WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

PING HUNG LI, *Applicant*

vs.

MODERN CONSTRUCTION, INC.
FALLS LAKE FIRE AND CASUALTY COMPANY, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, INC., *Defendants*

Adjudication Numbers: ADJ14149688, ADJ21878559
San Francisco District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Defendant seeks reconsideration of the Joint Findings, Award, and Orders (F&A) issued on April 24, 2026. The workers' compensation administrative law judge (WCJ) found, in relevant part, that in ADJ14149688 applicant sustained injury to his cervical spine and lumbar spine and applicant did not meet his burden of proof that he sustained injury arising out of and in the course of employment to the excretory system, bilateral upper extremities and bilateral lower extremities; in ADJ21878559 applicant did not meet his burden of proof that he sustained injury to the excretory system, spine, neck, bilateral upper extremities, and bilateral lower extremities during the period of February 3, 2020 through December 2, 2025; that applicant's condition was permanent and stationary on August 9, 2023; defendant did not meet its burden of proof that it is entitled to credit for overpayment of temporary disability for the period of March 6, 2021 through February 8, 2022; applicant's injury caused permanent disability of 44%; and that defendants are entitled to a credit in the amount of $5,600 for applicant's third party recovery.

Defendant contends that the WCJ erred by finding industrial injury and impairment to the cervical and lumbar spine, that the impairment utilized by the WCJ is not supported by substantial medical evidence, and that the Qualified Medical Evaluator (QME)'s final opinion on impairment, based on an "Almarez/Guzman" analysis, should be followed.

Applicant filed a response. The WCJ issued a Report and Recommendation (Report) recommending denial of the Petition.

Defendant filed a supplemental Petition contesting the WCJ's opinion that QME reports that discuss excluded sub rosa footage should be excluded from the record, thereby further supporting the finding of impairment from prior reports. Defendant alleges that the sub rosa footage, despite being unauthenticated, was sent by agreement between the parties. We accept and consider the supplemental Petition under our authority in WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964).

We have considered the allegations of the Petition, the Answer, the supplemental Petition, and the contents of the Report of the WCJ. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, rescind the WCJ's decision, and return this matter to the WCJ for further proceedings consistent with this decision. This is not a final decision on the merits of any issues raised in the petition and any aggrieved person may timely seek reconsideration of the WCJ's new decision.

FACTS

On January 22, 2021, applicant filed an Application for Adjudication of Claim (Application) alleging a specific injury on February 3, 2020 to the right hand, right clavicle, excretory system, spine, neck, bilateral upper extremities, and bilateral lower extremities. Applicant was a passenger in a motor vehicle collision.

On December 2, 2025, applicant filed a second Application, alleging cumulative injury from February 3, 2020 through December 2, 2025 to the excretory system, spine, neck, bilateral upper extremities, and bilateral lower extremities.

Applicant's current primary treating physician is Timothy Lo, M.D. Applicant began seeing Dr. Lo on November 9, 2022. (Applicant's Exhibit 1.) Dr. Lo took a history that applicant was involved in a motor vehicle accident in which he was the front row passenger when another vehicle struck the passenger side of the car. In this initial evaluation, applicant reported that he was unable to raise his right arm without help of the left arm, used a quad cane due to right sided weakness in his leg, had depression, and right side neck pain that radiated through the entire right side of his body and face. On physical examination, he had an antalgic gait, weakness, atrophy of the right calf at about 1 cm less than the left. He had significant atrophy in the right upper arm and forearm, with redness in the distal right hand with swelling. He could not lift his arm more than

five degrees with significant discomfort. He had tenderness and limitation in the right rotation of the head limited to 30 degrees. (*Id*. at p. 5.) Dr. Lo stated:

> "[Applicant] clearly has significant objective evidence of injury and the possibility of brachial plexopathy or spinal cord injury is possible. Electrodiagnostic studies typically will not detect cervical spinal cord injury and brachial plexopathy is frequently difficult to diagnose with electrodiagnostic studies. He had findings of right ulnar neuropathy, late on findings of carpal tunnel syndrome, and then subsequently polyneuropathy of the right upper extremity, which would be consistent with the difficulty in diagnosing brachial plexopathy through electrodiagnostic testing."

(*Id.* at p. 6.)

On November 30, 2022, applicant was seen for a QME evaluation by James Chen, M.D. (Defendant's Exhibit Q.) At this evaluation, applicant complained of pain to his right shoulder, neck, and low back. Dr. Chen reviewed and summarized medical records. He noted that on physical evaluation, the range of motion and motor testing of the cervical and lumbar spine were deferred due to pain, and sensation was intact to all cervical and lumbar dermatomes. The right shoulder was tender, but range of motion was also deferred due to pain. Dr. Chen diagnosed 1. Cervical strain with radiculopathy; 2. Right sternoclavicular joint subluxation; 3. Lumbar strain with radiculopathy; 4. Right shoulder rotator cuff tear post-surgery. (*Id*. at pp. 32 and 33.) He found all injury industrially caused and did not find applicant to be MMI. He recommended continued physical therapy and pain management. (*Id*. at p. 34.)

On July 12, 2023, applicant had another evaluation with QME Dr. Chen. (Defendant's Exhibit S.) At this evaluation, applicant noted that physical therapy was denied by the carrier and that he underwent acupuncture on his own. His pain was worse. (*Id*. at p. 2.) Again, on examination, the QME noted tenderness in the cervical spine, right shoulder, and lumbar spine but other testing could not be completed due to pain. (*Id*. at p. 4.) The diagnoses remained the same. Despite being unable to complete testing, he found applicant at MMI. He provided 8% impairment for the cervical spine based on a DRE II. There was no further explanation for this placement or rating. For the lumbar spine he also designated 8% for DRE II. For the right shoulder he provided 6% whole person impairment based only on the distal clavicle resection. (*Id*. at p. 5.) He also added 3% whole person impairment for pain without explanation. No chapters, charts, or page numbers from the AMA Guides were noted in the report.

On January 8, 2024, QME Dr. Chen was deposed by defendants. (Defendant's Exhibit W.) He admitted that because applicant stated that he had pain, he did not perform the testing because applicant stated he had pain and not because applicant refused to participate. (*Id*. at 19:13-24.) He also stated that where a patient is in pain, range of motion and strength testing will not be valid. (*Id*. at 20:2-5.) They discuss applicant's deposition testimony in which he stated he was basically paralyzed and without sensation on the right side. He opined at one point that the medical record does not support those complaints and that it would not change his impairment ratings. (*Id*. at 25:2-26:1.) He also opined that the abnormal nerve conduction studies were not due to applicant's diabetes. (*Id*. at 32:4-15.) They discussed the finding of carpal tunnel syndrome and the QME concluded that carpal tunnel would not be the result of the specific motor vehicle accident. (*Id*. at 33:24-34:2.) The remainder of the deposition included hypothetical questions and a request for the QME to review any additional discovery to include an additional deposition and surveillance.

On June 13, 2024, applicant was seen by PTP Dr Lo. (Applicant's Exhibit 5.) He presented with a quad cane in left hand and was given transportation for the appointment. On examination, there was weakness in the distal and proximal right lower extremity. He was unable to lift his right arm without the assistance of his left hand for right shoulder flexion and abduction. Mild swelling was noted in the right upper extremity. He could not lift the (non-specific) lower extremity to test strength. (*Id.*) Diagnoses were cervical disc disorder with myelopathy, brachial plexus disorder, chronic pain syndrome, adjustment disorder with mixed anxiety and depressed mood.

In Dr. Lo's report dated February 4, 2025, he noted that applicant was unable to ambulate alone as he uses a four-point cane on his left side and must have a person walk with him to support the left side as he drags his right leg and right arm does not swing. Physical exam of the right side revealed remarkable weakness. Dr. Lo requested an electric wheelchair. (*Id.* at p. 11.)

On September 26, 2024, the parties proceeded to a status conference, and trial was set on the issue of discovery to determine the authenticity of sub rosa footage and whether the film could be sent to the QME.

The parties proceeded to trial on April 14, 2025 on the issue of "authenticity of the sub rosa video, including whether it was applicant depicted on the video on the dates of the video and whether the sub rosa is to be sent to panel selected QME." (MOH/SOE, 04/14/2025, 2:24-27.) Surveillance taken on March 6, 2021, May 2, 2023, and May 3, 2023 (Defendant's Exhibits D, E,

F) were reviewed.[1] Applicant and his son testified. The matter was continued for further testimony, however thereafter, the parties agreed there was no further testimony, and the matter was submitted on May 27, 2025.

On July 8, 2025, the WCJ issued a Findings of Fact and Order finding, in relevant part, that Defendant's Exhibit D, surveillance dated March 6, 2021, was not properly authenticated, but that Exhibits E and F, surveillance on May 2 and 3, 2023, were properly authenticated and that applicant is identified in the surveillance, and that Defendant's Exhibits E and F were relevant to warrant submission to the QME for comment. The WCJ ordered Defendant's Exhibits E and F to be submitted to the QME. There was no objection or removal filed to this F&O.

On October 29, 2025, Dr. Chen evaluated applicant again. (Defendant's Exhibit T.) For this evaluation, he reviewed one additional report from Dr. Lo dated September 8, 2025 as well as the depositions of applicant and all three dates of surveillance, despite the F&O. (*Id*. at p. 5.) At the evaluation, applicant was seated in the motorized scooter and stated that he was unable to get up from a seated position. Again, the testing was deferred due to pain. Range of motion testing was attempted for the right shoulder, but he stated he could not move his right shoulder, so the testing was deferred. The diagnoses were right shoulder rotator cuff tear status post-surgery, cervical strain, and lumbar strain. (*Id*. at p. 7.) Dr. Chen stated, "I continue to opine that Mr. Li sustained injuries to his cervical spine, lumbar spine, and right shoulder that were industrial in causation." (*Id*.) However, after reviewing the surveillance he stated,

> I would therefore utilize the latitude afforded by the Almarez/Guzman decisions and revise his cervical spine and lumbar spine impairment ratings to zero percent whole person based on the range of motion and comfort as visualized in the video surveillance footage. I would also amend the pain add-on impairment to zero percent whole person impairment.

(*Id*. at p. 7.)

He continued to opine that applicant had 6% whole person impairment for the shoulder due to the shoulder surgery. He also released applicant to full duty work.

On December 5, 2025, Dr. Chen issued a supplemental report. (Defendant's Exhibit T.) In this report, he amended the permanent and stationary date to "at or before" the March 6, 2021 surveillance video. He also stated that applicant is not in need of future medical treatment for his

[1] These exhibits were not in EAMS, so we could not review them independently.

cervical spine and lumbar spine, adding that any treatment after the March 6, 2021 surveillance would be non-industrial. In regard to the change of opinion on impairment and treatment he stated:

> These videos change my opinion regarding Mr. Li's level of impairment because I consider them substantial medical evidence that Mr. Li's level of function is much higher than he reported. The surveillance videos show a high level of function that is not consistent with his presentations to his health care providers. The video surveillance of March 6, 2021 shows the applicant comfortably smoking outside of his home, getting in and out of a car, standing in line at an ATM machine, walking and rubbing his hands. I reviewed the video surveillance on May 2, 2023 of the applicant getting into and out of a car, entering and exiting a home all appearing very comfortable and in no distress.

(*Id.* at p. 2.)

On December 9, 2025, Dr. Chen issued another supplemental report responding to defense counsel's request that he opine as to whether there is a cumulative injury. (Defendant's Exhibit U.) He found that there was no evidence of a cumulative injury because there were no prior records to suggest prior injury or ongoing complaints. He opined that he did not need to evaluate applicant for a new cumulative injury given the number of times he had already seen applicant. (*Id*. at p. 3.)

On December 18, 2025, defendant filed a Declaration of Readiness to Proceed (DOR) to a Mandatory Settlement Conference (MSC) stating, "Applicant's attorney has alleged a CT claim citing a specific claim. PQME has already addressed this alleged mechanism of injury. Defendants dispute entitlement to additional panels." The MSC was set for February 11, 2026, and the matter was set for trial on all disputed issues.

On March 16, 2026, the parties proceeded to trial. The issues in ADJ14149688 were:

> 1. Parts of body, with applicant claiming injury to the excretory system, spine, neck, bilateral upper extremities, and bilateral lower extremities.
> 2. Permanent and stationary date, with the applicant contending his condition is not permanent and stationary, and the employer claiming March 6, 2021, based on the reporting of Dr. Chen in his December 9, 2025, report.
> 3. Permanent disability and apportionment.
> 4. Need for further medical care.
> 5. Attorneys' fees.
> 6. Defendants' petition for credit for overpayment of temporary disability in the amount of $26,653.72 for the period of March 6, 2021 through February 8, 2022.

(MOH/SOE, 3:3-20.)

In ADJ21878559, the only issue was "injury arising out of and in the course of employment." (*Id*. at 4:3.)

Applicant testified that following surgery his condition got worse to the point where he could not move his right arm and has pain in his neck. (MOH/SOE, 6:22-25.) He recalled seeing QME Dr. Chen on three occasions. The first time, he took measurements, but the second and third time he did not. (*Id*. at 6:27-33.) He testified that he told Dr. Chen there was video, but that Dr. Chen did not ask any questions about the video. (*Id.* at 6:35-37.) On cross examination, applicant testified that at the second evaluation he attempted to lift his right arm but was unable to so Dr. Chen helped push it up which caused pain in the shoulder and neck, but his arm has no feeling. (*Id*. at 6:45-7:3.) His deposition testimony was reviewed and applicant confirmed that from the tip of his shoulder to his fingertips he had no feeling, yet he does have pain in the neck and shoulder. (*Id*. at 7:5-16.) He added that his back and left thigh were hurting but not the right. (*Id*. at 7:32-24.) He did not recall who Dr. Timothy Lo was. (*Id*. at 7:36-40.)

Applicant testified that he cannot lift his arm but can move it slightly. (*Id*. at 8:15-19.) During physical therapy at that time, they were using electrical equipment which helped his arm to move some. He stated he does not have feeling in his right arm, but "if they use medical devices to poke on it, he will have feeling." (*Id.* at 8:25-32.) He also testified that he cannot walk without a cane or a walker as he has no sensation or strength in the right leg. He does not walk alone at home. (*Id*. at 9:18-24.) He stated that he had no feeling in his right arm or leg. (*Id*. at 9:31-35.)

The F&A issued on April 24, 2026. As relevant here, the WCJ found that applicant sustained injury to the cervical and lumbar spine, did not sustain compensable injury to the excretory system, bilateral upper extremities and bilateral lower extremities, and did not meet the burden to prove a cumulative injury from February 3, 2020 through December 2, 2025. The WCJ also found that the MMI date was August 9, 2023, that defendant did not meet its burden to prove a temporary disability over payment for the period of March 6, 2021 through February 8, 2022, and that applicant's injury caused permanent disability of 44%.

The WCJ opined that the only evaluator to comment on cumulative injury was Dr. Chen who found in his December 9, 2025 report that there was no evidence to support a cumulative injury. Likewise, no physician commented on causation for injury to the excretory system, upper extremities apart from the right shoulder, or lower extremities. She noted that the right hip and

right lower extremities were mentioned as diagnoses at various points by Dr. Lo, but causation was never discussed.

The WCJ disagreed that Dr. Chen's ultimate finding that MMI was reached prior to the March 6, 2021 surveillance was flawed because applicant had surgery after that date and therefore could not be MMI. Thus, the WCJ opined that August 9, 2023, the original date of the MMI report was the proper date.

Finally, for impairment the WCJ opined that Dr. Chen's *Almarez/Guzman* rating was not supported and was not substantial medical evidence. Though she did not find applicant credible at either the first trial or this trial, the medical opinion did not adequately address why the activity on the surveillance was inconsistent with the assignment of DRE II impairment for both the cervical and lumbar spine. Likewise, the WCJ opined that the QME's opinion that applicant was not entitled to medical care for the cervical and lumbar spine was an impermissible attempt to apportion medical treatment.

In response to defendant's Petition, the WCJ issued a Report affirming the opinion, but also noting that the March 6, 2021 surveillance was deemed unauthenticated and should not have been sent to the QME. As a result, all reports after receipt of the excluded surveillance are not substantial medical evidence.

DISCUSSION

I.

Former Labor Code section 5909[2] 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.

[2] All further statutory references will be to the Labor Code unless otherwise indicated.

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 May 27, 2026 and 60 days from the date of transmission is Sunday, July 26, 2026. The next business day that is 60 days from the date of transmission is Monday, July 27, 2026. (See Cal. Code Regs., tit. 8, § 10600(b).)[3] This decision issued by or on Monday, July 27, 2026 so that we have timely acted on the petition as required by section 5909(a).

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

Here, according to the proof of service for the Report and Recommendation by the workers' compensation administrative law judge, the Report was served on May 27, 2026 and the case was transmitted to the Appeals Board on May 27, 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 May 27, 2026.

II.

It is well established that decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal. Comp. Cases 310]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627 [35 Cal. Comp. Cases 16].) "The term 'substantial evidence' means evidence which, if true, has

[3] WCAB Rule 10600(b) (Cal. Code Regs., tit. 8, § 10600(b)) states that:

> Unless otherwise provided by law, if the last day for exercising or performing any right or duty to act or respond falls on a weekend, or on a holiday for which the offices of the Workers' Compensation Appeals Board are closed, the act or response may be performed or exercised upon the next business day.

probative force on the issues. It is more than a mere scintilla, and means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion … It must be reasonable in nature, credible, and of solid value." (*Braewood Convalescent Hosp. v. Workers' Comp. Appeals Bd.* (*Bolton*) (1983) 34 Cal.3d 159, 164 [48 Cal.Comp.Cases 566], emphasis removed and citations omitted.) To constitute substantial evidence "… a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Where the medical evidence or opinion on an issue is incomplete, stale, and no longer germane, or is based on an inaccurate history, or speculation, it does not constitute substantial evidence. (*Place v. Workers' Comp. Appeals Bd*. (1970) 3 Cal.3d 372 [35 Cal.Comp.Cases 525]; *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621.)

In this matter, we do not agree that any of the QME reporting upon which the F&O is based is substantial medical evidence. Beginning first with the reports following review of the surveillance, the opinions regarding permanent disability, future medical treatment, and maximum medical improvement are not supported by the record.

In *Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1127 (Appeals Bd. en banc) (commonly known as, and hereinafter referred to as *Almaraz II*), we held that a "scheduled permanent disability rating may be rebutted by successfully challenging the component element of that rating relating to the employee's WPI under the AMA Guides….by establishing that another chapter, table, or method within the four corners of the Guides most accurately reflects the injured employee's impairment." (*Almaraz II*, 74 Cal.Comp.Cases at pp. 1095-1096.) In *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman*) *(2010)* 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837], the Court affirmed our decision in *Almaraz II*.

In order for an applicant to prevail on this whole person impairment (WPI) assigned under *Almaraz II*, additional evidence is necessary: The doctor is expected to 1) provide a strict rating per the AMA Guides, 2) explain why the strict rating does not accurately reflect the applicant's disability, 3) provide an alternative rating using the four corners of the AMA Guides, and 4) explain why that alternative rating most accurately reflects applicant's level of disability. (*Id*. at pp. 828-829.)

Here, the QME, in support of rebutting the strict AMA ratings for the cervical and lumbar spines, simply stated:

> I would therefore utilize the latitude afforded by the Almarez II decisions and revise his cervical spine and lumbar spine impairment ratings to zero percent whole person based on the range of motion and comfort as visualized in the video surveillance footage. I would also amend the pain add-on impairment to zero percent whole person impairment.

(Defendant's Exhibit S at p. 7.)

This opinion is conclusory at best, and does not comport to the specific parameters for a substantial opinion outlined in *Almarez II*. Dr. Chen makes no effort to specifically point out how a DRE II rating for either the cervical spine or the lumbar spine does not adequately encapsulate impairment. This is particularly troublesome here because, particularly for the cervical spine, there are diagnostic tests including multiple MRIs and electrodiagnostic studies that would meet the minimum findings for a DRE II rating. The AMA Guides at page 383 specifically note, "In category II, the individual has objective findings but no radiculopathy or alteration of structural integrity, while in category III, radiculopathy with objective verification must be present."

We note here that even in the original ratings, Dr. Chen does a poor job at the outset of correlating the specific objective findings with the DRE II ratings. Based on the record, it does not appear that the treatment reports after the August 9, 2023 QME report or updated MRIs for the cervical spine were sent to Dr. Chen for review in the November 2025 report. These cannot be disregarded and should have been interpreted by Dr. Chen and then compared to the functionality seen in the surveillance. The DRE categories are diagnosis based ratings, much like the rating for the distal clavicle resection is a diagnosis based rating. Just as Dr. Chen kept the rating for the shoulder intact, he should have discussed why a similar diagnosis based rating is undermined by the surveillance.

As the WCJ points out, Dr. Chen does not state how the surveillance is inconsistent with the strict rating. He does not point to another chapter, chart, or page number within the "four corners" of the AMA Guides to support the alternative rating of 0%. Defendant implies that Dr. Chen is using a Range of Motion method (ROM), however, he does not say he used ROM, nor has he applied the testing or analysis required for use of that chapter per section 15.8 of the AMA Guides. Ultimately, the *Almarez II* analysis fails.

Dr. Chen's opinion on the MMI date being, "at or before" the March 6, 2021 surveillance video is likewise unsupported. In addition to the language itself being speculative, the medical evidence does not support this finding. "'Permanent and stationary status' is the point when the employee has reached maximal medical improvement, meaning his or her condition is well stabilized, and unlikely to change substantially in the next year with or without medical treatment." (Cal. Code Regs., tit. 8, § 9785 (a)(8); see also Cal. Code Regs., tit. 8, § 9811(k).) In this matter, applicant had surgery shortly after the March 2021 surveillance. Thus, by definition, applicant could not have been at MMI prior to June of 2021. Dr. Chen evaluated him in November of 2022, prior to the additional dates of surveillance, and also felt that applicant would benefit from further physical therapy. While Dr. Chen may believe that the cervical and lumbar spines were MMI prior to the March surveillance, it is clear that the right shoulder was not. Throughout 2024 and into 2025, there were additional MRIs, multiple surgical consultations, with recommendations for surgery, additional attempts at conservative care, and the denial of a functional restoration program. Though it seems that Dr. Lo was sent the surveillance, there is no comment in any of the reporting. Thus, the record is incomplete as to the point at which applicant was MMI.

We also disagree with Dr. Chen's opinion that all treatment rendered after the March 6, 2021 surveillance is nonindustrial, and that there is no need for future medical care for the neck and back. We emphasize the point made by the WCJ that this opinion amounts to impermissible apportionment of medical treatment. If the need for medical treatment is partially caused by an applicant's industrial injury, an employer must pay all the injured worker's reasonable medical expenses. (*Granado v. Workers' Comp. Appeals Bd.* (1968) 69 Cal.2d 399, [33 Cal.Comp.Cases 647].) An injured worker is entitled to medical care for a non-industrial condition that must be treated in order to cure or relieve the effects of an industrial injury. (*Bolton, supra*, 34 Cal.3d 159.)

Dr. Chen does not indicate any medical basis for cutting off industrial liability for medical treatment that he opined was warranted up to the point of the March 2021 surveillance. Likewise, his opinion still states that the injuries are 100% industrial. He is consistent that the industrial motor vehicle accident caused injury to the cervical and lumbar spines. There is no evidence anywhere in the record of an intervening event that would sever causation for ongoing care. Moreover, the spine is listed in diagnoses from the beginning of the medical record. Again, the opinion is not supported, is contradictory, and is not substantial.

Additionally, defendant notes in their supplemental Petition that there was an agreement that the March 6, 2021 surveillance could be sent to the QME despite a finding that the film was not authenticated and that it was not relevant to submit to the QME for review. First, there is nothing in the record to support an agreement between the parties that defendant would forego appeal of the decision in exchange for submission of the footage to the QME. Decisions of the Appeals Board "must be based on admitted evidence in the record." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc).) Second, based on the record before us, the finding that the footage was not authenticated was not vacated or appealed and remains intact. To our knowledge, applicant never admitted that he was featured in the March 6, 2021 video and the record shows no indication that the QME asked him about the surveillance or that the QME was advised that there was a dispute as to identity. Thus, any opinion based on review of that footage would not be substantial medical evidence.

The record is then left with only the original reporting from the QME. We agree with defendant that the reporting is now stale and may not be based on a complete history. Further, the QME in his later opinions essentially rescinded his prior opinions at to MMI, permanent disability, and the need for future medical care.

The WCAB has a duty to further develop the record when there is a complete absence of (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389, 393-395 [62 Cal.Comp.Cases 924]) or even insufficient (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]) evidence on an issue. In our en banc decision in *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2002) 67 Cal.Comp.Cases 138 (Appeals Board en banc), we stated that "[s]ections 5701 and 5906 authorize the WCJ and the Board to obtain additional evidence, including medical evidence, at any time during the proceedings (citations) [but] [b]efore directing augmentation of the medical record . . . the WCJ or the Board must establish as a threshold matter that specific medical opinions are deficient, for example, that they are inaccurate, *inconsistent or incomplete*." (*Id.* at p. 141, *italics added*.) Per *McDuffie*, if the existing physicians cannot cure the need for development of the record, the selection of an agreed medical evaluator (AME) should be considered by the parties. If the parties cannot agree to an AME, the WCJ can then appoint a physician to evaluate applicant's injury pursuant to section 5701. (*Ibid.*)

We are concerned that the QME's reporting cannot be rectified at this point. The QME admitted, in discussing the cumulative injury, that he had no interest in evaluating applicant as he had reviewed all the records and seen him multiple times. Upon return, the WCJ must consider whether proceeding with a new evaluator would be the best course.

Accordingly, we grant the Petition for Reconsideration, rescind the F&A and return the matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration of the decision of April 24, 2026 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award & Orders of April 24, 2026 is **RESCINDED** and that the matter is **RETURNED** to the WCJ for further proceedings consistent with this decision.

WORKERS' COMPENSATION APPEALS BOARD

/s/ PAUL F. KELLY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ CRAIG L. SNELLINGS, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

JULY 27, 2026

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

PING HUNG LI
GEORGE SURMAITIS
PURINTON LAW

TF/md

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