

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

RAUL SERVIN, *Applicant*

vs.

UPS FREIGHT; LIBERTY MUTUAL INSURANCE COMPANY, *Defendants*

**Adjudication Numbers: ADJ14680333
Pomona District Office**

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

Applicant filed a Petition for Reconsideration (Petition) in response to the workers' compensation judge's (WCJ) Findings and Award (F&A) issued on December 17, 2025. In the F&A, the WCJ found applicant's injury was not caused by the serious and willful misconduct of the employer and awarded permanent disability of 26% after apportionment.

Applicant contends the employers' serious and willful misconduct is established by substantial evidence and that the WCJ applied the incorrect legal standard; and that the apportionment finding is not supported by substantial medical evidence.

We did not receive an Answer.

The WCJ's Report and Recommendation (Report) recommends reconsideration be denied.

After our review of the record and for the reasons discussed below, we will grant the Petition for Reconsideration, affirm the finding that applicant's injury was not caused by the serious and willful misconduct of the employer and amend the award of permanent disability to 59% without apportionment (Findings 7 and 8, Award a and c).

I.

Former Labor Code section 5909¹ provided that a petition for reconsideration was deemed denied unless the Appeals Board acted on the petition within 60 days from the date of filing. (Former Lab. Code, § 5909.) Effective July 2, 2024, section 5909 was amended to state in relevant part that:

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

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

(Lab. Code, § 5909.)

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

Here, according to Events the case was transmitted to the Appeals Board on January 13, 2026, and 60 days from the date of transmission is Saturday, March 14, 2026. The time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10600(b).) Here, March 14, 2026, is a Saturday which by operation of law means this decision is due by the next business day, which is Monday, March 16, 2026. This decision issued by or on March 16, 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

¹ Unless otherwise stated, all further statutory references are to the Labor Code.

act on a petition. Section 5909(b)(2) provides that service of the Report shall be notice of transmission.

According to the proof of service, the Report was served on January 13, 2026, and the case was transmitted to the Appeals Board on January 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 January 13, 2026.

II.

As found by the WCJ in the Findings and Award, while employed on February 19, 2021 by defendant as a truck driver, applicant sustained injury to his bilateral knees.

The record contains reporting from Panel Qualified Medical Evaluator (PQME) Stephen Sweet, M.D., who evaluated the applicant three times and issued a total of six reports. (Exhibits 2-7, Stephen Sweet, M.D.)

In his November 2, 2023, evaluative report, Dr. Sweet concluded that applicant sustained injury to his bilateral knees and that each knee provided a 20% whole person impairment (WPI). (Exhibit 4, Stephen Sweet, M.D., November 2, 2023, pp. 20-22.) Dr. Sweet reviewed applicant's treatment records and history, and publications, before concluding that apportionment of impairment was "40% to pre-existing, nonindustrial degenerative changes, and the prior surgeries with the remaining 60% to the subject claim." (*Ibid.*)

In a March 28, 2025, supplemental report Dr. Sweet reviewed additional records and did not change his opinions. (Exhibit 2, Stephen Sweet, M.D., March 28, 2025, p. 4.)

In his final report, also a supplemental, Dr. Sweet notes there is a *likely* typographical error in the November 2, 2023, report and changes apportionment to "60% to pre-existing, nonindustrial degenerative changes, and the prior surgeries with the remaining 40% to the subject claim that caused aggravation of his longstanding preexisting bilateral knee issues." (Exhibit 3, Stephen Sweet, M.D., July 31, 2025, p 3.)

Treating physician Kenneth Jahng, M.D., issued an October 23, 2023, maximum medical improvement (MMI) report in which applicant was assigned a total 28% WPI for the bilateral knees and apportionment was stated as "30% related to the industrial injury and 70% to non-

industrial factors, including pre-existing degenerative changes and normal wear and tear.???”
(Exhibit 1, Kenneth Jahng, M.D., October 23, 2023, p. 5.)

In a November 24, 2025, supplemental report, Dr. Jahng changed impairment to 20% WPI for the left knee with a 2% WPI add on for pain, and a 15% WPI for the right knee. For apportionment the doctor states:

The patient was noted to have a pre-existing injury to his knees. He had surgery in both knees prior to his February 19, 2021 injury. A left knee MRI dated March 8, 2021 described areas of full-thickness cartilage loss. Subsequent radiographs also showed advanced osteoarthritis.

It appeared that his February 19, 2021 injury was an aggravating injury of a pre-existing condition thus 30% industrial apportionment was given. I believe this to be medically reasonable considering the above.

(Exhibit A, Kenneth Jahng, M.D., November 24, 2024, pp. 4-5.)

On December 10, 2025, the parties proceeded to trial.

Applicant testified in relevant part as follows. He first noticed the truck gate malfunctioning on January 21, 2021. He reported the issue to his supervisor Rick “Spairs” via text message. He also recalls an email on January 22, 2021, regarding having to jump off when the gate stopped working. The gate had two toggle switches, one down at the ground and another on the inside. The inside switch malfunctioned so the lift gate would not go down, causing him to have to jump down to the lower ground switch for access. He estimated the jump as around 5 feet. While working full time at that time, he estimated jumping down 10 to 15 times a day and more than 50 times in a week. (Minutes of Hearing and Summary of Evidence (MOH), December 10, 2025, p. 4, lns 4-13.)

On January 29, 2021, he emailed his employer regarding the malfunction and requested to switch trailers. He had indicated his legs were getting tired. The employer told him they would look into it. He got into an argument with his supervisor Rick and Drew around February 4, 2021, pleading to use the spare trailer because his knees were tired and hurting. He ultimately left the job on February 19 and indicated that the liftgate was still not repaired. He had told his supervisor that jumping off several times a day was a dangerous condition and noted it on his DVIR and trailer trip sheet. (*Id.* at p. 4, lns 15-23.)

He confirmed that he was eventually allowed to use the spare trailer around a week after his dispute with his supervisor. After his route he had taken the trailer to JB Trailer for repairs at

the request of Rick. He was then provided with the spare trailer for use. He did not see the defective trailer afterwards. Midway through his route on February 19, 2021, he called Rick and told him his knees were hurting from jumping off the trailer for the past three to four weeks and he needed to go to the doctor. (*Id.* at p. 5, lns 1-2, 5-9.)

Under cross-examination, he testified that JB Trailer likely did come out in January at night to inspect and hopefully fix the liftgate. This was because he had texted his supervisor on January indicating he noticed there was grease on the lube nipples and had inquired with his boss if JB Trailer had come out. His boss told him at the time he was unsure. He confirmed that around the second or third week of February he took the trailer to JB Trailer, per his boss's request, for drop-off and then received the spare trailer. He confirmed that he used the spare trailer for about a week of deliveries before his reported injury. (*Id.* at p. 6, lns 4-7, 14-16.) On recross-examination, he was asked if he mentioned specifically that it was a "dangerous condition" when he informed employer, and he indicated that he said the liftgate was malfunctioning. (*Id.* at p. 7, lns 11-13.)

Andrew Covert, the employer's regional operations manager, testified in relevant part as follows. He was not the direct supervisor. The direct supervisor, Rick Spairs, was no longer with defendant. (*Id.* at p. 7, lns 22-24.) Everything possible was done to fix the defective trailer prior to applicant going out on workers' comp leave. He has not encountered a liftgate causing knee injuries and that most common liftgate-related injuries were due to pinch points to the toes or falling off. (*Id.* at p. 8, lns 7-9, lns 13-15.) On cross-examination witness, he testified there is a ladder on the trailer to go down in emergency circumstances. The ladder is a way to get down that does not require any jumping. The trailer used by the applicant had that step. (*Id.* at p. 8, lns 22-23, p. 9, lns 3-5.)

The record contains a text from applicant to Rick Spairs and Andrew Covert on January 22, 2021, at 10:36 am which includes "my switch inside that let's you down keep getting stuck so I have to jump off and use other switch before it starts raining and gets slippery." (Exhibit 8.) This text appears to be restated in an email string between applicant and Andrew Covert on January 22, 2021, at 11:29 am which appears to also include an entry for January 22, 2021, forwarded to applicant consisting of:

John,

Can you send someone to VWR Rancho today to look at R2043? Driver is stating that the toggle switch to lower the lift gate inside the truck is not working, and the ABS light stays on. He will be back at 15:15 today. Thank you.

Applicant replied, "Thank you sire." (Exhibit 9, pp. 1-2.)

Finally, there is an email from applicant to Rick Spairs and Andrew Covert on January 29, 2021, at 7:33pm which states "[c]an we please get this lift gate fixed I'm tired of jump down and having to fold it buy hand if we can't get it fixed then switch trailers." (Exhibit 10.)

After trial the WCJ issued the F&A on December 17, 2025, finding applicant's injury was not caused by the serious and willful misconduct of the employer and awarding permanent disability of 26% after apportionment.

III.

Applicant alleges that he was injured as a result of the serious and willful misconduct of defendant. This is because defendant was "aware that the switch for the lift gate of his trailer [*sic*] was malfunctioning" which "thereby require[ed] the applicant to jump from the lift gate continuously, which led to the applicant's bilateral knee injury." (Petition for Increased Benefits pursuant to Labor Code § 4553 Serious & Willful Misconduct, February 18, 2022.)

Section 4453 provides, in relevant part, that "[t]he amount of compensation otherwise recoverable shall be increased one-half, together with costs and expenses not to exceed two hundred fifty dollars (\$250), where the employee is injured by reason of the serious and willful misconduct of ... [t]he employer, or his managing representative." (Lab. Code, § 4453(a).)

"An award for serious and wilful [*sic*] misconduct is 'of the nature of a penalty.' Such an award can be sustained only if the evidence establishes and the [WCAB] finds every fact essential to its imposition." (*Dowden v. Industrial. Acc. Com.* (1963) 223 Cal.App.2d 124, 129 [28 Cal.Comp.Cases 261].) "A claim of serious and wilful [*sic*] misconduct raises issues of law as well as of fact. Issues relating to the credibility of witnesses, the persuasiveness or weight of evidence, and the resolution of conflicting inferences are questions of fact. 'But as to what minimum factual elements must be proven in order to constitute serious and wilful misconduct, and the sufficiency of the evidence to that end, the questions are of law.' [citation]." (*Id.* at p. 128.)

The employee bears the burden of proof in establishing an employer's serious and willful misconduct. (Lab. Code, § 5705; and see *Central California Ice Co. v. Industrial Acci. Com.*, (1944) (*Montgomery*) 66 Cal.App.2d 339, 343-344 [9 Cal.Comp.Cases 276] ["the burden of establishing serious and wilful [*sic*] misconduct on the part of the employer rests on the injured employee].)

In *Bigge Crane & Rigging Co. v. Workers' Comp. Appeals Board (Hunt)* (2010) 188 Cal.App.4th 1330 [75 Cal.Comp.Cases 1089], the court explained that the standard for proof of a claim of serious and willful conduct was different than the standard of proof in workers' compensation and different than the standard of proof in an ordinary claim of negligence.

As the Supreme Court explained in *Lambreton v. Industrial Acc. Com.* (1956) 46 Cal.2d 498 [297 P.2d 9], "a claim for normal benefits and a claim for increased benefits by reason of serious and wilful misconduct are not sought upon the same general set of facts, nor do they involve merely a difference or change in legal theory. The relief sought is not the same; the legal liability is not the same; and the 'proceedings' to recover the benefits as respectively provided are recognized as being different. (Lab. Code, § 5407.) Normal benefits automatically follow from an injury within a covered employment relationship, whereas the additional award based on serious and wilful misconduct of the employer is an additional award which, although denominated and regarded for administrative purposes as 'increased compensation,' is actually of the nature of a penalty, which is imposed ... only upon proof of the aggravated criminal or quasi-criminal behavior which constitutes serious and wilful misconduct, and against which the employer cannot purchase insurance. (*Mercer-Fraser Co. v. Industrial Acc. Com.* (1953) 40 Cal.2d 102, 108, 121 [251 P.2d 955], and authorities there cited; Ins. Code, § 11661.)" (*Lambreton*, at p. 504, fn. omitted.)

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The watershed case on "serious and willful misconduct" is *Mercer-Fraser, supra*, 40 Cal.2d 102. In *Mercer-Fraser*, the Supreme Court assumed, without holding, that the deliberate decision of the company's chief engineer and superintendent of maintenance and construction to not provide additional bracing to prefabricated sections of a building under construction, despite numerous warnings about the stability of the sections and the fact the weather was windy, would be sufficient to support a finding of "serious and willful misconduct." (*Id.* at pp. 120–121.) The court concluded the findings actually made by the commission, however, were consistent with a determination of negligence only and thus could not support the award of additional compensation. (*Id.* at pp. 124–127.)

The Supreme Court discussed the meaning of serious and willful misconduct at length, contrasting such conduct with conduct that is negligent or even grossly negligent. (*Mercer-Fraser, supra*, 40 Cal.2d at pp. 116–118.) " 'Wilful misconduct

... necessarily involves deliberate, intentional, or wanton conduct in doing or omitting to perform acts, with knowledge or appreciation of the fact, on the part of the culpable person, that danger is likely to result therefrom.’ ” (*Id.* at p. 117, quoting *Porter v. Hofman* (1938) 12 Cal.2d 445, 447 [85 P.2d 447].) “ ‘Wilfulness necessarily involves the performance of a deliberate or intentional act or omission regardless of the consequences.’ ” (*Mercer-Fraser*, at p. 117 [Citation].)

“ ‘ “Wilful misconduct” means something different from and more than negligence, however gross. The term “serious and wilful misconduct” is described ... as being something “much more than mere negligence, or even gross or culpable negligence” and as involving “conduct of a quasi criminal nature, the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequences[.]” ... ’ ” (*Mercer-Fraser, supra*, 40 Cal.2d at p. 117 [Citation].)

“ ‘While the line between gross negligence and wilful misconduct may not always be easy to draw, a distinction appears ... in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results, while wilful misconduct involves a more positive intent actually to harm another or to do an act with a positive, active and absolute disregard of its consequences. It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the [L]egislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence and that this misconduct must be wilful. While the word “wilful” implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. But wilful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence. Wilful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its possible result.’ ” (*Mercer-Fraser, supra*, 40 Cal.2d at p. 118 [Citation].)

“ ‘ Such intent and knowledge of probable injury may not be inferred from the facts in every case showing an act or omission constituting negligence for, if this were true, any set of facts sufficient to sustain a finding of negligence would likewise be sufficient to sustain a finding of wilful misconduct. As has been repeatedly declared, “ ‘wilful misconduct’ means something more than negligence—more, even, than gross negligence.” [Citations.]’ ” (*Mercer-Fraser, supra*, 40 Cal.2d at p. 118 [Citation].) “Manifestly, ‘serious and wilful misconduct’ cannot be established by showing acts any less culpable, any less deliberate, or any less knowing or intentional, than is required to prove wilful misconduct.” (*Mercer-Fraser*, at p. 118.)

Measured against this rigorous standard, the Supreme Court concluded the commission's findings were "significant of nothing more culpable than negligence." (*Mercer-Fraser, supra*, 40 Cal.2d at p. 124.) For example, "findings ... that the employer, through its general superintendent, failed and neglected to exercise that degree of prudence, foresight and caution which, under the circumstances, a prudent employer would then and there have exercised, and ... statements concerning what a 'prudent employer' would have done 'had it turned its mind to the fact' obviously do not establish serious and wilful misconduct, which, as has been shown, requires an act or omission to which the employer has 'turned its mind.'" (*Id.* at pp. 124–125.) "There [was] no suggestion that [he] was incompetent or inexperienced or that his employer ... was itself guilty of misconduct in employing [him] for the job at hand." (*Id.* at p. 127.)

(*Id.* at pp.1340, 1348-1350.)

Here, in assessing applicant's serious and willful misconduct claim, the WCJ provided the following discussion:

The court does not find a serious and willful against employer in this present action given that employer took remedial actions to fix both issues with the lift gate, the gate folding issue and the broken inside lift gate switch issue. While the mechanic, JB trailer, may not have acted in applicant's desired turnaround time, as frustrating as that may be, it is not as if employer did nothing. Employer appears to have contacted their mechanical vendor who came out and applied lube, to get the gate to fully close. When this was unsuccessful, it appeared employer confirmed with applicant that parts were being ordered. When told the switch was broken, employer appears to have had applicant drop of the trailer for repairs and then provided applicant with an alternate trailer. The span of time in which this occurred did not seem unreasonable given employer's credible testimony and the common layman's experience that mechanical repairs take time diagnose, order parts, install, and test.

Furthermore, while employer had knowledge of the defective gate issues, the court does not find said defect to be a dangerous condition, especially in light of the evidence that there was an alternative way down that did not require jumping. This brings to question whether this defect even caused applicant's injury, given this alternative route, or whether applicant chose the riskier but perhaps speedier path.

Additionally, employer testified credibly that they were unaware of such a defect causing a knee injury, rather that a gate failure usually resulted in pinches or a fall.

In conclusion, even with what seems to be a minor defect, the employer did not deliberately fail to act, rather they appeared to have taken several good faith attempts to resolve the issue before having applicant drop off the trailer at JB trailer for repairs and then even provided applicant an alternative trailer afterwards.

(Opinion on Decision, pp. 3-4.)

We find the WCJ's reasoning to deny the serious and willful petition persuasive. On the record before us, while applicant's employer may have been negligent in that applicant made it clear that the condition of the trailer was causing him harm and thereafter four weeks elapsed before the employer remedied the circumstances, the employer's conduct did not rise to the standard of intentional "quasi-criminal" conduct articulated in *Mercer-Fraser, supra*, 40 Cal.2d 102. Moreover, while applicant's warnings to his employer raised a concern about the *potential* for serious injury, this evidence again supports a claim of negligence and not of intentional "quasi-criminal" conduct. We also note that by the end of the four-week period where applicant's employer's conduct is at issue, his employer had already provided him with a different trailer. Thus, applicant's employer's conduct does not rise to the level contemplated by section 4453.

We therefore uphold the WCJ's finding of fact that "Applicant's injury was not caused by the serious and willful misconduct of the employer."

IV.

The burden of proving apportionment of permanent disability falls on the employer because it is the employer that benefits from apportionment. (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535, 1560 [74 Cal.Comp.Cases 113]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229]; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).)

In *Escobedo* the Appeals Board held that (1) section 4663 requires the reporting physician to make an apportionment determination; (2) apportionment to other factors allows apportionment to causation, including pathology, prior conditions, and retroactive work restrictions; (3) applicant holds the initial burden to prove industrial injury and also has the added burden of establishing the approximate percentage of permanent disability directly related to the industrial injury; (4) defendant has the burden of establishing the approximate permanent disability caused by other factors; and (5) a medical report addressing apportionment may not be relied upon unless it constitutes substantial evidence. (*Escobedo, supra*, at p. 607.)

Therefore to be substantial evidence on the issue of apportionment, 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. Furthermore, if a physician opines that a percentage of disability is caused by a degenerative disease, the physician must explain the nature of the disease and how and why it is causing disability at the time of the evaluation. (*Id.* at pp. 620-621.)

Here treating physician Jahng's apportionment is clearly conclusory and does not set forth the reasoning in support of its conclusions. Moreover, even the doctor seems to doubt his own conclusions as evidenced by the question marks at the end of his findings: "30% related to the industrial injury and 70% to non-industrial factors, including pre-existing degenerative changes and normal wear and tear.???" (Exhibit 1, Kenneth Jahng, M.D., October 23, 2023, p. 5.) Dr. Jahng's statements in his supplemental report that "[i]t appeared that his February 19, 2021 injury was an aggravating injury of a pre-existing condition thus 30% industrial apportionment was given" do not rehabilitate the conclusory nature of his opinions. (Exhibit A, Kenneth Jahng, M.D., November 25, 2024, p. 5.) It is clear Dr. Jahng's opinions are not substantial evidence of apportionment.

PQME Dr. Sweet's opinions are even more deeply entrenched in the land of unsupported conclusory opinion.

Apportionment of disability is "40% to pre-existing, nonindustrial degenerative changes, and the prior surgeries with the remaining 60% to the subject claim." (Exhibit 4, Stephen Sweet, M.D., November 2, 2023, pp. 22-22.) Dr. Sweet then reviews additional records without changing his apportionment opinions. (Exhibit 2, Stephen Sweet, M.D., March 28, 2025, p 4.) Dr. Sweet then notes there is a *likely* typographical error and changes apportionment as "60% to pre-existing, nonindustrial degenerative changes, and the prior surgeries with the remaining 40% to the subject claim that caused aggravation of his longstanding preexisting bilateral knee issues." (Exhibit 3, Stephen Sweet, M.D., July 31, 2025, p 3.)

Not only does Dr. Sweet completely flip his apportionment percentages, nowhere does he set forth reasoning in support of his conclusions nor the how and why such degenerative changes were causing disability at the time of the evaluation.

As Dr. Sweet's opinions on apportionment are also not substantial, we are left with no basis to find apportionment. It is clear that defendant has the burden of establishing the approximate permanent disability caused by other factors and that medical reports addressing apportionment may not be relied upon unless they constitute substantial evidence. (*Escobedo, supra*, at p. 607.)

As defendant has not met the burden of proving apportionment, apportionment fails and an unapportioned award of disability follows.

To determine applicant's permanent disability rating we simply take the WCJ's rating in the F&A Opinion on decision and remove the apportionment as follows:

Right knee: 17.05.06.00 - 20 - [1.4] 28 - 350G - 31 - 36%

Left Knee: 17.05.06.00 - 20 - [1.4] 28 - 350G - 31 - 36%

36 C 36 = 59

We therefore amend the F&A to provide a finding of 59% disability without apportionment and award benefits consistent therewith.

V.

Following our independent review of the record, and for the reasons stated above, we grant applicant's January 9, 2026 Petition for Reconsideration, and we affirm the December 17, 2025 Findings and Award as to the finding that applicant's injury was not caused by the serious and willful misconduct of the employer and amend the findings to award permanent disability of 59% without apportionment (Findings 7 and 8, Award a and c).

For the foregoing reasons,

IT IS ORDERED that applicant's January 9, 2026 Petition for Reconsideration is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the December 17, 2025 Findings and Award is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

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7. Applicant sustained permanent disability of 59% without apportionment.
8. Applicant's attorneys are entitled to a reasonable attorney's fee of 15%.

AWARD

AWARD IS MADE in favor of **RAUL SERVIN** against **UPS FREIGHT; LIBERTY MUTUAL INSURANCE COMPANY** of:

a. Permanent disability of 59%.

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c. Applicant's attorney's fees of 15%, to be commuted from the far end of the award.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR IN PART AND DISSENT IN PART
(See Concurring and Dissenting Opinion),

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 16, 2026

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

**RAUL SERVIN
SILBERMAN & LAM
ACUMEN LAW**

PS/oo

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

CONCURRING AND DISSENTING OPINION OF COMMISSIONER JOSÉ H. RAZO

I respectfully dissent. While I concur with my colleagues in finding applicant has not met the high burden of establishing the employer's serious and willful misconduct, I am unable to join in Part IV of the decision. I am of the opinion the record is sufficient to return this matter to the trial level for further development on the issue of apportionment.

It is clear the defendant has the burden of proof to establish apportionment. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 612 (Appeals Board en banc).) It is also clear the Appeals Board has broad powers to make further inquiry when warranted.

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Kuykendall, supra*, page 404.) The preferred procedure is to allow supplementation of the medical record by the physicians who have already reported in the case. (*McDuffie v. Los Angeles County Metropolitan Transit Authority* (2003) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).)

My colleagues clearly point out the deficiencies in the medical reporting on the issue of apportionment. What is lacking, however, is a discussion of the existing factual record that amply supports apportionment.

Here, defendant has established that applicant had "a pre-existing injury to his knees. He had surgery in both knees prior to his February 19, 2021 injury. A left knee MRI dated March 8, 2021 described areas of full-thickness cartilage loss. Subsequent radiographs also showed advanced osteoarthritis." (Exhibit A, Kenneth Jahng, M.D., November 25, 2024, p. 4) It was based on these findings that Dr. Jahng found only 30% of the disability was caused by the February 19, 2021, injury. (*Id.* at p. 5.)

PQME Dr. Sweet also noted "pre-existing, non- industrial degenerative changes, and the prior surgeries" and "diagnostic testing showing significant preexisting pathology along with her [*sic*] history of obesity" before apportioning applicant's disability "60% to pre-existing, nonindustrial degenerative changes, and the prior surgeries." (Exhibit 3, Stephen Sweet, M.D., July 31, 2025, p. 3.)

Although the doctors may not have adequately explained the “how and why” of apportionment in this case, it is clear based on the medical evidence that there are obvious facts supporting some apportionment. This is not a case cloaked in the mystery of vague medical opinion. Whether that apportionment is 40%, 60% or some other percent, we should not ignore facts that clearly invoke the spirit of the 2004 legislative changes to the workers’ compensation system when the legislature enacted section 4663 as part of SB 899. Where, as here, there are significant and substantial facts that could reasonably lead to apportionment, it is our constitutional duty to “accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character” by creating a substantial record. (Cal Const, Art. XIV § 4.) Substantial justice should be afforded to all parties, including defendants.

I would return this matter to the trial level to further develop the record on apportionment through supplementation of the medical record by the physicians who have already reported in the case regarding apportionment. (*McDuffie, supra*, p. 139.)

For the foregoing reasons, I dissent as to Part IV of the decision.



WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 16, 2026

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

**RAUL SERVIN
SILBERMAN & LAM
ACUMEN LAW**

PS/oo

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