WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

JOSE VASQUEZ DELGADO, ***Applicant***

vs.

EDWARD SEELY COMPANY,
ZENITH INSURANCE COMPANY, ***Defendants***

Adjudication Number: ADJ11776398
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated below, we will grant reconsideration, amend the WCJ's decision to admit the November 19, 2021 Functional Capacity Evaluation (FCE) Report of Thomas McDonald, D.C., applicant's exhibit two (2) into evidence. For the reasons stated in the Report and the Opinion on Decision, both of which we adopt and incorporate, except as noted below, we will otherwise affirm the April 9, 2024 Findings, Award & Orders.

We do not adopt or incorporate the WCJ's discussion of *Batten v. Workers' Comp. Appeals Bd.* (2015) 241 Cal.App.4th 1009 [80 Cal.Comp.Cases 1256] to exclude the FCE report. The portions of the Report and Opinion on Decision that we exclude have been omitted from the Report and Opinion on Decision attached to this decision.

Contrary to the WCJ, we see no reason to exclude the November 19, 2021 FCE. We note that the panel qualified medical evaluator (QME) Moses Jacob, D.C., suggested a FCE be obtained and that such a report may be of value to vocational experts. The FCE is not a comprehensive medical evaluation and it cannot have been obtained to rebut the opinions of other evaluating

physicians. Therefore, it does not violate Labor Code sections 4061(i) or 4062.2. Accordingly, we will amend the April 9, 2024 Findings, Award & Orders to admit applicant's Exhibit 2 into evidence.

Nevertheless, we do agree with the WCJ that the November 19, 2021 FCE is not substantial evidence. In the Opinion on Decision, the WCJ stated:

> [The] 3-page FCE report from Dr. McDonald dated November 19, 2021, does not review or summarize any medical records, and does not discuss actual physical capacities in much detail. Its only measurements are range of motion for the left knee, and the primary findings or conclusions appears to be that the Applicant has "developed CRPS," has a "peroneal nerve lesion on the left [sic]," and an unstable left knee, with 3 cm of measured atrophy of the left thigh, that he walked with a limp slowly using a cane, has "very limited range of motion of the lumbar spine," a "very significant loss of strength and endurance" (although the specific body parts are not referenced and the term endurance is not defined) although he notes the endurance loss "cannot be accurately measured," and that in his opinion the Applicant's "loss of ability and endurance is severe." (Applicant's 2 at p. 2.) It is not quite clear as to what exact capacity loss is being referenced, to but in this context it appears to be the capacity to bend at the waist, squat, climb, kneel, or stoop. (Id.) As far as I can tell, this FCE was never sent to and/or reviewed by the QME, Dr. Jacob….
>
> (Report at p. 14.)

Finally, we have given the WCJ's credibility determinations great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].) Furthermore, we conclude there is no evidence of considerable substantiality that would warrant rejecting the WCJ's credibility determination. (*Id*.)

For the foregoing reasons,

IT IS ORDERED that reconsideration of the April 9, 2024 Findings, Award & Orders. **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the April 9, 2024 Findings, Award & Orders is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

* * *

ORDERS

1. Applicant's Exhibit 2, the FCE report of Thomas McDonald, D.C., dated November 19, 2021, is admitted into evidence.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

KATHERINE A. ZALEWSKI, CHAIR
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 1, 2024

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

JOSE VAASQUEZ DELGADO
KNOPP PISTIOLAS
CHERNOW, PINE AND WILLIAMS
EMPLOYMENT DEVELOPMENT DEPARTMENT

PAG/abs

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

REPORT AND RECOMMENDATION
IN RESPONSE TO APPLICANT'S
PETITION FOR RECONSIDERATION

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) e-filed on April 29, 2024, Applicant's attorney seeks reconsideration of the Findings, Award & Orders with Opinion on Decision (FA&O) dated and served on April 9, 2024. That FA&O in relevant part found the Applicant while employed as a laborer by the Edward Seely Company, sustained injury AOE/COE on August 10, 2017, to his left knee, low back, left hip, and left ankle, but not to his right knee or right hip, which resulted in permanent partial disability of 70%, based on the reporting and deposition testimony of the QME, Moses Jacob, D.C., awarded future medical treatment for the body parts found to have been industrially injured, and awarded a 15% attorney fee. It also ordered that the Functional Capacity Evaluation (FCE) report of Thomas McDonald, D.C., dated November 19, 2021, should not be admitted in to evidence. Applicant had been seeking a finding of permanent and total disability pursuant to the *LeBoeuf* case[1] based on the evidence including the reporting of his vocational expert, Jeff Malmuth. I apologize to the Board and the parties for the delay in the filing of this Report and Recommendation.

Applicant's Petition specifically alleges: 1. The FA&O were in excess of the judge's powers; 2. The evidence does not justify the Findings of Fact; and 3. The Findings of Fact do not support the Findings, Award and Orders. (Petition at p. 1.) More specifically, it argues that the reporting of Jeff Malmuth warrants a finding that the Applicant was permanently and totally disabled (PTD) pursuant to *Ogilvie* [2] and/or *LeBoeuf* (Petition at pp. 6-9), that I erred in concluding the report of Mr. Malmuth was not substantial evidence (***Id.*** at pp. 9-12), that I drew improper inferences based on personal experience in place of medical and vocational evidence (***Id.*** at pp. 12-14), that I erred in concluding there was no injury AOE/COE to the right knee and right hip as a compensable consequence of the accepted injuries (***Id.*** at pp. 14-15), and finally that I erred in not admitting the Dr. McDonald FCE report into evidence (***Id.*** at pp. 15-16.)

Defense counsel e-filed an Answer to the Petition on May 13, 2024. That Answer argues: 1. The Applicant has not met his burden under Labor Code section 3202.5 to prove injury AOE/COE to the right knee and right hip by a preponderance of the evidence (***Id.*** at p. 2); 2. The WCJ correctly found the FCE report of Dr. McDonald to be inadmissible, and that even it had been admitted, it does not constitute substantial medical evidence (***Id.*** at pp. 3-4); and 3. The WCJ correctly rejected Applicant's *LeBoeuf* claim and properly found PD based on the QME reporting and deposition testimony of Dr. Jacob and defendant's vocational expert, Scott Simon. (***Id.*** at pp. 4-6.)

[1] See LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal.3d 234, 48 Cal.Comp.Cases 587.

[2] See Ogilivie v. Workers' Comp. Appeals Bd. (2011) 197 Cal.App.4th 1262, 76 Cal.Comp.Cases 624.

More specifically, it argues that the QME never found injury to Applicant's right knee or right hip in any of his three reports and was not even asked about such an alleged injury when deposed by Applicant's attorney, and that there is no medical evidence in the record to find industrial injury AOE/COE to those body parts as a compensable consequence. (***Id***. at p. 2.) It further argues that the Dr. McDonald FCE report was properly excluded from evidence pursuant to Labor Code sections 4061(i), 4062.2, 4064(d), and *Batten v. Workers' Comp. Appeals Bd*. (2015) 241 Cal.App.4th 1009, 80 Cal.Comp.Cases 1256, as it was improperly obtained as a private expert report by Applicant's attorney outside of the mandatory process to obtain medical/legal reports. (***Id***. at p. 3.) Alternatively, it argues that even if that report had been admitted, it does not constitute substantial medical evidence, as it is a "3-page note" that does not review medical records, was based on range of motion measurements of the left knee, and does not discuss the applicant's physical capabilities with any specificity. (***Id***. at p. 3.) The Answer further points out this FCE was never sent to the QME for review or comment. (***Id***. at p. 4.)

With respect to the *LeBoeuf* issues, the Answer notes the Petition entirely ignores the extensive sub rosa video of the Applicant reviewed by the QME, defendant's vocational expert Mr. Simon, and the judge, which documented activities inconsistent with Applicant's reported physical limitations and which raise credibility concerns with respect to the Applicant's reporting and trial testimony. (***Id***. at p. 5.) It further argues I correctly reviewed and considered all the relevant evidence and the Applicant's credibility in finding that Mr. Simon's reporting was more persuasive that Mr. Malmuth's, that Mr. Malmuth's reporting was not substantial evidence, and that the medical reporting and deposition testimony of the QME Dr. Jacob warranted a finding of 70% PD, and explained the reasons for those findings and decisions. (***Id***. at pp. 5-6.)

BACKGROUND

As noted in the FA&O's Opinion on Decision, this case was tried on January 11, 2024, which included trial testimony from the Applicant through a Spanish interpreter. The Opinion on Decision includes a detailed summary of the relevant evidence. (Opinion on Decision at pp. 3-11.) The highlights of that summary are as follows. The Applicant was employed by Seely Orchard as a supervisor/laborer when on August 10, 2017, he suffered an accepted injury to his left knee when his left leg was pinned between to large bins of pears during harvest. (MOH/SOE at p. 3.) This incident resulted in a tibial plateau fracture that was treated surgically with an ORIF procedure and subsequently with a second surgery. Unfortunately, per the QME, following these surgeries, the Applicant developed Complex Regional Pain Syndrome (CRPS) of the left lower extremity. (***Id***. at p. 3.) Later claims of injury to the low back, left hip, and left ankle were accepted based on QME reporting from Dr. Jacob, but claims of compensable consequence to his right knee and right hip were denied. (***Id***. at p. 4.)

The QME, chiropractor Moses Jacob, D.C., who I note is frequently used as an AME at the Oakland WCAB, issued three reports. The first two dated April 18, 2019 and April 1, 2021, were based on examinations and the third was a supplemental report dated August 6, 2021, that reviewed and commented on additional medical records, he did not have at the time of the re-exam. (Joint 101.) In his first report, Dr. Jacob nominally concluded the Applicant was not yet P&S, as he wanted to review lumbar x-rays before making such a finding, but he did provide "conditional" impairment ratings and he also recommended the Applicant have a surgical consult with an orthopedic spine surgeon to determine if a potential back surgery could benefit him. (***Id***.

at p. 4.) His conditional "strict" AMA ratings were 7 whole person impairment (WPI) for the lumbar spine per DRE II, 16 WPI for the left knee based on reduced range of motion (ROM) measurements, 12 WPI for the right ankle, and a 3 WPI pain add on. (***Id.*** at pp. 4-5.) However, he also provided an *Almaraz/Guzman* [3] rating of 50 WPI, analogizing to a Class IV gait disorder using Table 13-15 of the AMA Guides, 5th Edition., which he indicated was a "more accurate" reflection of Applicant's total impairment, considering the Applicant's reported pain and the impacts of the injury on activities of daily living (ADLs.) (***Id.*** at p. 5.) He did not find any non-industrial apportionment, subject to his review of the requested lumbar x-rays and provided work restrictions of no standing, walking, crouching, bending or lifting of more than 10 pounds and work in a seated position, with no weight bearing activities. **(*Id.*)**

Dr. Jacob re-examined the Applicant on April 1, 2021, and by this time he was using a cane instead of the walker he presented with at the time of the first exam. He had also undergone a second knee surgery, which removed hardware implanted at the time of the first surgery. (***Id.*** at p. 5-6.) He found the Applicant to be P&S, and provided "strict" impairment ratings of 8 WPI for the lumbar spine using DRE II, which was a 1 WPI increase from before, 16 WPI for the left knee, 12 WPI for the left ankle, and 12 WPI for the left hip based on ROM. (***Id.*** at p. 6.) He increased his *Almaraz/Guzman* rating to 60 WPI, and seemingly indicated a 3 WPI pain add on should apply to that, although he did not really explain why his opinion had changed, merely citing the second surgery, neurological deficits, and chronic pain. (***Id.***) His other opinions were unchanged from his first report, with the small exception of changing his work restriction of no lifting of more than 10 pounds, to no lifting of more than 5-10 pounds. (***Id.***)

In a supplemental report dated August 6, 2021 (Joint 101), he reviewed additional records, including those related to the second knee surgery and a normal lower extremity EMG/NCV study by Dr. Rutchik, which did not reflect any nerve injury, and he did not change any of his previously expressed opinions. (***Id.*** at pp. 6-7.) Other reports in evidence including those from the last PTP, Dr. Gary Stein, reflect that Applicant last treated on this claim back in in May of 2022. (***Id.*** at p. 7.) The Applicant also had a surgical consult with back surgeon, Dr. Christian Athanassious, whose report dated April 5, 2022 is in evidence, and who recommended lumbar surgery. (Applicant's 3, ***Id.*** at p. 8.)

After issuing these 3 reports, Dr. Jacob was deposed on January 18, 2022. (Joint 102.) In his testimony, he changed his *Almaraz/Guzman* opinions dramatically. He was questioned by defense counsel regarding his 60 WPI *Almaraz/Guzman* rating, and ultimately changed his opinion and disavowed that rating, conceding the fact it was based on Category IV of the Guides Gait Disorder Table 13-15, at page 336, which applies where a person "cannot stand without help, mechanical support, and/or an assistive device." That was not the case with the Applicant. He ultimately testified that he would stick with his strict AMA ratings because that is the "true" rating and what the Applicant "deserves." (***Id.*** at p. 9.) He was questioned about the extensive sub rosa video of the Applicant which he had reviewed,[4] and generally felt that it was "pretty much" and "predominantly" consistent with his physical exams and that the Applicant was credible and not

[3] See Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist. (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), and Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman) (2010) 187 Cal.App.4th 808, 75 Cal.Comp.Cases 837.

[4] For a detailed summary of that sub rosa, see the Supplemental Minutes of Hearing Summarizing Sub Rosa Video of Applicant dated and served with the FA&O on 4/9/24, which can be found in Filenet.

embellishing or exaggerating his complaints. (***Id.***) The balance of the deposition dealt with questions about *Kite,*[5] and whether the impairments he provided for the various body parts should be added rather than combined. He did not mention *Kite* in any of his written reports. When initially asked about it, he did change his opinion and said it would be appropriate to add the impairments, but did not really explain why. However, in the end, he conceded he did not know if *Kite* could or should apply when only one side of the body was involved and he backed off a definitive opinion on *Kite* and indicated he "defers to counsel and the judge" as to whether the knee rating should be added to the left hip and/or left ankle ratings. (***Id.*** at p. 9.) He was never asked about whether in his opinion there was a compensable consequence injury to the right hip and/or right knee. (***Id.***)

The Applicant testified at trial through an interpreter. He has not worked since his injury on August 10, 2017, and has not even looked for a job as "no one would want to hire a cane user cannot walk." (Opinion on Decision at p. 10.) He has had two left knee surgeries and has constant pain in his left knee, constant pain in his left hip, and numbness in his left leg. (***Id.***) To deal with the pain he takes over the counter Tylenol and Ibuprofen, which enable him to walk and move about more easily. (***Id.*** at pp. 10-11.) Dr. Athanassious' recommendation for surgery was denied, and had it been approved he would have pursued it. (*Id.*) He has pain in his right knee, which began within a year of his original injury, and he believes this is the result of putting additional weight on his right leg to compensate for his injured left leg. (***Id.*** at p. 11.) He uses a cane, which was recommended to him by the surgeon who did his second knee surgery, Dr. Schakel. (***Id.***) He estimates he can stand for 25-30 minutes before he has to sit and he can walk for 5-10 minutes at a time with the cane. (***Id.***) He has not looked for work since the injury because he does not feel capable of doing a job, and does not believe he had do even a light job because of pain. (***Id.***)

In the FA&O, before considering Applicant's *LeBoeuf* claim, I rated Dr. Jacob's opinions, as reflected in his reports and deposition testimony, using the parties' stipulated occupational group of 491 and Applicant's age of 48 on the date of the injury, as follows at p. 18:

Lumbar DRE II	15.03.01.00 8	[1.4] 11 491H 14 16
L Knee ROM	17.05.04.00 19	[1.4] 27 491H 33 37
L Hip ROM	17.05.04.00 12	[1.4] 17 491H 21 24
L Ankle ROM	17.07.04.00 12	[1.4] 17 491H 21 24

Per the CVC table in the 2005 Schedule for Rating Permanent Disabilities, 37C24 = 52 52C24 =64 64 C16 =70

70% PD is 433.25 weeks of indemnity at $290.00 a week, which is equivalent to $125,642.50, plus the applicable life pension, which was awarded.

APPLICANT'S CLAIMS OF ERROR

Applicant's Petition summarizes what he feels is the relevant evidence. (Petition at pp. 2-3, 5-6.) Applicant's first argument is that the evidence supports a PTD finding and that I erred by not following the opinion of Applicant's vocational expert Jeff Malmuth, who concluded the

[5] See Athens Administrators for East Bay Municipal Utility District v. Workers' Comp. Appeals Bd. (Kite) (2013) 78 Cal.Comp.Cases 213 215 (writ den.)

Applicant "is not capable of successfully returning to any form of employment in the competitive labor market" and "would not be amenable to or capable of benefitting from any form of assistance through vocational rehabilitation." Petition. (***Id.*** at pp. 6-9.)

Despite the long and wordy Jeff Malmuth reports in evidence, I did not and do not find this opinion that the Applicant cannot return to any form of employment and that he is not amenable to or capable from benefiting from any kind of vocational rehabilitation, to be sufficiently explained under *Escobedo* to constitute substantial medical evidence. That is why I did not find Mr. Malmuth's vocational opinions to be persuasive, especially in the face of what in my judgment were the better reasoned and better explained competing opinions from defendant's vocational expert, Scott Simon. (Defendant's B.)

Although Mr. Simon found the Applicant was not amenable to vocational rehabilitation *in the form of classroom training only* because of pre-existing non-industrial factors such as limited English language skills, a lack of education, and poor testing, he concludes the Applicant would be a good candidate for and could benefit from VR in the form of either direct placement or on-the-job training. (Defendant's B, report of 7/18/22 at p. 18.) He also reviewed the sub rosa video and noted the inconsistencies between the Applicant's claimed limitations and what he was seen doing in the video, such as driving. Although I will not get into the details of the perennial fight between Mr. Malmuth and Mr. Simon over the correct and/or better method to analyze available jobs and labor market access or lack thereof, given the Applicant's applicable work restrictions as found by the QME, I will say that as discussed in the Opinion on Decision at pp. 22-24, I found Mr. Simon to be more persuasive than Mr. Malmuth in their respective reporting.

Finally, as noted in the Opinion on Decision at p. 24, I did not find Applicant's trial testimony and/or his account of his reported pain levels to the QME and/or to the vocational experts to be credible. Mr. Malmuth's opinions are premised in large part on Applicant's reported pain complaints and resulting limitations, along with the findings in Dr. McDonald's FCE report. Although the Petition asserts I ignored medical reporting on these issues and improperly substituted my personal experience in drawing certain inferences, I disagree. It is obviously hard to judge the frequency or intensity of the pain experienced by another person, which is inherently subjective. In attempting to make such assessments, I look at all the evidence, which in this case, includes the undisputed facts that the Applicant does not take *any* prescription pain medications, and has not had or solicited *any* industrial treatment of any kind since May 2022. (Opinion on Decision at p. 24.) As I stated in the Opinion on Decision, had the Applicant been experiencing the extreme pain levels he claimed, I believe he would have sought out industrial medical treatment and/or prescription medications in an effort to mitigate his pain and improve his functionality. Aside from the Applicant's testimony that Dr. Athanassious' request for back surgery authorization was denied, there is no evidence of other UR denials of RFAs for medication or any other medical treatment.

Contrary to the assertions in the Petition, I think it is reasonable and proper for the finder of fact to use all available evidence in the record, including undisputed facts, medical evidence, witness testimony, and sub rosa video, to assess and judge credibility, including a rough assessment of the relative pain an Applicant is likely experiencing, when it involves claims where it is alleged that pain limits and/or precludes a potential return to work. While difficult, it is necessary to make such findings in cases like this. I also found the sub rosa video I reviewed which

showed the Applicant working in the garden with a shovel and bending at the waist repeatedly and without apparent difficulty, to be telling. For all these reasons, and especially my finding that after considering all the evidence, I found Mr. Simon's vocational opinions to be more persuasive that those of Mr. Malmuth, I concluded and still believe that Applicant had not met his burden to prove the Applicant was PTD pursuant to *LeBoeuf*.

Applicant's second claim for error is that the record supports a finding of compensable injury to the right knee and right hip. (Petition at pp. 14-15.) The analysis here is brief and conclusory, citing only to the Applicant's subjective belief his right knee symptoms were caused by compensating for his bad left knee (which is not expert medical opinion) and to one report of the then PTP, Dr. Gary Stein, dated May 9, 2022 (Applicant's 1.) That report references the right knee only in passing and declares the Applicant's right knee pain "was probably" aggravated by compensatory stress from the left knee injury. (***Id.*** at p. 14.) However, the Petition completely ignores the extended discussion of that report in the Opinion on Decision, *which is the only evidence in the entire record to potentially support a claim of injury to the right knee*, much less the right hip, and why that report is not substantial evidence for the purpose of making an injury AOE/COE finding. (***Id.*** at pp. 12-13.) Specifically, I found that one passing sentence in a PTP PR-2 report, which noted that arthritis in Applicant's right knee was "probably aggravated" by compensatory stress related to the left knee injury, and where that opinion is conclusory and not explained sufficiently to satisfy the requirements in *Escobedo*, cannot be the basis to find injury AOE/COE to Applicant's right knee and/or right hip. I also noted that Applicant's attorney failed to work up the claims of injury to these body parts with either the PTP and/or the QME, Dr. Jacob, and never even raised the issue and/or asked Dr. Jacob at his deposition if he believed there was a compensable consequence injury to any part of the right lower extremity. (***Id.*** at p. 13.) In fact, I commented in the Opinion on Decision that when Dr. Jacob was questioned at his deposition about a *Kite* analysis, he initially seemed to think or recall there was a right lower extremity injury, but upon further review of his reporting in the course of that deposition, he confirmed he was mistaken and that was not the case. I view that testimony as essentially a statement that he did not find a compensable consequence injury to Applicant's right knee or right hip. (***Id.***) Finally, aside from the one report of Dr. Stein that only references the right knee, there is absolutely no medical evidence in the record that Applicant's attorney can point to that could even arguably provide a basis for finding a compensable consequence injury to Applicant's right hip. Applicant's own non-expert suspicions or beliefs that they are industrial, which was his trial testimony, do not qualify.

Applicant's third claim of injury is that I erred in excluding the FCE report from the chiropractor, Dr. McDonald, dated November 19, 2021 (Marked for ID only as Applicant's 2), on the basis it was improperly obtained by Applicant's attorney outside the med/legal process and was barred by *Batten* and related caselaw and statutes. (Petition at pp. 15-16.) The Petition disputes my assertion in the Opinion on Decision that this FCE was self-procured out of the blue and was not specifically requested by the QME, Dr. Jacob, citing to Dr. Jacob's first report dated April 18, 2019 at p. 23. (Joint 101.) Having reviewed that report and passage, I concede that in the context of the vocational rehab section at the end of that report, Dr. Jacob states, "This gentleman, in my opinion, should be considered a medically qualified injured worker for vocational rehabilitation. Considering the significant aspect of this case, I suggest a Functional Capacity Evaluation would guide [sic] and give us some further information on possible future employment position. [sic]. I refer to a vocational expert to guide us." When read in the context of that report, it is clear that Dr. Jacob *is not soliciting an FCE and/or saying one was necessary in order to assist him or enable*

him to provide permanent work restrictions or any other substantive medical/legal opinions, but rather to see if there are jobs that the Applicant could do in the labor market that are consistent with the work restrictions he provides in the immediately preceding section of the report.

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Even if I had admitted this report into evidence, I agree with defense counsel's argument in the Answer that it is not substantial medical evidence, and it would not have changed or affected my finding as to Applicant's PD or his *LeBoeuf* claim. As discussed on the Opinion on Decision, this brief 3-page report has multiple caveats on its face, does not define key terms in making its findings or drawing its conclusions, fails to provide any range of motion measurements for any body part beyond the left knee, and does not explain how it comes to its final opinions. It was not sent to the QME, Dr. Jacob, for his review and comment and I will not treat its opinions/conclusion as de facto work restrictions or capacity limitations, which is how Mr. Malmuth used it for purposes of his vocational analysis, and which is the province of the QME evaluator and not a privately retained expert.

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RECOMMENDATION

In sum, for the reasons explained above, I recommend that Applicant's Petition for Reconsideration be denied.

Dated: June 13. 2024

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

OPINION ON DECISION

INTRODUCTION

This case was tried and submitted on January 11, 2024. The Applicant was the only witness to testify and did so through a Spanish interpreter. (Minutes of Hearing and Summary of Evidence (MOH/SOE) dated January 11, 2024, at pp. 6-11.) The issues for determination are: 1. Injury AOE/COE to the right knee and right hip; 2. Permanent disability and apportionment, with Applicant claiming permanent and total disability (PTD) pursuant to *LeBoeuf*[1] based on vocational evidence from Jeff Malmuth, and defendant's related claim of less than total permanent disability based on the medical-legal reporting of the QME, Moses Jacob, D.C., and the vocational opinions of Scott Simon; 3. The need for further medical treatment; and 4. Applicant attorney's request for a 15% attorney fee on any PD awarded. (See MOH/SOE at pp. 2-3.) The EDD lien on file was deferred as an issue. (***Id.*** at p. 3, Issue No. 5.)

FACTUAL BACKGROUND

The Applicant was employed by Seely Orchard as a supervisor/laborer at an orchard/ranch and sustained an accepted specific injury to his left knee, low back, left hip, and left ankle on August 10, 2017, when his left leg was pinned between two large bins of pears during harvest time, which resulted in a left knee tibial plateau fracture repaired by ORIF surgery and a subsequent second surgery and the later development of complex regional pain syndrome (CRPS) of the left lower extremity. (Joint 101 report of 4/18/19 at pp. 6-7, p. 17, MOH/SOE at p. 6.) Per the AME's account, the Applicant was alone at the time and had to call his wife, who was able to come down and free him. (Joint 101, report of 4/18/19 at p. 7.) Additional claims of injury to his low back, left hip, and left ankle were accepted, and claims of injury to his right knee and right hip are alleged but have been denied. (MOH/SOE, Stipulation No. 1, at p. 2.)

The parties utilized chiropractor, Moses Jacob, D.C., as their QME. Applicant was first seen by Dr. Jacob on April 18, 2019, who issued a report of the same day. (Joint 101, Report of 4/18/19.) He presented using a walker. (***Id.*** at p. 8.) Dr. Jacob diagnosed post-surgical left knee tibial plateau fracture with post-surgical findings (ORIF), healed right fibula head fracture with residual displacement, left lower extremity CRPS Grade 1, secondary lumbar sprain/strain, left hip sprain strain with secondary degenerative changes, post leg fracture, left ankle muscular weakness and strain associated with leg fracture, partial peroneal nerve fiber lesions supplying tibialis anterior and peroneus longus muscles on the left side, and post-traumatic psychological stress disorder, to be addressed by an appropriate specialist. (***Id.*** at p. 17.) Dr. Jacob found direct specific injuries to the left lower extremity including the left knee, left hip, left leg and ankle, and to the lumbar spine, and left hip as compensable consequence injuries of the original injury. (***Id.*** at pp. 21-22.)

Although he made a nominal finding that the Applicant was not permanent and stationary (P&S), stating he wanted to review lumbar x-rays before doing so, he also provided conditional impairment ratings and recommended he see and AME quality orthopedist to determine if any further surgeries, would benefit him. (***Id.*** at p. 17-18.) He first provided strict AMA ratings, subject

[1] See LeBoeuf v. Workers' Comp. Appeals Bd. (1983) 34 Cal.3d 234, 48 Cal.Comp.Cases 587.

to his review of requested weight bearing x-rays of the lumbar spine, of 7 whole person impairment (WPI) for the lumbar spine based on DRE II, 16 WPI for the left knee based on range of motion (ROM), 12 WPI for the right ankle, various sensory deficit ratings for the left lower extremity, and a 3 WPI pain add on, which combine using the CVC table to 40 WPI. (***Id***. at pp. 18-19.) However, he also provided an Almaraz/Guzman[2] rating of 50 WPI analogizing to a Class IV gait disorder using Table 13-15 of the AMA Guides to Permanent Impairment 5th Edition (Guides), which he indicated was a more accurate reflection of the total impairment based on Applicant's pain and impacts of activities of daily living. (***Id***. at pp, 20-21.)

Dr. Jacob did not find any apportionment to non-industrial factors, subject to review of the requested weight bearing x-rays of the lumbar spine. (***Id***. at p. 22-23.) He provided permanent work restrictions of work in a seated position, with no weight bearing activities, which include no standing, walking, crouching, bending, or lifting of more than 10 pounds. (***Id***. at p. 23.) He also felt the Applicant was QIW as to his regular job. (***Id***.) As to future medical treatment, he recommended a high quality orthopedist consult to address whether any further surgery might be of benefit, a trial of conservative chiropractic for the lumbar spine, pain medications as needed, and braces and/or a cane, as needed. (***Id***. at p. 21.)

The Applicant was re-examined by the QME Dr. Jacob on April 1, 2021 who issued a report of the same date. (Joint 101, report of 4/1/21.) This time he presented using a cane instead of a walker. (***Id***. at p. 3.) Interim developments since the last exam included a second surgery with Dr. Schakel in July 2020, which removed hardware from the first surgery. (***Id***. at p. 3.) He noted that no additional TTD was paid after that surgery, reportedly because 104 weeks of TTD had been paid. (***Id***.) He again found the Applicant to be P&S. (***Id***. at p. 7.) The exam noted improvement of Applicant's right knee as compared to before, with marked restriction of the left knee, due to "significant scar formation" with marked dermal discoloration noted. (***Id.***) The left ankle was noted to be slightly improved, with "significant residuals" including "marked atrophy" that remain, and with neurological findings supporting sensory loss. (***Id.***) His formal diagnoses were unchanged. (***Id.*** at p. 8.)

As to strict AMA ratings, he increased the lumbar spine to 8 WPI, bumping up 1 WPI to DRE II, and he renewed his request for x-rays of the lumbar spine, which he evidently was never sent. (***Id.*** at p 8.) The left knee and left ankle ratings remained unchanged at 16 WPI and 12 WPI respectively. (***Id.*** at p. 9.) However, in lieu of the sensory deficit ratings, and he noted an EMG/NCV study by Dr. Rutchik, which was interpreted as normal, he provides a strict AMA rating for the left hip based on ROM of 12 WPI. (***Id.*** at pp. 3, 9.) As to *Almaraz/Guzman*, he increased his rating by analogy to the gait disorder table to 60 WPI, up 10 points from before, but did not really explain why this opinion had changed, other than noting the second surgery, neurological deficits, and chronic pain. (***Id.*** at p. 10.) He also added a 3 WPI add on for pain, which in context and unlike before, appears based on its placement in the report to be meant to apply to the *Almaraz/Guzman* rating. (***Id.***) His other substantive med/legal opinions were unchanged, with the slight exception that he dropped the lifting restriction from 10 pounds to no lifting of more

[2] See Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist. (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), and Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman) (2010) 187 Cal.App.4th 808, 75 Cal.Comp.Cases 837.

than "5-10" pounds. (***Id.*** at pp. 11-12.) The reasons for that change likewise were not explicitly discussed or made clear.

Dr. Jacob's third and last report was a supplemental dated August 6, 2021, in which he reviews and comments on 161 pages of interim records it appears he did not have and/or was not sent at the time of the re-exam. (Joint 101, report of 8/6/21.) These records included the reported left knee surgery, which removed the hardware from the first ORIF, conducted by Dr. Mark Schakel on June 25, 2020. (***Id.*** at p. 3.) His diagnosis as summarized by the QME, was displaced bicondylar fracture of the left tibia, sequela to chondromalacia of the left knee, complex tear of the medial meniscus, with left knee sequela, and will as "residual substantial limitation persistent of the left knee as well as lower back pain associated with altered gait. (***Id.***) They also included the normal EMG/NCV of the left lower extremity study dated February 28, ***2020 from Dr. Jonathan Rutchik, who commented that there was "no clear nerve injury" and that*** the left calf atrophy was likely due to "disuse and pain." (***Id.*** at p. 4.) Having reviewed and summarized these records, which Dr. Jacob noted were consistent with Applicant's oral history to him at the re-exam, he did not change any of his prior med/legal opinions. (***Id.*** at p. 5.)

Other reports in evidence include one from the last PTP, Dr. Gary Stein, dated November 3, 2021, in which he reviewed and comments on the sub rosa video and in which he does not change any of his prior opinions, including the recommendation of a total left knee replacement. (Applicant's 1, MOH/SOE Stipulation No 6, at p. 2.) That stipulation also references that the Applicant last treated with him in approximately May of 2022. (***Id.***) The last treater report in evidence is a narrative report from Dr. Gary Stein dated May 9, 2022. (Applicant's 1, report of 5/9/22) That report included a diagnosis of low back pain with MRI evidence of lower lumbar disc pathology, facet arthropathy, and resulting foraminal stenosis with failure of epidural steroid injection to provide substantial relief to date. (***Id.*** at p. 3.) It also noted a discussion with the Applicant regarding a potential left total knee replacement surgery, which he advised "might be difficult" because of his combined back problems and radicular pain in the left leg, although he felt was a reasonable option give the exhaustion of all other options. (***Id.***) Finally, and this is the only medical evidence that I could find in the record with respect to the alleged compensable consequence injuries to the right hip and right knee, he opines "He also has contralateral arthritis in the medical compartment of the right knee which bothers him sometimes as well during this [sic] has probably been aggravated by compensatory stress transfer regarding his severe left knee injury." (***Id.***)

Also in evidence is a lumbar surgical consult from Dr. Christian Athanassious, dated April 5, 2022, who is part of the same medical group as Dr. Schakel and Dr. Stein, Santa Rosa Orthopedics. (Applicant's 3.) That report notes the Applicant has had more than 12 sessions of physical therapy and 3 epidural injections which "have not given him long term relief," and that he is walking with a cane and has a current pain level of 8/10. (***Id.*** at p. 1.) In the impression section of the report, he notes he discussed a potential spinal fusion at L5-S1 with the Applicant but felt the better option was a posterior decompression along with anterior and posterior fusion at L5-S1, which he felt was medically necessary and appropriate. (***Id.***) It is not clear if any RFA issued related to this report. Based on this record and the parties' stipulation, it would seem that Dr. Stein saw Mr. Vasquez Delgado a month later and that was his last industrial treatment to date.

Dr. Jacob was deposed on January 18, 2022. (Joint 102.) In that testimony, he clarified that the 3 WPI pain add on was meant for the left knee. (***Id.*** at pp. 7-8.) He was also asked about his *Almaraz/Guzman* rationale and explained that based on his findings and the clinical presentation, in conjunction with the two surgeries, he felt it was a significant and complex case and that the 60 WPI was warranted when all the affected body parts were considered for "a complete assessment." (***Id.*** at pp. 8-9.) However, since his review of the extensive sub rosa video indicated there was a "small" percentage of time when the Applicant walked or stood without using his cane, he ultimately backed off his *Almaraz/Guzman* rating of 60 WPI since that was based on Category IV of the gait Table 13-15, which applies when an individual "cannot stand without help, mechanical support, and/or an assistive device. (***Id.*** at pp. 10-13.) He notes this concession would limit him to a 39WPI rating using Category III of that Table, and he testified the rating should be the higher of that or the strict AMA rating. (***Id.*** at pp. 14-17.) He specifically stated "if we are going to stick to this strict interpretation of Class IV, then I will remove the AMA – my rating for *Almaraz* and say give him the true rating, because that's what he deserves." (***Id.*** at p. 13, lines 9-12.) He then reaffirmed his strict and "true" standard ratings for the back, left knee, left hip, and left ankle. (***Id.*** at p. 17.)

He also indicated that after reviewing the sub rosa, he felt that the activities in the video were "predominantly" consistent with his two exams of the Applicant, explaining that the times he did walk without a cane were only about 10%, and even then he had it with him in case he needs it, and the distances involved were short. (***Id.*** at p. 18.) He also expressed the same opinion with respect to the video documented activities and that they were "pretty much" consistent with his objective findings and the time of the exams. (***Id.*** at p. 19.)

On cross-examination, Dr. Jacob conceded that the symptoms of Applicant's "mild" CRPS diagnosis "wax and wane," and are not present 100% of the time. (***Id.*** pp. 19-20.) He notes that the sub rosa video shows the Applicant walking awkwardly and carefully. (***Id.*** at p. 21.) He noted the Applicant's Epworth test score was 22 which reflects sleep issues, and concedes it is possible that could affect psychiatric and/or cognitive aspects of the Applicant, but that is beyond his expertise. (***Id.*** at pp. 22-23.) Considering everything, he felt and believes the Applicant was credible and was not embellishing or exaggerating his complaints. (***Id.*** at pp. 24-24.) The Applicant did not complain of any internal and/or gastric issues. (***Id.*** at p. 24.) In response to a question about whether in his opinion the Applicant would require unscheduled breaks during any work to address or deal with pain, he responds "he likely would" but that he would ultimately defer to a vocational expert on that issue. (***Id.*** at pp. 26-28.) He also stated that it is "likely" there might be days when the Applicant cannot leave home due to pain. (***Id.*** at pp. 28-29.)

The balance of the deposition consisted largely of discussion of whether *Kite*[3] does or should apply with respect to his ratings. Initially, he opined that he originally did not consider *Kite*, but upon reflection, believed that it was appropriate to add all the components. (***Id.*** at p. 29.) However, he did not explain exactly what body parts should be combined and/or why. (***Id.*** at p. 29-36.) Ultimately, he conceded he did not know if *Kite* could or should apply where only one side of the body was implicated and he did not provide a definitive *Kite* opinion as to whether or what ratings should be combined and/or why, and that he "defers to counsel and the judge" to

[3] See *Athens Administrators for East Bay Municipal Utility District v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal.Comp.Cases 213, 215 (writ den.)

determine if the knee should be added to the ankle and/or hip ratings. (***Id.*** at p. 34.) Dr. Jacob was never asked if the Applicant sustained a compensable injury to the right hip and/or right knee.

The Applicant testified at trial through an interpreter, with the relevant highlights as follows. (MOH/SOE at pp. 6-11.) He is not currently working, and last worked for pay on the date of his injury August 10, 2017. (***Id.*** at p. 6.) He has not looked for a job since because "no one would want to hire a cane user who cannot walk." (***Id.***) He has had two left knee surgeries, and has constant pain in his left knee, which travels up and down his left leg. (***Id.***) He has pain at times in his left ankle, which sometimes swells, and when that occurs, he has to elevate it. (***Id.*** at pp. 6-7.) He has constant pain in his left hip, and his leg becomes numb, and to deal with the pain he takes over the counter Tylenol and Ibuprofen, which reduce the pain and enable him to walk and move about more easily. (***Id.*** at p. 7.) He estimates he can sit for 20 minutes before his back pain increases, and Dr. Athanassious recommended back surgery but it was denied. (Id.) Had it been approved he would have pursued it. (***Id.***)

He first noticed pain in his right knee within a year of the original injury, and he believes this is from putting additional weight on that leg to compensate for his injured left leg. (***Id.***) Because of his back pain he has reduced ability to bend at the waist and has problems doing so. (***Id.*** at p. 8.) The makes it difficult to dress, wash dishes or fold clothes. (***Id.***) He has a cane with him and uses it, and it was recommended by Dr. Schakel, who did his second knee surgery. (***Id.***) He estimates he can stand 25-30 minutes before he needs to sit and that he can walk 5-10 minutes with the cane. (***Id.***) He has difficulty climbing stairs, cannot squat or kneel, and has difficulty sleeping. (***Id.***) He has not looked for work, because he does not feel capable to doing a job, and does not believe he can even do a light job because of pain. (***Id.*** at p. 9.)

On cross-examination, he admits that he sometimes uses the cane in his left hand but "almost always" uses it in his right. (***Id.***) He "almost never" works in his home garden but acknowledges that he "maybe" has used a shovel to pick up dog poop and move grass from the ground. He acknowledges bending at the waist "a little" while doing so, and notes that it was a long shovel, which enabled him to do so. (***Id.*** at p. 10.) Although he initially testified he has a valid California driver's license, he later clarified that it is currently suspended and has been since 2016 due to tickets. (***Id.***) He will help with household chores such as washing dishes or folding clothes but has to do so sitting down. (***Id.***) He is right handed. He will sometimes move the can to his left hand as needed to open doors and/or while carrying light things. (***Id.*** at p. 11.) He denies the ability to do light gardening or weed pulling. (***Id.***)

INJURY AOE/COE TO THE RIGHT KNEE AND RIGHT HIP

The first issue for determination is Applicant's alleged claim of injury AOE/COE to the right knee and right hip. (MOH/SOE at pp. 2-3, Issue No. 1.) The implication are those are compensable consequence injuries of the left knee injury, but that was never made clear or explicitly argued as such. At trial, Applicant's attorney did not point to any specific evidence in support of the claimed injury to those body parts. The QME, Dr. Jacob, did not address or discuss injury AOE/COE to those body parts in any of his three reports, and *does not appear to have ever examined the right hip or right knee*, although he did take measurements of the circumference of the right calf and thigh, presumably to compare to potential atrophy on the injured left side. (Joint

101, Reports of 4/18/19 at p. 11, and 4/1/21 at p. 6.) As noted above, he only discussion of causation of injury to either of those two body parts is referenced in the last PTP report of Dr. Gary Stein in evidence dated May 9, 2022 (Applicant's 1) at p. 3, where he states "He also has contralateral arthritis in the medial compartment of the right knee which bothers him sometimes as well as during this has probably been aggravated by compensatory stress transfer regarding his severe left knee injury. Obviously, this is a passing reference in a narrative PR-2 report and not a comprehensive medical legal report.

Having reviewed all the evidence, I find and conclude that Applicant has not sustained his burden to prove injury AOE/COE to the right hip and/or right knee, either directly and/or as a compensable consequence. In fact, the only reference to injury to either body part is the cited report of Dr. Stein. However, I find that one sentence in a report focused on Applicant's left knee, does not constitute substantial medical evidence for purposes of a finding of injury to that body part. Dr. Stein did not have and did not review the complete medical record when providing that opinion, it is conclusory and not sufficiently explained as required by Escobedo, and finally it is not even definitive, as is uses the qualifier that the right knee, which shows arthritis in the medical compartment that can likely be attributed to his multi-decade pre-injury career of heavy agricultural labor as it does not appear to be part of the specific injury, and says the knee was "probably" aggravated by compensatory stress transfer from the injured leg. I therefore find there is insufficient medical evidence in this record to make a finding of injury AOE/COE to the right knee or right hip.

I will say however, that I find it odd that QME was never asked to provide an opinion on and/or to examine the right hip or right knee as a compensable consequence, and moreover was never asked about this at his deposition. To that extent, Applicant's attorney failed to properly work up such a claim of injury. I note that at one point in the deposition, when the applicability of *Kite* was being discussed, the QME, Dr. Jacob, initially seemed to think there was an injury to the right leg/knee, but after a review of his reporting, that turned out not to be the case, which is why he eventually backed off of the initial *Kite* opinion he provided for the first time at his deposition, because this case only involved injury to one side of the lower extremities, and deferred a finding to the trial judge because he was "unaware of any logic or case" that says a *Kite* analysis should apply to a one sided injury. (See Joint 102 at pp. 33-34.) In sum, there is insufficient evidence on this record to find injury AOE/COE to the right hip and/or right knee, and Applicant had plenty of time and opportunity to medically work up such a claim, but never did so.

***[4]

APPLICABLE LAW

A decision of a WCJ must be supported by substantial evidence in light of the entire record. (Labor Code section 5952(d); *Escobedo v. Marshalls* (2005) (Appeals Board en banc) 70 Cal.Comp.Cases 604, 620; *Lamb v. Workmen's Comp. Appeals Bd*. (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310, 314]; *Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500, 503]; *LeVesque v. Workmen's Comp. Appeals Bd*. (1970) 1 Cal.3d 627, 635

[4] "[Footnote 4 is omitted.]

[35 Cal.Comp.Cases 16, 22].) To be substantial evidence, expert medical opinion must be framed in terms of reasonable medical probability, be based on an accurate history and an examination, and must set forth the reasoning used to support the expert conclusions reached. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (Gatten) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687, 1691].) "[A] medical opinion is not substantial evidence if it is based on facts no longer germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (Citations.)" (*Gatten*, *supra*, at p. 928.)

A rating under the Permanent Disability Rating Schedule (PDRS), which includes the prima facie utilization of the combined values chart (CVC), may be rebutted based on the specific circumstances of a given case. (See *Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal.App.4th 1262, 1263-1276, [76 Cal.Comp.Cases 624, 626]; *Contra Costa County v. Workers' Comp. Appeals Bd*. (*Dahl*) (2015) 240 Cal.App.4th 746, 755-761 [80 Cal.Comp.Cases 1119]; *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Guzman*), (2010) 187 Cal.App.4th 808, 827-829, [75 Cal.Comp.Cases 837].) The PDRS may also be rebutted by vocational evidence that proves the Applicant is not amendable to benefiting from vocational rehabilitation services, which is consistent with a total loss of earning capacity. (*LeBoeuf v. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 234. 242-243, 48 Cal.Comp.Cases 587, 594.)

RATING DR. JACOB'S REPORTS AND DEPOSITION TESTIMONY

There are no P&S reports in this record from any treating doctor, and the only ratable P&S reports are from the QME, Dr. Jacob. Without consideration of the vocational aspects and evidence in the case which are discussed below, I rate the strict ratings of the QME Dr. Jacob as follows using the parties' stipulated occupational group of 491 and an age at injury of 48, based on Applicant's [ ] date of birth and the August 10, 2017 date of injury.

Lumbar DRE II	15.03.01.00 8 [1.4] 11	491H 14 16
L Knee ROM	17.05.04.00 19 [1.4] 27	491H 33 37
L Hip ROM	17.05.04.00 12 [1.4] 17	491H 21 24
L Ankle ROM	17.07.04.00 12 [1.4] 17	491H 21 24

Using the CVC 37C24 = 52 52C24 =64 64 C16 =70

70% PD is 433.25 weeks of indemnity at $290.00 a week or $125,642.50, plus the applicable life pension.

NEED FOR FURTHER MEDICAL [TREATMENT] AND ATTORNEY FEE

I further find based on the opinions of Dr. Jacob in his three reports along with the two reports of the PTP, Dr. Gary Stein dated May 9, 2022 and November 3, 2021 (Applicant's 1), and a secondary treater spine surgeon, Dr. Christian Athanassious, dated April 5, 2022, (Applicant's 3), that there is a need for further medical [treatment] for the left knee, low back, left hip and left ankle, and I therefore award future medical treatment to cure and relieve the effects of that injury.

Finally, I find that Applicant's attorney has provided sufficient services in the course of this claim, including this trial, attending the QME's and the Applicant's depositions, and working the case up for a *LeBoeuf* claim, to warrant a fee of 15% of the PD awarded, and I therefore make such an award.

APPLICANT'S LEBOEUF CLAIM

In addition to the medical evidence, the parties offered expert vocational evidence to support their respective positions in the form of four reports from Jeff Malmuth on behalf of the Applicant dated October 31, 2022 and March 24, 2023 (Applicant's 4), and three reports from Scott Simon on behalf of the defendant, dated June 6, 2023, February 6, 2023, and July 18, 2022, (Defendant's B.)

As discussed above, the final permanent work restrictions provided by the QME Dr. Jacob, which were unchanged through his three reports, except for a minor reduction of the lifting restriction from 10 pounds in his initial report to 5-10 pounds in his final report after the re-exam, are work in a seated position, with no weight bearing activities, which include no standing, walking, crouching, bending, or lifting of more than 5-10 pounds. (Joint 101 report of 4/18/19 at p. 23, report of 4/1/21 at p. 12, and report of 8/6/21 at p. 5.) In essence, this is a sedentary work restriction combined with a lifting restriction of no more than 5-10 pounds.

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After reviewing and summarizing all the relevant QME reports and a history taken by his assistant Willow Swenson[5] which includes the undisputed facts that the Applicant, who emigrated from Mexico in 1987, only speaks Spanish, attended school in Mexico through secondary school, and has only worked in the United States as a mattress assembler and agricultural worker/supervisor. (Applicant's 4 report of 10/31/22, at pp. 33-35.) A history was taken that he had been taking Norco, but does not have a new prescription, and that he now takes over the counter Ibuprofen. (***Id.*** at p. 37.) It is noted he worked for this employer for about 28 years. (***Id.*** at p. 51.)

After review of this history and vocational testing conducted by Zindy Campos over Skype, Mr. Malmuth finds and concludes that he could not find any "good matches" for employment, (***Id.*** at p. 49), and he further opines that because of the "functional limitations" of his injuries has a combined effect that will "prevent him from returning to and maintaining a regular work schedule." (***Id.*** at p. 52.) He later opines, "anyone with the limitations similar to those of Mr. Delgado Vasquez [sic] will be incapable of working in any capacity for any employer since he would be unpredictably available to consistently perform productive work for various periods of time." (***Id.*** at p. 53.) He states the Applicant "possesses no transferable skills to engage in direct placement in an open and competitive traditional on-site, or non-traditional remote home based labor market considering the sole and direct consequence of the residual functional capacity secondary to the industrial injuries." (***Id.*** at pp. 55, 58.) He declares he does not believe the Applicant "would possess the capacity to perform at a minimum standard of productivity on an ongoing and sustained manner in a competitive work environment." (***Id.***) His final conclusions are

[5] See Jeff Malmuth report of 10/31/22 at p. 32. (Applicant's 4.)

that the Applicant "has effectively sustained a total loss in his capacity to meet occupational demands" that he "cannot be expected to compete for (or maintain work in an open traditional on-site, or non-traditional remote home-based labor market" and therefore he is "unable to return to the open labor market and has a total loss (100%) of hearing capacity" and that he is not "amenable to or capable of benefiting from any form of assistance through vocational rehabilitation services. (***Id*** .at p. 59.)

In contrast, the defense vocational expert, Scott Simon in his initial report of July 18, 2022 (Defendant's B), which pre-dates Mr. Malmuth's first report, after reviewing the same medical reports, doing his own vocational testing, reviewing the sub rosa video, and taking his own history from the Applicant, opines the Applicant "would be able to be directly placed back in the workforce in other physically compatible occupations." (Defendant's B, Report of 7/18/22 at p. 17.) He also concludes that his vocational testing scores "reflect someone who is not amenable to vocational training at this time. His inability to comprehend test instructions prevented his participation in a portion of the vocational evaluation. *However, the applicant's inability to participate in educational training would solely be due to non-industrial factors o limited language skills and a lack of formal education*." (***Id.*** at pp. 17-18, Emphasis added.) He also found that the Applicant is a "good candidate for on-the-job training." (***Id.*** at p. 18.)

He pointed out that the sub rosa video he reviewed from 2019 through 2021 documented the Applicant "engaging in numerous physical activities, many of which are inconsistent with his reported level of functioning." (***Id.*** at p. 29.) He in particular noted that the Applicant had given him a history that he had not driven in 6 years which was contradicted by the extensive driving documented on the video. (***Id.***) He also pointed out the fact that the Applicant no longer treating for his injuries and was taking only over the counter pain medication for his reportedly high pain levels, the significance of which he defers to the trier of fact. (***Id.***) Finally, he concluded that based on pre-existing non-industrial *Montana* factors, that prior to his injury, the Applicant had "maximal access to only 3% of the overall labor market prior to this current industrial injury" (***Id.*** at p. 29), that that he has sustained a 55% loss of his future earning capacity. (***Id.*** at p. 30.)

Mr. Simon reviews and comments on the initial Malmuth report in his second report dated February 6, 2023. (Defendant's B, Report of 2/6/23.) He comments that although Mr. Malmuth acknowledges the Applicant possessed a broad range of pre-injury skills, it is not explained how those skills have gone away and should not be considered. (***Id***. at p. 5.) He disputes Mr. Malmuth's opinion that the Applicant cannot benefit from on the job training, noting his definition means the "virtually no one can learn new skills in on the job training. (***Id***. at p. 6.) He states "if we strictly apply the work restrictions, in that instance, such an individual would be able to return to work in lower skilled occupations of many types. I have highlighted only a small number of them in my report." (***Id.*** at pp. 6-7.) He also notes that "working as a gas station attendant or similar job might actually be an ideal placement" for him. (***Id.*** at p. 7.)

Mr. Malmuth addresses and critiques the initial Simon report in his second report of March 24, 202322, 2021. (Applicant's 1, Report of 4/22/21.) That report contains an unusually detailed summary of and commentary on the sub rosa video taken of the Applicant. (***Id.*** at pp. 3-19, which includes how much and in what hand the Applicant uses his cane..) As noted in the supplemental MOH/SOE summarizing that sub rosa, served with this decision, much of that video shows the

Applicant walking to and from his truck and driving, as well as doing some gardening with a shovel. He then provides a long critique of Mr. Simon's vocational analysis using O*NET and OASYS instead of Mr. Malmuth's preferred method using the DOT, which is perennial argument as between these two vocational experts. (***Id.*** at p.19-27.) He also points out that although Mr. Simon argues that the Applicant can benefit from on the job training, he does not identify specific jobs in that context. (Id. at p. 38.) He also argues that Mr. Simon improperly used SOC codes in finding jobs compatible with sedentary work, and that of the purported 1,137 compatible jobs all but 83 "far exceed a sedentary limitation." (***Id.*** at p. 56.) His final conclusion is that Mr. Simon's use of SOC codes to determine vocationally and medically appropriate jobs "is defective and leads to a flawed analysis." (***Id.*** at p. 57.)

Mr. Simon's last report of June 6, 2023 (Defendant's B, Report of 2/23/23), responds to that report. He emphasizes that the DOT used by Mr. Malmuth to determine possible jobs is based on outdated data from the 1970's which has not been updated since, and that even the sedentary jobs back in the 1970's were much more physically arduous than they are now, and that this is a "very significant flaw" in his analysis. (***Id.*** at p. 5.) He also notes since the early 2000's the "labor marked has essentially moved in such a way that approximately two-thirds of the entire labor market is in the sedentary and light exertional level" as documented in a 2018 study by the Department of Labor. (***Id.*** at p. 5.) He concludes by noting he sees the Applicant as being able to work in a sedentary position "on a full time basis, but part-time work is another consideration if he is desirous of returning to work." (***Id.*** at pp. 7.)

Having read and considered the entire record, reviewed the sub rosa video, and the reports of the dueling vocational experts, I conclude and find that Mr. Malmuth's opinion that the Applicant cannot do any jobs in the open labor market and/or has lost 100% of his earning capacity is not credible and/or persuasive for purposes of a *LeBoeuf* analysis. Although Mr. Simon finds the Applicant is not amenable to classroom vocational rehabilitation, based on pre-existing *Montana* factors that pre-dated his injury, I find that his analysis that there are many sedentary jobs the Applicant can perform, and that he can benefit from direct placement and/or on the job training, is credible and believable in light of entirety of the record. Similarly, I am persuaded by Mr. Simon's rebuttal report, that many of Mr. Malmuth's opinions are based on outdated data that he uses in his DOT evaluation method. I also find that Mr. Malmuth's final opinions are largely conclusory and do not constitute substantial vocational evidence, because they are insufficiently explained. I agree with Mr. Simon's arguments that Mr. Malmuth and his method minimize the jobs available to the Applicant that are consistent with the work restrictions provided by the QME Dr. Jacob.

This is also not the case where there are synergistic factors limiting Applicant's access to the labor market and/or his ability to benefit from vocational rehabilitation. At present, the Applicant by his own admission and testimony, takes no prescription medication for his pain, and he has not treated with any medical professionals for this injury since May of 2022. While Applicant's testified that cannot work because of his pain levels, I did not find that particularly credible, especially since his pain is obviously not sufficient to prompt him to take or seek out prescription pain medication. If he is experiencing the level of pain he claims, in my view and experience he would seek out some type of pain management treatment and/or prescription medication to manage and deal with that pain, and he has not treated at all in almost 2 years. His failure to do so speaks louder than his words. While I am sure he experiences some level of pain,

I believe his account of his current pain levels are exaggerated in terms of its impact on his day to day functionality.

As to the sub rosa video, I agree with the QME that quibbles over which hand the Applicant uses his cane are overblown. However, the video of him gardening with the shovel does show extended and repeated bending without apparent difficulty, and without the use of a cane or other assistive device, that is definitely inconsistent with his accounts of his inability to bend at the waist that he provided to the QME and the two vocational evaluators. In sum, based on the current medical and vocational record, and the entirety of the facts in this case, including the sub rosa video which I personally reviewed, I do believe there are jobs the Applicant can physically do and/or be trained for on the job that are consistent with the QME's sedentary work restrictions. Despite the Applicant's subjective testimony about limitations on sitting, the QME did not provide any restrictions on sitting Accordingly, since I find Mr. Simon's vocational opinions more persuasive and credible than that of Mr. Malmuth on whether the Applicant is able to work with the QME's restrictions, and because I do not believe that Mr. Malmuth's finding of vocational non-amenability is substantial vocational evidence, I find and conclude that the Applicant has not established or proven that the PDRS has been rebutted pursuant to the *LeBoeuf* case by the preponderance of the evidence. Accordingly, the schedule and the standard rating outlined above, will be used in finding and awarding the PD in this case.

I further find that based on the deposition testimony of Dr. Jacob, his opinions as to his *Almaraz/Guzman* rating and as to Kite, both of which he essentially withdrew, did not sufficiently explain, and/or deferred to the judge on, are not substantial medical evidence and cannot provide a basis to rate the PD in this case for anything other than his strict ratings, which he reaffirmed at that deposition. Accordingly, I use those ratings as the basis for my findings and award. Applicant's attorney could have solicited a supplemental report and/or worked up those alternative ratings and/or the Kite issue after the deposition, but never did so.

DATE: April 9, 2024

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