1-7.)

1. Medical Evidence

As this matter proceeded through arbitration, and pursuant to the terms of the arbitration agreement the parties each retained their own medical experts.

Applicant retained three qualified medical evaluators (QME). Mechel Henry, M.D., reported on applicant's orthopedic complaints and authored seven reports in evidence, which were admitted as a singular exhibit. (Applicant's Exhibit 1.) Robert Shorr, M.D., reported on applicant's neurological complaints and authored five reports in evidence, which were also admitted as a

[2] All future references are to the Labor Code unless noted.

singular exhibit. (Applicant's Exhibit 2.) Joshua Kirz, Ph.D., reported on applicant's psychological complaints and authored two reports in evidence, which were also admitted as a singular exhibit. (Applicant's Exhibit 3.) [3]

Dr. Henry took a history of cumulative injury as follows:

> He was an ironworker since 1995 or 1996, working 8-12 hours a day, five days a week, five days in a row with lunch and rest breaks, working 100% outdoors. It was a very physical job. He had to place wires, metal frames for bridges and buildings, various floors, 3, 18 and 24 foot beams, and up to 100-300 pounds with others all day long. The heaviest thing he had to lift by himself was up to 100 pounds. He had to lean forward and bend while lifting. Currently, he can lift a small bag of groceries 15 pounds to 20 pounds for a short period of time. His job required he reach above, below, and at shoulder level, move his feet constantly, use his hands constantly. He was exposed to construction sites and outdoor environment and uneven ground and heights and hazardous equipment and construction sites.

(Applicant's Exhibit 1, Report of Mechel Henry, M.D., May 26, 2021, p. 5.)

Dr. Henry ultimately diagnosed applicant as follows:

> 1. Cervical, thoracic, and lumbar strain; MRI of the lumbar spine without contrast from August 1, 2022, showed anterolisthesis was 1 mm at L5-S1; chronic pars defect on the left at L5; disc degeneration was mild to moderate at L5-S1 and mild from L1-2 through L4-5; L5-S1 small right foraminal disc extrusion; mild left and mild to moderate right foraminal stenosis; interspinous ligament sprain was mild at L4-5.
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> 2. Bilateral knee DJD, right greater than left; MRI of right knee without contrast from August 2, 2022 showed chronic oblique tear at the posterior horn of the medial meniscus extending to the inferior articular surface with a small parameniscal cyst at the posterior medial joint line measuring 1.4 x 0.2 x 1.0 cm, mild chondromalacia at the inferior medial femoral condyle; mild trochlear chondromalacia; mild infrapatellar bursitis; tiny popliteal cyst; no ligament tear; MRI of left knee without contrast from August 2, 2022 showed oblique tear at the posterior horn of the medial meniscus extending to the inferior articular surface with a tiny parameniscal cyst at the posterior medial joint line measuring 0.3 x 0.2 x 0.3 cm, no medial compartment arthrosis; mild trochlear chondromalacia; small popliteal cyst; no ligament tear.
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> 3. Bilateral ankle chronic Achilles tendinitis; MRI of right ankle without contrast from August 1, 2022 showed mild chronic insertional tendinosis with tenosynovial

[3] In the future, parties should avoid submitting multiple reports as a single exhibit as it makes pinpoint citation to the document unnecessarily difficult. If parties do wish to have a conglomerated exhibit consisting of either one medical facility or one author with multiple reports and multiple documents labeled with the same page number, they should, at a minimum, include, as is applicable, either bates stamps, or a cover page for the exhibits identifying the name f the facility or author, the date of each medical report, and the number of pages per report

reactive fluid or tenosynovitis inframalleolar posterior tibialis tendon; mild chronic plantar fasciitis; remote low to intermediate grade sprain deep deltoid ligament fibers; mild prominence of the posterior process of the talus with adjacent os trigonum and associated surrounding fluid signal or synovitis could be associated with posterior ankle impingement; minor Gruberi bursitis; MRI of left ankle without contrast from August 1, 2022 showed mild chronic insertional tendinosis with tenosynovial reactive fluid or tenosynovitis inframalleolar posterior tibialis tendon; suspected remote low to intermediate grade sprain with partial-thickness injury anterior talofibular ligament; mild chronic plantar fasciitis; remote low to intermediate grade sprain deep deltoid ligament fibers with question of minor interstitial tearing or degeneration; prominence of the posterior process of the talus with surrounding fluid signal or synovitis could be associated with posterior ankle impingement.

4. Bilateral carpal tunnel status post decompression.

5. Bilateral medial and lateral epicondylitis.

6. Bilateral ulnar neuritis.

7. Bilateral shoulder tendinitis, left greater than right; MRI of left shoulder without contrast from August 2, 2022 showed mild capsulitis; moderate supraspinatus tendinosis with a partial articular surface tear involving less than 50% of the fibers measuring 0.2 x 0.3 cm with 0.5 cm of retraction of the torn articular fibers; moderate infraspinatus tendinosis with mild interstitial tearing of the superior fibers measuring 0.4 x 0.2 x 0.2 cm; posterior superior labral tear from 9:00 to 10:00; moderate tendinosis of the intra-articular portion of the long biceps tendon and moderate biceps tenosynovitis; MRI of right shoulder without contrast from August 2, 2022 showed mild capsulitis; moderate supraspinatus tendinosis with a partial articular surface tear involving less than 50% of the fibers measuring 0.7 x 0.6 cm with 0.3 cm of retraction of the torn articular fibers; moderate infraspinatus tendinosis with interstitial tearing of the distal fibers measuring 0.2 x 0.2 x 0.3 cm; degenerative posterior superior labral tear from 9:00 to 11:00; moderate tendinosis of the intra-articular portion of the long biceps tendon with a tiny interstitial tear measuring 0.2 x 0.1 x 0.2 cm and mild biceps tenosynovitis.

8. Right CMC osteoarthritis.

9. Sleep insomnia

10. Sexual dysfunction

11. Depression/anxiety - (supported by Josh Kirz, PhD)

(Applicant's Exhibit 1, Report of Mechel Henry, M.D., May 22, 2024, pp. 11-12.)

Dr. Henry opined that based upon the history of job duties taken, the cause of applicant's injuries and impairments were 100% industrial from working as an ironworker for over 20 years. (*Id*. at pp. 13-15.) Dr. Henry assigned work restrictions as follows: can stand, walk, sit, bend, squat, climb, twist, reach, crawl, drive, grasp, and push or pull up to 1 to 2 hours per day maximum. (*Id*. at p. 15.) Dr. Henry further limited applicant lifting and carrying no more than 10 pounds for more than 1 to 2 hours per day. (*Id*. at p. 16.)

Dr. Henry reviewed five subrosa films of applicant and commented upon them as follows:

> In reviewing the surveillance videos, they show Mr. Perez walking and briefly walking / jogging and wearing a knee brace. Mr. Perez goes with his wife at his own pace. The rest of the videos show Mr. Perez performing ADLs, which would be expected with his diagnosis and do not change any of my prior opinions.

(Applicant's Exhibit 1, Report of Mechel Henry, M.D., February 20, 2025, p. 2.)

Dr. Shorr evaluated applicant's neurologic complaints, including radicular complaints. Dr. Shorr diagnosed applicant with multiple issues including cervical spinal stenosis and severe ongoing left carpal tunnel syndrome per EMG results. (Applicant's Exhibit 2, Report of Robert Shorr, M.D., September 11, 2019, p. 30.)

Dr. Shorr did not discuss work restrictions and simply found that applicant could not return to his prior occupation. (Applicant's Exhibit 2, Report of Robert Shorr, M.D., March 28, 2023, p. 18.)

Dr. Kirz took a history of psychological complaints as follows:

> Mr. Perez became tearful when questioned about his mood. He described his mood as extremely depressed and anxious. He feels worthless because of his inability to work or contribute financially. He has no interest or motivation to do anything. He tends to be irritable with others and isolates himself socially. He denied suicidal thoughts, but feels hopeless about his situation.
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> Mr. Perez sleeps poorly, typically only five hours per night. He attributed his sleep difficulties to the combination of pain and worry about his situation. He described his memory and concentration as poor.
>
> Mr. Perez described constant anxiety and rumination on the effects of injury. He reiterated his worries about the future and his inability to work. The only kind of work he knows how to do is iron work, yet he can no longer perform such work. He has panic-like episodes approximately once per week. These are triggered when he is particularly frustrated by his functional limitations.

(Applicant's Exhibit 3, Report of Joshua Kirz, Ph.D., April 17, 2023, p. 3.)

Dr. Kirz diagnosed applicant with major depressive disorder and somatic symptom disorder with predominant pain. (*Id*. at p. 14.) Applicant's psychological injury was found to be 100% industrial without apportionment. (*Id*. at pp. 15-16, 19.) Dr. Kirz assigned applicant a global assessment of functioning (GAF) score of 57. (*Id*. at p. 18.)

Dr. Kirz discussed work restrictions as follows:

> 1. Ability to comprehend and follow instructions: Very Slight Impairment
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> 2. Ability to perform simple and repetitive tasks: Very Slight Impairment
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> 3. Ability to maintain a work pace appropriate to a given workload: Slight to Moderate Impairment
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> 4. Ability to perform complex or varied tasks: Impairment Slight to Moderate
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> 5. Ability to relate to other people beyond giving and receiving instructions: Slight Impairment
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> 6. Ability to influence people: Moderate Impairment
>
> 7. Ability to make generalizations, evaluations or decisions without immediate supervision: Slight to Moderate Impairment
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> 8. Ability to accept and carry out responsibility for direction, control and planning: Moderate Impairment

(*Id*. at pp. 18-19.)

Defendant retained two qualified medical evaluators (QME). Charles Xeller, M.D., reported on applicant's orthopedic complaints and authored four reports in evidence, which were admitted as a singular exhibit. (Defendant's Exhibit A.) Roy Curry, M.D., reported on applicant's psychological complaints and authored two reports in evidence, which were admitted as a singular exhibit. (Defendant's Exhibit C.)

Dr. Xeller diagnosed applicant with stenosis of the neck and bilateral carpal tunnel. (Defendant's Exhibit A, Report of Charles Xeller, M.D., July 21, 2021, p. 54.) He commented upon causation and apportionment, in total, as follows:

> I would accept that he has a cumulative industrial trauma with development of stenosis of his neck. However, in a 59-year-old gentleman some of that has to be apportioned to changes due to activities of daily living. I would say that 25% is pre-existing and 75 % is due to the heavy nature of his work.

> Again, the carpal tunnel is 100% industrial but his cervical degenerative changes 25 % not work related.

(*Id*. at p. 55.)

Dr. Xeller reviewed a medical history which included an MRI to the lumbar spine reported as follows:

> 08/01/2022 Radiology/Diagnostics MRI Lumbar Spine without Contrast – David Lefkowitz, MD Indication: Work-related injury October 1, 2017; low back pain and bilateral lower extremity radiculopathy for 7 years. Impression: 1) Anterolisthesis is 1 mm at LS -S1; chronic pars defect on the left at LS; disc degeneration is mild to moderate at LS -S1 and mild from Ll-2 through L4-5. 2) LS-51 small right foraminal disc extrusion; mild left and mild to moderate right foraminal stenosis. 3) interspinous ligament sprain is mild at L4-5. 4) Relationship of findings to the patient's injury is indeterminate.

(*Id*. at p. 6.)

Dr. Xeller commented upon impairment to the lumbar spine, in total, as follows: "I do not find impairments of his back, knees or ankles." (*Id*. at p. 54.)

Dr. Xeller assigned the following work restrictions: "As for work, he has a 10- pound lifting restriction and pulling/pulling (*sic*) restriction which I agree with which will take him out of his work with rebar." (*Ibid*.) After reviewing the subrosa video of applicant, Dr. Xeller modified his work restriction opinion to state that applicant could work with a sit / stand option with an overhead lifting restriction of 20 pounds. (Defendant's Exhibit A, Report of Charles Xeller, M.D., October 26, 2021, p. 6.) Then, upon viewing additional subrosa video, Dr. Xeller again modified his work restrictions to light duty with restrictions on maximum lifting and repetitive hand motion. (Defendant's Exhibit A, Report of Charles Xeller, M.D., November 1, 2023, p. 3.)

Dr. Curry concurred with Dr. Kirz on multiple issues including applicant's psychological diagnosis, industrial causation, and applicant's GAF score of 57. (Defendant's Exhibit C, Report of Roy Curry, M.D., October 20, 2023, p. 36.)

Dr. Curry did not independently comment upon psychological work restrictions. (See generally, Defendant's Exhibit C.)

Dr. Curry reviewed the subrosa video and suggested that the activity on the video "calls in to question the accuracy of [applicant's] GAF[.]" (Defendant's Exhibit C, Report of Roy Curry, M.D., March 21, 2024, p. 2.) Dr. Curry deferred the issue of limitations and restrictions to the orthopedic evaluators. (*Ibid*.)

2. Vocational Evidence

Both parties retained vocational experts. Applicant entered three reports from Scott Simon into evidence, which were submitted as a single exhibit. (Applicant's Exhibit 6.)

Mr. Simon conducted vocational testing, which revealed that applicant operated at a 4th grade level in mathematics. (Applicant's Exhibit 6, Report of Scott Simon, M.S., April 5, 2022, p. 6.) Applicant scored between the 2nd and 3rd percentile in problem-solving ability. Applicant was at the 20th percentile in reading. (*Id*. at p. 7.)

Mr. Simon opined that applicant was not amenable to vocational rehabilitation due to the multiple work restrictions placed upon him, specifically noting: "*Even if he did participate in educational retraining there would not be an end goal. He cannot uphold a minimal exertional level jobs in the regional economy."* (*Id*. at pp. 19-20 (emphasis in original).) After reviewing applicant's labor market and the restrictions assigned by applicant's evaluators, Mr. Simon concluded that applicant was not able to compete in the open labor market. (*Id*. at pp. 29-30.)

Defendant offered one report from Eugene Van de Bittner into evidence. (Defendant's Exhibit E.) Although Exhibit E was offered into evidence, a ruling on its admissibility never issued. The arbitrator issued a finding of fact that applicant's petition to exclude the report was denied; however, no order admitting the exhibit issued. We will correct the record accordingly and issue an order that Exhibit E is admitted into evidence. Applicant objected to the admission of Exhibit E on the grounds that it does not constitute substantial evidence. Whether a medical-legal opinion constitutes substantial evidence goes to the weight of an opinion, not its admissibility. (Cal. Code Regs., tit. 8, § 10682(c).) Thus, the arbitrator was correct to consider Exhibit E in issuing his decision.

Dr. Van de Bittner concluded that based upon the work restrictions of Drs. Haber, Shorr, Henry and Xeller, applicant could perform multiple occupations on the open labor market. (Defendant's Exhibit E, Report of Eugene Van de Bittner, Ph.D., August 15, 2022, p. 77.) However, in the next sentence of the report, Dr. Van de Bittner states: "Mr. Perez would likely have no occupations to consider in the open labor market when considering the overall opinions of Dr. Henry." (*Ibid*.)

Dr. Van de Bittner ultimately opined that applicant is employable as follows:

> Among other things, in my opinion, Mr. Perez is employable at a variety of jobs in the open labor market when considering the work restrictions assigned by Dr. Henry, for reasons summarized in the Employability Analysis and Labor Market

> Opportunity Analysis sections above. Additionally, Mr. Perez is more employable when considering the work restrictions assigned by Dr. Xeller for reasons described in the Employability Analysis and Labor Market Opportunity Analysis sections above. **He is also employable based on the level of functional capacity demonstrated on the surveillance videos.**

(*Id*. at p. 90, emphasis added.)

DISCUSSION

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.

(§ 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, according to Events, the case was initially transmitted to the Appeals Board on February 10, 2026, and 60 days from the date of transmission is Saturday, April 11, 2026, which by operation of law means this decision is due by Monday, April 13, 2026. (Cal. Code Regs., tit. 8, § 10600.). This decision is issued by or on April 13, 2026, so that we have timely acted on the Petition as required by section 5909(a). Although the matter was retransmitted to the Appeals

Board a second time on February 26, 2026, out of an abundance of caution, we have calculated the 60-day deadline as running from the initial transmission.

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.

According to the proof of service for the Report and Recommendation by the arbitrator, the Report was served on February 26, 2026. The case was transmitted to the Appeals Board on February 10, 2026. Service of the Report and transmission of the case to the Appeals Board did not occur on the same day. Accordingly, and with this opinion, we have provided the parties with the notice of transmission date required by section 5909(b)(1).

II.

1. Errors in the arbitrator's opinion

Before addressing the issue of permanent total disability, we would first note that multiple errors exist in the opinion in this matter.

Pursuant to section 5272, arbitrators generally have the same duties and responsibilities as a workers' compensation judge (WCJ). Section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and 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].) 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." (*Hamilton*, *supra*, at p. 475.)

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).) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal.2d 122, 139.)

We first note a significant error exists in the arbitrator's rating, wherein the arbitrator issued a finding based upon a "range of evidence" approach. The arbitrator stated in his report:

> As stated above, the Arbitrator finds that the applicant's medical reports overstate the level of disability when considered in light of the sub rosa video, while the defense medical reports understate the disability when viewed in conjunction with the entire medical record and the sub rosa video. Accordingly, the Arbitrator finds that a range-of-the-evidence determination is appropriate.

(Report, p. 23, lines 11-15.)

A "range of evidence" approach is more frequently associated with older cases, when parties obtained competing QMEs and each QME's report constituted substantial evidence, which then formed a range from which the WCJ could decide. (*Blackledge v. Bank of America* (2010), 75 Cal.Comp.Cases 613, 625 (Appeals Board en banc) (rating must be based on substantial medical evidence).) Today, range of evidence is not often used, but remains permissible when deciding between competing reports, *both of which constitute substantial medical evidence*. When no report constitutes substantial evidence, there is no evidence from which a range can be formed. "Range of evidence" cannot be used merely to achieve equity, no matter how noble a goal that may be.

Here, the parties used competing QMEs as part of an arbitration carve-out agreement. However, the arbitrator's use of "range of evidence" was not proper. By the arbitrator's own determination, he was not presented with competing opinions on disability, both of which constituted substantial medical evidence. In his Report, the arbitrator expressly finds that neither report is substantial on the assignment of whole-person impairment. In such cases, an arbitrator may exercise their discretion and order development of the record. An arbitrator may not issue a

finding based upon a "range of evidence" when the reports that make up the range are found to be insubstantial.

Next, the arbitrator, in part, formed his opinion as to the range of evidence based upon the arbitrator's own opinions of applicant's physical abilities as demonstrated in the sub rosa videos. This is not proper as the assignment of applicant's impairment is a medical opinion, which requires expert medical evidence.

"[T]he 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." (*Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 839 [30 Cal.Comp.Cases 188]; see also, *Peter Kiewit Sons v. Industrial Acci. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831 [30 Cal.Comp.Cases 188] "[i]n a field which forces the experts into hypothesis, unaided lay judgment amounts to nothing more than speculation"].)

The requirement for expert medical evidence exists throughout workers compensation proceedings, including determination of temporary disability, permanent disability, apportionment, and causation of injury to name a few.[4] (See also, *Escobedo*, *supra*, [wherein the Appeals Board required that apportionment under section 4663 be established by substantial medical evidence].)

Generally, there are two uses of subrosa video in workers' compensation. First, subrosa can be sent to a medical evaluator with a request that the evaluator review any medical conclusions reached in light of the activities seen in the video. In such cases, the subrosa video is being used as *medical evidence* to establish the nature and extent of disability. This is precisely how the subrosa is being used in this case. The parties submitted the subrosa to the *medical experts* who issued their opinions accordingly. When presented with competing opinions, the role of the trier of fact is to determine which, if any, medical opinion constitutes substantial medical evidence. To

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[4] See e.g., *State Comp. Ins. Fund v. Workers' Comp. Appeals Bd. (Rodarte)* (2004) 119 Cal.App.4th 998, 1005 [59 Cal.Comp.Cases 579] (*Rodarte*); *County of San Bernardino v. W.C.A.B.* (*Nelson-Watkins*) (2018) 83 Cal. Comp. Cases 1282, 12830-1286 [2018 Cal. Wrk. Comp. LEXIS 46] (writ denied) [applicant's correlation of symptoms with work exposures insufficient to establish knowledge her condition was caused by employment]; *Hughes Aircraft Company v. Workers' Comp. Appeals Bd.* (*Zimmerman*) (1993) 58 Cal.Comp.Cases 220 [1993 Cal. Wrk. Comp. LEXIS 2853] (writ den.) [general medical advice that work stress was depleting applicant's immune system insufficient to confer knowledge for purposes of section 5412]; see also *Zenith Insurance Co. v. Workers' Comp. Appeals Bd.* (*Yanos*) (2010) 75 Cal. Comp. Cases 1303, 1305-1306 (writ denied) [2010 Cal. Wrk. Comp. LEXIS 208] [statute of limitations does not begin to run prior to applicant's knowledge she had sustained a cumulative trauma and that injury was work-related].

be clear, the trier of fact may find that a medical expert's summary of a video is inaccurate, which makes their opinion not substantial. However, the trier of fact may not inject their own opinion on impairment based upon activity seen in the video, as they are not a medical expert.

A second use of subrosa occurs where defendant seeks to impeach applicant's credibility through activities seen in the video, which defendant argues are incongruent with applicant's testimony or other evidence. In such cases the video is no longer being used as *medical* evidence, but instead it is being used as *factual* evidence of credibility. In such cases, it is proper for the trier of fact to determine based upon what is viewed in the video, whether factual inconsistencies impact credibility, but that is not the case here. The arbitrator does not discuss the issue of credibility anywhere within the Report.

However, and notwithstanding the errors noted above, we need not address applicant's partial disability rating as we are finding that applicant has proven permanent total disability in accordance with the fact.

2. Applicant established permanent total disability in accordance with the fact.

As our Supreme Court has explained:

> Permanent disability is understood as the irreversible residual of an injury. (Citation.) A permanent disability is one which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market. (Citation.) Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity.

(*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal. 4th 1313, 1320, 57 Cal. Rptr. 3d 644, 156 P.3d 1100 (Brodie).)

The court in *Ogilvie* further explained that the PDRS is rebuttable.

> Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

(*Ogilvie v. Workers' Comp. Appeals Bd*., 197 Cal. App. 4th 1262, 1277, 129 Cal. Rptr. 3d 704.)

The standard for finding permanent total disability via *Ogilvie* rebuttal follows:

> The proper legal standard for determining whether applicant is permanently and totally disabled is whether applicant's industrial injury has resulted in applicant sustaining a complete loss of future earning capacity. (§§ 4660.1, 4662(b); see also 2005 PDRS, pp. 1–2, 1–3.) …
>
> A finding of permanent total disability in accordance with the fact (that is complete loss of future earnings) can be based upon medical evidence, vocational evidence, or both. Medical evidence of permanent total disability could consist of a doctor opining on complete medical preclusion from returning to work. For example, in cases of severe stroke, the Appeals Board has found that applicant was precluded from work based solely upon medical evidence. (See i.e., *Reyes v. CVS Pharmacy*, (2016) 81 Cal. Comp. Cases 388 (writ den.); see also, *Hudson v. County of San Diego*, 2010 Cal. Wrk. Comp. P.D. LEXIS 479.)
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> A finding of permanent total disability can also be based upon vocational evidence. In such cases, applicant is not precluded from working on a medical basis, per se, but is instead given permanent work restrictions. Depending on the facts of each case, the effects of such work restrictions can cause applicant to lose the ability to compete for jobs on the open labor market, which results in total loss of earning capacity. Whether work restrictions preclude applicant from further employment requires vocational expert testimony.
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> * * *
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> … [P]er *Ogilvie* and as described further in *Dahl*, the non-amenability to vocational rehabilitation must be due to industrial factors. (*Contra Costa County v. Workers' Comp. Appeals Bd*., (*Dahl*) 240 Cal. App. 4th 746, 193 Cal. Rptr. 3d 7.)

(*Soormi v. Foster Farms*, 2023 Cal. Wrk. Comp. P.D. LEXIS 170, *11-12, citing *Wilson v. Kohls Dep't Store*, 2021 Cal. Wrk. Comp. P.D. LEXIS 322, *20–23.)

> When you analyze permanent total disability, you are first looking at the industrial injury and the work preclusions assigned to applicant. You then analyze whether those work preclusions were caused by the industrial injury. You then determine whether those work preclusions prevent applicant from gainful employment on the open labor market, which includes an analysis of whether applicant can be rehabilitated to a new career. Where applicant is not capable of rehabilitation and employment, and absent apportionment, applicant is permanently totally disabled.
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> * * *
>
> To be abundantly clear, a person's ethnic origin is not a disability. A person's immigration status is not a disability. Whether a person can speak the English language is not generally a disability. A person's lack of education is not a disability. . .
>
> It may be true that an unskilled worker is more susceptible to sustaining permanent total disability because such a person begins the analysis with a limited labor market. However, that is not a basis to discount applicant's level of disability. To be clear, the employer receives a discount in such cases. However, the discount is

> found, not in the percentage of disability, but in the rate of the permanent total disability award. . .
>
> The analysis changes if applicant's pre-existing education or language ability is due to a disability. Like many states, California encourages employers to hire disabled workers. The State assures employers that they will not be held liable for pre-existing disabilities through multiple avenues. First, we have apportionment based on causation and apportionment based on prior awards. (§§ 4663, 4664.) Next, we have the Subsequent Injuries Benefits Trust Fund ("SIBTF"), which covers the employer for any increase in permanent disability that was amplified by a prior disability. (§§ 4751, et. seq.)

(*Id*. at *14-16.)

As explained above, the purpose of the AMA Guides is to assign impairment based upon a person's loss of ADLs. Most workers' compensation cases do not involve total disability. Most cases involve assignment of partial disability via the AMA Guides. Thus, doctors generally assign causation based on the causation of the rated impairment in the AMA Guides.

What appears to be a point of confusion in many cases is that the focus of causation and apportionment changes when using *Ogilvie* rebuttal because the defined impairment changes.

When applicant is seeking to rebut the PDRS using *Ogilvie*, disability is no longer rated as an impairment under the AMA Guides. Instead, the impairment is now the *work restrictions* assigned to applicant from the industrial injury. The disability is the effect of those work restrictions on applicant's ability to rehabilitate and compete in the open labor market. Accordingly, causation and apportionment, when analyzed under an *Ogilvie* rebuttal, must focus on the ***cause of the work restrictions***. As applicant is seeking an award of 100% disability, the cause of the work restrictions contributing to applicant's inability to work must be 100% industrial, without apportionment.

The law of apportionment was explained in the en banc decision *Nunes I*:

> The California worker's compensation system requires that, "[e]mployers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors. 'Apportionment is the process employed by the Board to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.'" (*Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal.4th 1313, 1321 [57 Cal. Rptr. 3d 644, 156 P.3d 1100, 72 Cal.Comp.Cases 565], quoting

Ashley v. Workers' Comp. Appeals Bd. (1995) 37 Cal.App.4th 320, 326 [43 Cal. Rptr. 2d 589, 60 Cal.Comp.Cases 683].)

Section 4663(c) provides, in relevant part:

> (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.
>
> (Lab. Code, § 4663(c).)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*), we explained:

> Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting physician and the WCAB must make determinations of what percentage of the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.

(*Id*. at p. 607.)

Accordingly, section 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use. (Lab. Code, § 4663(c); *Escobedo*, *supra*, at pp. 607, 611–612.) Apportionment must account for "other factors both before and subsequent to the industrial injury," and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions. (*Ibid*.)

(*Nunes v. State of California, Dept. of Motor Vehicles* (*Nunes I*), (2023) 88 Cal.Comp.Cases 741, 748-749 (Appeals Board en banc).)

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

1) Applicant has been assigned a work restriction(s), which requires substantial **medical** evidence.

2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires **vocational** expert evidence.

3) The work restriction(s) precludes applicant from competing on the open labor market, which requires **vocational** expert evidence.

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

To be clear, we are focused only on those restrictions that contribute to the vocational expert's findings. An applicant may have multiple work restrictions, some of which are non-industrial or prior industrial. If the industrial work restrictions, standing alone, preclude applicant from rehabilitation and preclude applicant from competing on the open labor market, applicant has met their burden on causation of disability. If applicant's preclusion from rehabilitation and work is caused or contributed by either non-industrial work restrictions or partially industrial work restrictions, applicant fails their burden on causation of disability.

To the extent that defendant seeks to apportion permanent total disability, defendant must prove apportionment of the work restrictions that establish permanent total disability.

Nunes I further held that Labor Code section 4663 requires a **reporting physician** to make medical determinations in a case, including determinations on the issue of apportionment. The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but that a vocational evaluator may not opine on issues that require expert medical evidence. (See, *id*.) The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*"). In sum, a vocational expert is not a medical expert and cannot opine on matters outside their expertise.

Turning to the facts of this case, we find the work restrictions assigned by Dr. Henry to constitute substantial medical evidence as Dr. Henry took an adequate history, examined applicant, and set for detailed reasoning for why applicant is precluded from returning to work, absent such restrictions.

Dr. Xeller's opinions are often conclusory, without any explanation. Dr. Xeller's final opinion on work restrictions included a restriction on maximum lifting without stating any weight limit. (Defendant's Exhibit A, Report of Charles Xeller, M.D., November 1, 2023, p. 3, ["Based on my looking at that surveillance video, he can work a light duty job. He has some restrictions on maximum lifting and repetition of hand motions."].) Dr. Xeller states that applicant has limitations to repetitive hand motion without stating what those limitations are. Dr. Xeller's opinions are incomplete, and thus they do not constitute substantial medical evidence.

Here, applicant's vocational expert conducted vocational testing, examined applicant, reviewed the work restrictions assigned by the medical doctors, and found that applicant was not feasible for vocational rehabilitation and could not compete on the open labor market. The opinion of applicant's expert appears well-reasoned and substantial. To the extent that applicant was filmed on subrosa, the medical doctors reviewed the subrosa, which did not impact their decision. No issue was raised to suggest that the doctors' reviews were inaccurate.

Furthermore, the subrosa film as described in the record does not contradict any of the work restrictions placed upon applicant. Dr. Henry limited applicant to 1-2 hours of exertional activity per day. The fact that applicant is exerting himself in subrosa on multiple different days for brief periods of time does not contradict Dr. Henry's work restrictions. Perhaps if applicant were filmed exerting himself beyond 2 hours in a single day, we would expect the medical expert to change their opinion, but the record does not support this.

The opinions of defendant's vocational expert are of little value as defendant's expert was self-contradicting and impermissibly injected his own non-expert opinion as to applicant's functional limitations based upon his own non-expert review of the subrosa films. Vocational experts cannot provide medical opinions.[5]

Next, Dr. Van de Bittner improperly includes opinions on "vocational apportionment," which mirror the apportionment opinions assigned by Dr. Xeller to applicant's AMA Guides impairments. As discussed above and in *Nunes I*, vocational apportionment is not a valid concept as a vocational counseler is not a medical expert. As noted above, the apportionment of applicant's AMA Guides impairments are not germane here. Where applicant seeks to rebut application of the PDRS based upon the effect of work restrictions under an *Ogilvie* analysis, it is incumbent upon

[5] While this opinion has referred to Dr. Van de Bittner using his proper title, pursuant to his curriculum vitae, Dr. Van de Bittner holds a doctor of philosophy (Ph.D.) and is not a medical doctor.

defendant to prove non-industrial contribution *to the work restrictions*. No medical doctor has apportioned any of applicant's work restrictions. Furthermore, the arbitrator found no basis for apportionment of any of applicant's impairments and defendant has not sought review of that finding.

3. Section 4660.1(c) is not germane to a finding of permanent total disability in accordance with section 4662.

The arbitrator did not find permanent total disability based, in part, upon the determination that applicant's psychological impairment was not compensable pursuant to section 4660.1(c). However, section 4660.1(c) is clearly preempted when applicant is proving permanent total disability in accordance with the fact under section 4662.

Statutory analysis begins by examining "the words themselves because the statutory language is generally the most reliable indicator of legislative intent … The words of the statute should be given their ordinary and usual meaning and should be construed in their statutory context." (*Fitch v. Select Products Co.* (2005) 36 Cal. 4th 812, 818 (quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal. 4th 709, 715–716.) When the words of a statute are clear, we must follow their plain meaning. (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal. 4th 995, 1003.) If the plain, commonsense meaning of a statute's words is unambiguous, the plain meaning controls. (*In re Jennings* (2004) 34 Cal. 4th 254, 263.)

By the terms of section 4660.1: "(g) This section does not preclude a finding of permanent total disability in accordance with Section 4662." (§ 4660.1(g).) This language is clear and the words are unambiguous. Where applicant is seeking to prove permanent total disability in accordance with section 4662, the terms of section 4662 control, and thus, *all* industrial work restrictions are considered.

Where applicant is seeking to prove permanent disability through application of 4660.1 and the PDRS, then subsection (c) may exclude consideration of certain impairments, but in such a case, the trier of fact should evaluate whether an exception to subsection (c) applies, including whether applicant's injury may be considered catastrophic. (§ 4660.1(c).)

Accordingly, we grant applicant's petition for reconsideration and as our Decision After Reconsideration, we rescind the January 30, 2026 Third Amended F&A, and substitute a new F&A, which finds that applicant is permanently and totally disabled and orders that Defendant's Exhibit E is admitted into evidence.

For the foregoing reasons,

IT IS ORDERED that applicant's petition for reconsideration of the Third Amended Arbitrator's Findings and Award issued on January 30, 2026, by the arbitrator is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Third Amended Arbitrator's Findings and Award issued on January 30, 2026, by the arbitrator is **RESCINDED** with the following **SUBSTITUTED** in its place:

FINDING OF FACT

1. Applicant, Martin Perez, while employed by Harris Rebar during the period of January 1, 1998 through October 1, 2017 as an ironworker, occupational group number 482, sustained an injury arising out of and occurring in the course of employment to his cervical spine, thoracic spine, lumbar spine, bilateral shoulders, bilateral upper extremities, bilateral hands, bilateral wrists, bilateral knees, bilateral feet, bilateral ankles, and psyche.

2. On the date of injury Harris Rebar was insured by BITCO Insurance / Old Republic General Insurance Corporation / CIG, adjusted by Gallagher Bassett Services and by Zurich Insurance Company.

3. At the time of the injury the applicant's earnings were $1,416.47 per week.

4. Applicant has been paid 104 weeks of temporary total disability and has been adequately compensated for all claim periods of temporary disability with the last payment being made on June 21, 2020.

5. The employer has furnished some medical treatment.

6. Applicants' disability was entirely caused by the continuous trauma injury and there is no basis for apportionment to non-industrial factors of disability.

7. Pursuant to Labor Code section 4662, applicant's injury has caused applicant to sustain industrial work restrictions which preclude applicant from rehabilitation into the open labor market and preclude applicant from competing for employment on the open labor market and thus applicant is permanently and totally disabled in accordance with the fact.

8. Applicant's attorney has performed services reasonably valued at 15% of the permanent total disability awarded herein, the exact calculation and commutation of which is deferred to the parties to adjust with jurisdiction reserved in the event of a dispute.

9. The issues of self-procured medical treatment and costs is deferred to the parties to adjust with jurisdiction reserved in the event of a dispute.

AWARD

AWARD IS MADE in favor of Martin Perez and against BITCO Insurance / Old Republic General Insurance Corporation / CIG as follows:

A. Permanent total disability at the rate of $944.31 per week, beginning June 22, 2020 and continuing, subject to adjustment pursuant to Labor Code section 4659, and less attorney's fees of 15%, which are deferred to the parties to adjust with jurisdiction reserved in the event of a dispute.

B. Future medical treatment to cure or relieve from the effects of the industrial injury.

IT IS FURTHER ORDERED that Defendant's Exhibit E is **ADMITTED** into evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ CRAIG L. SNELLINGS, COMMISSIONER

I DISSENT,

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 13, 2026

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

MARTIN PEREZ
JOHNSON LAW FIRM
KARLIN, HIURA & LASOTA LLP
MARK L. KAHN

EDL/mt

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

DISSENTING OPINION OF COMMISSIONER JOSÉ H RAZO

While I agree with many of the points discussed in the majority opinion, I dissent because the current record does not constitute substantial evidence and thus, it does not support an award of permanent total disability.

I agree that it is not within the province of the trier of fact to interject their own opinion as to medical limitations seen on subrosa video. However, here I do not see this as happening. Instead, it appears that the evaluators have not adequately explained the work limitations imposed upon applicant given the contents of the videos. For example, the videos depict applicant jogging recreationally. The *entirety* of Dr. Henry's analysis as to the videos is as follows:

> In reviewing the surveillance videos, they show Mr. Perez walking and briefly walking/jogging and wearing a knee brace. Mr. Perez goes with his wife at his own pace. The rest of the videos show Mr. Perez performing ADLs, which would be expected with his diagnosis and do not change any of my prior opinions.

(Applicant's Exhibit 1, Report of Mechel Henry, M.D., February 20, 2025, p. 2.)

I disagree with the majority and do not find that this opinion constitutes substantial medical evidence as it is not an adequate explanation. It is merely a conclusion.

I would have rescinded the Third Amended F&A and returned this matter to the trial level for further proceedings. I would have suggested that the parties consider obtaining a functional capacity evaluation from a respected physician in the field, and absent an agreement, the arbitrator could consider appointing such an expert as a regular physician. The doctor completing the evaluation could then thoroughly review the activities seen on the subrosa video with applicant and provide a substantial opinion as to applicant's physical limitations, which can then be provided to the vocational evaluators.

If the updated evaluations do not support an award of permanent total disability, then the arbitrator could reexamine the issue of permanent partial disability. However, as noted by the arbitrator in his Report, the reporting of both parties' QMEs may require further development of the record to support their respective opinions on WPI, which could also warrant appointment of a regular physician.

For these reasons, I respectfully dissent.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

APRIL 13, 2026

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

MARTIN PEREZ
JOHNSON LAW FIRM
KARLIN, HIURA & LASOTA LLP
MARK L. KAHN

EDL/mt

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