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

**JESSE CANO SR, *Applicant***

**vs.**

**ECOLOGY CONTROL INDUSTRIES, INC.;**
**ZURICH AMERICAN INSURANCE COMPANY, *Defendants***

**Adjudication Number: ADJ9983378**

**Long Beach District Office**

**OPINION AND DECISION**
**AFTER RECONSIDERATION**

We previously granted reconsideration in order to further study the factual and legal issues. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings & Award (F&A) issued on May 18, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained a catastrophic industrial injury to his lumbar spine, thoracic spine, cervical spine, right shoulder, and psyche which resulted in applicant sustaining 85% permanent partial disability with a corresponding life pension.

Applicant argues that the WCJ erred because applicant sustained permanent total disability because applicant established that he is not amenable to vocational rehabilitation due to the industrial injury and that the industrial injury precludes him from employment on the open labor market. Applicant argues, in the alternative, that he rebutted the use of the Combined Values Chart (CVC), and thus, the addition of his multiple impairments would result in 100% permanent total disability.

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

We have considered the allegations of the Petition for Reconsideration, the Answer and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the WCJ's May 18, 2022 F&A and return this matter to the trial level for further proceedings consistent with this decision.

## FACTS

Applicant worked for defendant as a truck driver when he sustained an admitted industrial injury to his lumbar spine, cervical spine, and right shoulder on November 13, 2014. (Minutes of Hearing and Summary of Evidence, April 28, 2021, p. 2, lines 5-8.) Applicant alleged further injury to the thoracic spine and psyche, which the WCJ found industrial.

### 1. Medical Evidence

Applicant was evaluated for his orthopedic injury by agreed medical evaluator (AME) Lawrence Feiwell, M.D., who authored seven reports in evidence. (Joint Exhibits A through G.) Dr. Feiwell took a history of injury as follows:

> Mr. Cano is a 49-year-old right hand dominant male truck driver who began working for Ecology Control Industries in approximately July 2014. On November 13, 2014, the patient was pushing and moving a 55-gallon oil container when he felt pain in his neck, right shoulder and low back.

(Joint Exhibit C, Report of AME Lawrence Feiwell, M.D., January 21, 2016, p. 2.)

> Dr. Feiwell diagnosed applicant with the following: "1. Cervical degenerative disc disease, C4 to C7, status post three surgeries. 2. Thoracolumbar spine Scheuermann's kyphosis, status post-surgery. 3. Right rotator cuff tear, status post two repairs." (Joint Exhibit D, Report of AME Lawrence Feiwell, M.D., December 13, 2018, at p. 21.) Dr. Feiwell ultimately assigned 64% whole-person impairment to applicant's orthopedic injuries. (See Joint Exhibit E.) He found applicant's impairments to be 100% industrial and did not find apportionment.

(Joint Exhibit D, *supra* at p. 23.)

Dr. Feiwell assigned work restrictions as follows:

> Mr. Cano has no significant work restrictions for the right shoulder at this time. Due to multilevel fusion of his spine he would be limited to sedentary work He would be unable to perform any bending or stooping or sitting for more than a half hour out of every hour, He would also require an ergonomic work station, I would suggest he undergo vocational rehabilitation consultation as he may not be employable.

(*Ibid*.)

Applicant was evaluated for his psychological injury by Marc Charles, M.D., who authored two reports in evidence. (Applicant's Exhibits 1 and 2.) Dr. Charles diagnosed applicant with a personality disorder and assigned applicant a Global Assessment of Functioning score of 60. (Applicant's Exhibit 1, Report of Marc Charles, M.D., May 2, 2019, pp. 18-19.) He found applicant's disability to be 100% industrial. (*Id*. at pp. 19-20.) Dr. Charles did not opine upon work restrictions from the psychological injury. (See generally, *id*.)

**2. Vocational Evidence**

Applicant retained Laura Wilson as his vocational expert. Ms. Wilson authored one report in evidence. (Applicant's Exhibit 3, Report of Laura Wilson, January 2, 2020.) Ms. Wilson took a history of work limitations that went beyond the work limitations ascribed by Dr. Feiwell and included Ms. Wilson's impressions of what constituted limitations based upon her reading of the medical record, including the impact of the medications that applicant was taking. (*Id*. at pp. 5-7.) Ms. Wilson then used computer software to create interpretations of what applicant's work restrictions should be. (*Id*. at pp. 11-14.) Using her interpretation of applicant's work restrictions, Ms. Wison opined that applicant was not amenable to vocational rehabilitation and could not sustain gainful employment on the open labor market. (*Id*. at p. 33.)

While Ms. Wilson discusses the CVC, she does not offer any opinion as to whether it is rebutted. (See generally, *id*. at pp. 26-27.)

## DISCUSSION

To constitute substantial evidence an expert's opinion must not be speculative. (*Escobedo v. Marshalls* (2005) 70 Cal. Comp. Cases 604, 621 (Appeals Board en banc).) 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. (*Ibid*.) "When the foundation of an expert's testimony is determined to be inadequate as a matter of law, we are not bound by an apparent conflict in the evidence created by his bare conclusions." (*People v. Bassett* (1968) 69 Cal. 2d 122, 139, 70 Cal. Rptr. 193, 443 P.2d 777.)

> A corollary of the no-fault principles of workers' compensation is that an employer takes the employee as he finds him at the time of the employment. Thus, an employee may not be denied compensation merely because his physical condition was such that he sustained a disability which a person of stronger constitution or in better health would not have suffered.

(*South Coast Framing v. Workers' Comp. Appeals Bd*. (*Clark*) (2015) 61 Cal. 4th 291, 299, 188 Cal. Rptr. 3d 46, 349 P.3d 141.)

To properly analyze whether applicant is permanently totally disabled, one must understand how permanent total disability rebuttal works.

As our Supreme Court has explained:

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

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

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

> Thus, we conclude that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation

> of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating.

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

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

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

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

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

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

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

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

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

In the en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes I*"), the Appeals Board held that Labor Code section 4663 requires a **reporting physician** to make medical determinations in a case, including determinations on the issue of apportionment. The Board further held that vocational evidence may be used to address issues relevant to the determination of permanent disability, and that vocational evidence must address apportionment, but that a vocational evaluator may not opine on issues that require expert medical evidence. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*").

Applicant primarily argues that he rebutted the PDRS to show permanent total disability. However, in this case, applicant's vocational expert's report does not constitute substantial evidence as the evaluator has incorrectly and improperly interjected her own medical opinions into the case regarding applicant's work restrictions and limitations. A vocational evaluator does not create medical facts in a case. Vocational experts review the medical record created by the doctors and reach conclusions as to applicant's vocational feasibility based upon that record.

Applicant's physical restrictions are medical issues, which require medical evidence. If the vocational expert has cause to disagree with or otherwise expand upon the work restrictions assigned, the parties must return to the medical experts to clarify applicant's ability to return to work. If the evaluators have failed to detail work restrictions to the parties' satisfaction, the parties

should conduct appropriate discovery to obtain accurate and detailed work restrictions. For example, the parties may wish to consider obtaining a functional capacity evaluation.

As we explained above, the analysis of permanent total disability, in this case, begins with a detailed description of applicant's work restrictions. The present record lacks such a description. Accordingly, applicant did not rebut the PDRS as applicant's reporting is not substantial evidence.

Next, applicant argues that his impairments should be added and not combined using the CVC. In a recent en banc decision, the Appeals Board clarified the process for rebutting the CVC.

> One element of the PDRS is the Combined Values Chart (CVC). The purpose of the CVC is described within the PDRS, which cites to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (2001) (AMA Guides), which is adopted and incorporated for purposes of rating permanent disability under the 2005 PDRS. (Lab. Code, §§ 4660, 4660.1; Hoch, Andrea, Schedule for Rating Permanent Disabilities, (2005), p. 1-11; AMA Guides, pp. 9-10.) In sum, impairment under the AMA Guides is designed to reflect how a disability affects a person's activities of daily living ("ADLs") (self-care, communication, physical activity, sensory function, non-specialized hand activities, travel, sex, and sleep). (AMA Guides, pp. 2-9.) CVC "values are derived from the formula A + B(1-A) = combined value of A and B, where A and B are the decimal equivalents of the impairment ratings." (AMA Guides, p. 604.)
>
> Impairments to two or more body parts are usually expected to have an overlapping effect upon the activities of daily living, so that generally, under the AMA Guides and the PDRS, the two impairments are combined to eliminate this overlap.

(*Vigil v. County of Kern*, 2024 Cal. Wrk. Comp. LEXIS 23 at *7-8, (Appeals Board en banc).)

> The Combined Values Chart (CVC) in the Permanent Disability Ratings Schedule (PDRS) may be rebutted and impairments may be added where an applicant establishes the impact of each impairment on the activities of daily living (ADLs) and that either:
>
> (a) there is no overlap between the effects on ADLs as between the body parts rated; or
>
> (b) there is overlap, but the overlap increases or amplifies the impact on the overlapping ADLs.

(*Id.* at *13.)

Here, no medical evidence was presented at all regarding rebuttal of the CVC. It does not appear that any party asked any of the medical evaluators to address this issue. Applicant refers to the report of his vocational expert to establish rebuttal, but the report contains no such opinion. Even if the vocational expert had provided an opinion on CVC rebuttal, such an opinion would again be outside the scope of their expertise. CVC rebuttal is a medical issue, which requires medical evidence. Accordingly, we find that applicant did not present evidence rebutting the CVC.

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. (*Id.* at p. 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 (Appeals Board en banc).)

Although on the record before us applicant failed to prove rebuttal of the permanent disability rating schedule (PDRS), applicant presents a credible argument that he may be precluded from work on the open labor market due to the industrial injury. The AME stated this directly. As we have very recently clarified the roles of the medical and vocational evaluators and the proper method of CVC rebuttal, it would appear prudent to allow further development of the record on this issue. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284.)

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's May 18, 2022 F&A and return this matter to the trial level for further proceedings consistent with this decision.

For the foregoing reasons,

**IT IS ORDERED** as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings & Award issued on May 18, 2022 is **RESCINDED**.

**IT IS FURTHER ORDERED** that this matter is **RETURNED** to the trial level for further proceedings consistent with this decision.

**WORKERS' COMPENSATION APPEALS BOARD**

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

**I CONCUR,**

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

**/s/ CRAIG SNELLINGS, COMMISSIONER**

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

**September 9, 2024**

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

**JESSE CANO SR.**
**OZUROVICH & SCHWARTZ**
**LAW OFFICES OF TRACEY LAZARUS**

**EDL/mc**

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