WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KELLY HAVANIS, *Applicant*

vs.

**CALIFORNIA DEPARTMENT OF TRANSPORTATION;
STATE COMPENSATION INSURANCE FUND, *Defendants***

**Adjudication Number: ADJ3802146 (LBO 0361469)
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 of Fact and Award" (F&A) issued on February 11, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant was not 100% permanently totally disabled and instead awarded 80% permanent partial disability with a corresponding life pension pursuant to the stipulations of the parties.

Applicant argues that the WCJ erred in not following the opinions of applicant's vocational expert because the opinions constituted substantial evidence. Applicant further argues that the WCJ failed to consider evidence of 'vocational apportionment'. Applicant next argues that the WCJ erred in finding that applicant did not rebut the Combined Values Chart (CVC) per the holding in *East Bay Municipal Utility District v. Workers' Compensation Appeals Board*, (*Kite*), (2013), 78 Cal.Comp.Cases 213 (writ den.), because the WCJ improperly rejected the opinions based upon the doctor's specialty. Finally, applicant argues that the WCJ erred in applying medical apportionment.

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 February 11, 2022 F&A and return to the matter to the trial level for further development of the record.

FACTS

Applicant worked for defendant as a mechanic when he sustained industrial injury to his shoulders, knees, wrists, psyche, heart and hips, and in the form of psoriatic arthritis and sleep disorder on January 20, 2004. (Minutes of Hearing and Summary of Evidence, September 30, 2021, p. 2, lines 4-8.) This matter primarily proceeded to trial on the issue of applicant's permanent disability rating, with applicant claiming permanent total disability through both vocational expert reporting and via application of *Kite*. (*Id*. at p. 2, line 17, through p. 3, line 6.)

On the initial trial date, the parties stipulated to the rating of applicant's permanent disability as follows:

> 7, If the apportionment discussion by the doctors is found to be valid, then the medical reports of Dr. Joseph, Dr. McKenna, Dr. Greenberg, Dr. Levine, and Dr. Kanter rate out to 83 percent permanent disability for $140,812,50.
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> 8. If the apportionment discussion by the doctors is found to be invalid, then the reports of the previously-mentioned doctors rate out to 92 percent permanent disability or 1,062.50. (*sic*)

(*Id*. at p. 2, lines 17-22.)

Thereafter, the WCJ issued an order vacating submission, and the matter was reset for trial on December 22, 2021. The stipulations and issues were modified to read as follows:

> The previous stipulations, Nos. 7 and 8, are stricken from the record, and a new stipulation is entered into and will be marked No. 10.
>
> 10. If the applicant is not found to be 100 percent permanently disabled -- based on the deposition of Seymour Levine, M.D., dated 2/27/2019, in conjunction with the Kite case -- then the string rating, using the combined value chart of the applicant's permanent disability, would be 80 percent after apportionment, or $134,062.50.
>
> Regarding the issues, Issues No. 1, 2, and 3 are stricken from the record, and Issue No. 5 will be added.

> 5. Whether the applicant is 100 percent permanently totally disabled, per the vocational expert reports of Aida Worthington, dated 12/30/2013, 12/12/2016, 3/9/2018, and 10/9/2020; or 100 percent permanently totally disabled, based on Dr. Levine's deposition, dated 2/27/2019, read in conjunction with the Kite case, or not, based on the vocational expert reports of Howard Goldfarb, dated 9/29/2017, 9/11/2018, and 12/28/2020.

(Minutes of Hearing, December 22, 2021, p. 2, lines 7-18.)

1. Medical Evidence

Given the stipulation of the parties as to the permanent disability rating, we will focus our analysis of the medical record on the work restrictions assigned by the doctors and the *Kite* analysis provided by Dr. Levine.

Applicant was evaluated by dermatology qualified medical evaluator (QME) Paul McKenna, M.D., who authored four reports in evidence. (Applicant's Exhibits 1 through 4.) Dr. McKenna took a history of applicant developing a skin rash diagnosed as psoriasis around December 2003. (Applicant's Exhibit 1, Report of Paul McKenna, M.D., May 2, 2005, p. 2.) Dr. McKenna noted that applicant had a history of both work stress, non-industrial work stress, and a recent use of green nitrile gloves. (*Id*. at pp. 9-10.) He diagnosed applicant with psoriasis and dyshidrosis, which were aggravated by industrial exposures. (*Id*. at p. 10.) He found 30% industrial causation. (*Id*. at p. 11.)

Dr. McKenna restricted applicant to using cotton liners and not using green gloves while working. (*Ibid*.)

Applicant was evaluated in internal medicine by agreed medical evaluator (AME) Craig Joseph, M.D., who authored three reports in evidence. (Joint Exhibits 101 through 103.) Dr. Joseph restricted applicant to no excessive stress and no heavy lifting. (Joint Exhibit 102, Report of Craig Joseph, M.D., October 2, 2014, p. 27.)

Applicant was evaluated in psychology by agreed medical evaluator (AME) Richard Greenberg, M.D., who authored two reports in evidence. (Joint Exhibits 104 and 105.) Dr. Greenberg assigned applicant a GAF score of 55, of which 45% was found to be non-industrial. (Joint Exhibits 104, Report of Richard Greenberg, M.D., June 7, 2012, pp. 50-51.) He opined that applicant had slight to moderate impairment in the following work functions: ability to comprehend and follow instructions; ability to perform simple and repetitive tasks; ability to maintain work pace appropriate to given work load; ability to perform complex or varied tasks; ability to relate to other people beyond giving and receiving instructions; ability to influence

people; ability to make generalizations, evaluations or decisions without immediate supervision; and, ability to accept and carry out responsibility for direction, control and planning. (Joint Exhibits 105, Report of Richard Greenberg, M.D., February 21, 2013, pp. 2-3.)

Applicant was evaluated by orthopedic agreed medical evaluator (AME) Phillip Kanter, M.D., who authored two reports in evidence. (Joint Exhibits 106 and 107.) Dr. Kanter assigned the following work restrictions:

> Regarding the right shoulder region, there are no work restrictions.
>
> Regarding the left shoulder region, this individual is precluded from very heavy lifting and repetitive usage of the right upper limb above the shoulder or head level for such activities as pushing, pulling, reaching or lifting,
>
> With regard to the right wrist/hand, there are no work restrictions.
>
> With regard to the left wrist/hand, there are no work restrictions.
>
> With regard to the right hip, this individual is precluded from prolonged weight bearing or walking, attempts at kneeling or squatting and heavy lifting.
>
> With regard to the left hip, this individual is precluded from prolonged weight bearing or walking, attempts at kneeling or squatting and heavy lifting.
>
> With regard to the right knee, there are no work restrictions.
>
> With regard to the left knee, there are no work restrictions.

(Joint Exhibits 106, Report of Phillip Kanter, M.D., March 30, 2009, pp. 24-25.)

Dr. Kanter did not change work restrictions when he reevaluated applicant in 2011. (See Joint Exhibits 107, Report of Phillip Kanter, M.D., April 25, 2011, pp. 21-22.)

Applicant was evaluated in rheumatology by agreed medical evaluator (AME) Seymour Levine, M.D., who authored three reports in evidence and was deposed. (Joint Exhibits 108 through 111.) Dr. Levine evaluated applicant's psoriatic arthritis and provide a rating to it, but deferred to Dr. Kanter to address work restrictions. (Joint Exhibit 109, Report of Seymour Levine, M.D., August 26, 2011, p. 23.)

As to rebuttal of the Combined Values Chart, Dr. Levine testified in deposition as follows:

> Q. Just one last area of questioning, Doctor, at least from my end here, you are familiar with the AMA Guides, which includes the Combined Values Chart?

A. Yes.

Q. Now, this is an individual with orthopedic disability, psychiatric disability, skin disorder, cardiovascular disorder, sleep disorder -- among other things. Do you believe that utilization of the Combined Values Chart accurately describes his impairment in this matter, or would you use some other methodology to do so?

* * *
THE WITNESS:

Now, there's orthopedic issues; let's say, psychiatric issues; rheumatologic issues; dermatologic issues. From the rheumatologic perspective, those items that are generated by the chronic pain syndrome of psoriatic arthritis should be combined. So if we have something for psoriatic arthritis and something for sleep, since the sleep issue would be part and parcel of chronic pain generated by psoriatic arthritis, that should be combined. But we have really separate ortho issues from the rheumatologic issues. They really, in my mind, should be added. And the same would be for psychiatric issues. Those are the -- those separate disciplines within a given discipline, as I just mentioned – like rheumatologic, the factors derived from the rheumatologic should be combined. And all the disciplines, then, should be added because I think they're separate issues that stand on their own grounds to cause disability in this patient.

BY MR. OZUROVICH:

Q. So is it your testimony, then, that it would be appropriate more accurate to assess his whole person impairment by adding the various impairment ratings as opposed to compressing them by utilization of the CVC?

A. Yes. And recognize that I only dealt with the rheumatologic. I didn't say that that should be -- I don't know if I necessarily said that that should be added on top of the ortho opinion, but I would say that now.

(Joint Exhibit 111, Deposition of Seymour Levine, M.D., February 27, 2019, p. 22, line 1, through p. 23, line 20.)

The WCJ rejected the analysis provided by Dr. Levine because Dr. Levine's opinion went beyond the specialty of rheumatology and the other specialists in the case did not opine on whether the CVC should be rebutted. (Report and Recommendation on Petition for Reconsideration, March 2, 2022, pp. 3-4.)

2. Vocational Evidence

Applicant was evaluated by vocational expert Aida Worthington, who authored four reports in evidence. (Applicant's Exhibits 5 through 8.)

In her initial evaluation of applicant, Ms. Worthington reviewed applicant's assigned work restrictions and completed vocational testing, which showed that applicant was in the 50th-75th percentile. (Applicant's Exhibit 5, Report of Aida Worthington, December 30, 2013, p. 19.) "These scores suggest that Mr. Havanis has a level of intellectual ability that would allow him to engage in certain retraining programs commonly considered for vocational rehabilitation purposes." (*Ibid*.) She opined that applicant's injury had caused applicant to incur a 61% loss of future earning capacity. (*Id*. at p. 27.) She analyzed as follows:

> After conducting this Vocational Evaluation, the Transferable Skills Analysis for Mr. Havanis, and reviewing the above indicated medical reports, the multiple diagnoses, work restrictions that restrict him to sedentary and to a limited number of light jobs, GAF of 55, and 6 slight to moderate work function impairments, medication intake and side effects, his occupation that he is no longer able to perform, his noticeable slow mobility and difficulty with walking, his need to use a cane, and lack of transferable skills to perform other jobs, based on LC§4660 (b)(2), Mr. Havanis has experienced 61 % Diminished Future Earning Capacity since he has been unable to return to work since 2006 and is still unable to secure and sustain employment according to all the above mentioned factors. Based on Ogilvie JJL Mr. Havanis is still amenable to rehabilitation. Mr. Havanis has reached Maximum Medical Improvement and his condition has been determined to be Permanent and Stationary.

(*Id*. at p. 29.)

Ms. Worthington reevaluated applicant in 2016. She opined that applicant was not capable of returning to work as follows:

> Because of the synergetic effect of Mr. Havanis' industrial injuries which resulted in multiple diagnoses, work restrictions and whole person impairments, a diagnosed GAF score of 55 with all eight "slight to moderate" work function mental impairments diagnosed by AME Psychiatrist Dr. Greenberg, a heart injury that required two stents and "no exposure to excessive emotional stress" work restriction indicated by AME Dr. Joseph, his chronic pain, sleep disorder, need for a medically prescribed cane for ambulation, lack of transferable skills, and the results of this vocational evaluation, Mr. Havanis is not amenable to vocational rehabilitation in any form. It is my professional opinion that Mr. Havanis is unable to return to work and compete in the open labor market. Therefore, Mr. Havanis has experienced 100% Diminished Future Earning Capacity because of the industrial injuries and repercussions of the same.

(Applicant's Exhibit 6, Report of Aida Worthington, December 12, 2016, p. 17.)

Ms. Worthington commented upon 'vocational apportionment' as follows:

> [R]egarding apportionment, the undersigned agrees that there is a significant nonindustrial factor in Mr. Havanis' case; however, this significant non-industrial factor does not have a significant impact on Mr. Havanis' impairments since they add up from 132% WPIs when taking into consideration the 'Total Whole Person Impairment" regarding his orthopedic WPIs, and to 140% when adding up all of the WPIs by body part, indicated by AME Orthopedic Dr. Kanter, AME Rheumatologist Dr. Levine (with 30% non-industrial), AME Psychiatrist Dr. Greenberg (with 45% non-industrial) and AME Internal Medicine Dr. Joseph (with 30% non-industrial).
>
> * * *
>
> Therefore, upon given consideration to the indicated apportionment by the evaluating physicians in this case, and applying and analyzing this apportionment to the awarded whole person impairments, it is my professional opinion that Mr. Havanis is unable to return to work based on the synergistic effect of the combination of all of Mr. Havanis' injured body parts, impairments, and work restrictions even when considering the awarded apportionment to non-industrial factors.

(Applicant's Exhibit 7, Report of Aida Worthington, March 9, 2018, pp. 7-8.)

Applicant was evaluated by defendant's vocational expert Howard Goldfarb, who authored three reports in evidence. (Defendant's Exhibits A through C.) In general, Mr. Goldfarb found that applicant was amenable to rehabilitation. (Defendant's Exhibit A, Report of Howard Goldfarb, September 29, 2017, p. 37.) Mr. Goldfarb further found that applicant was capable of light to sedentary work. (*Id*. at p. 43.)

DISCUSSION

1. The Expertise of Dr. Levine

In determining whether to admit evidence, the Appeals Board is governed by the principles of Labor Code[1] section 5908, which states that the appeals board "shall not be bound by the common law or statutory rules of evidence and procedure, but may make inquiry in the manner, through oral testimony and records, which is best calculated to ascertain the substantial rights of the parties and carry out justly the spirit and provisions of this division." The right to present evidence implicates the right to due process. (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 175 [36 Cal.Comp.Cases 93, 102]; *Pence v. Industrial Acci. Com*. (1965) 63 Cal.2d 48, 51 [30 Cal.Comp.Cases 207, 209].)

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

Evidence Code, section 720 determines whether a witness is qualified to testify as an expert, and it states:

> (a) A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert **on the subject to which his testimony relates**. Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.
>
> (b) A witness' special knowledge, skill, experience, training, or education may be shown by any otherwise admissible evidence, including his own testimony.

(Cal. Evid. Code, § 720 (emphasis added).)

Like lawyers, medical doctors often specialize in a practice area. Also, like lawyers, a licensed doctor is not precluded from practicing in any area. (Cal. Bus. & Prof. Code, §§ 2050, 2051.) While a doctor's specialization may indicate a particular area of knowledge and expertise, specialization does not by itself limit one's area of expertise. In short, a doctor is not limited to commenting upon their specialized area. A doctor may opine upon any issue raised, if they feel they have the special knowledge, skill, experience, training, or education to do so.

When the issue is whether the CVC is rebutted, the subject of the expert's testimony is how to properly rate disability. The Administrative Director is required to certify medical evaluators, which includes certification in their ability to rate injuries. (§ 139.2.) Every QME must pass a competency examination prior to being appointed, which expressly certifies that the QME has "Knowledge of the combining rule for impairment rating in the January 2005 rating schedule." (See Division of Workers' Compensation Medical Unit, QME Competency Examination Information Booklet, rev. 1-2024, p. 7; see also, § 139.2(b)(1); Cal. Code Regs., tit. 8, § 11(f).)

Dr. Levine is not only certified as a QME in internal medicine and rheumatology, but here the parties agreed to him as an AME. The parties presumably choose an AME because of the AME's expertise and neutrality. (*Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) The Appeals Board will follow the opinions of the AME unless good cause exists to find his opinion unpersuasive. (*Ibid*.) The fact that Dr. Levine was jointly selected as an AME further evidences that both parties believed him capable of commenting upon the issue of applicant's impairment rating.

In short, an evaluator's expertise may be included in the analysis of whether they are qualified to opine on an issue, but it should not be the end of the analysis. Where an objection is

raised to the evaluator's qualifications, by the court or by a party, the proper course is to raise that issue with the evaluator, who may then testify as to their qualifications as an expert on any particular issue. As this did not occur, we will rescind the F&A and return the matter to the parties for further proceedings.

2. Rebuttal of the Combines Values Chart (CVC)

Permanent disability in workers' compensation cases is determined using the Permanent Disability Ratings Schedule (PDRS), which is prima facie evidence of applicant's level of permanent disability. (§§ 4660(c), 4660.1(d).) However, the PDRS is rebuttable. (*Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Almaraz-Guzman*) (2010) 187 Cal.App.4th 808, 822 [75 Cal.Comp.Cases 837].) As the Sixth District stated in *Almaraz-Guzman*:

> Section 4660, subdivision (b)(1), recognizes the variety and unpredictability of medical situations by requiring incorporation of the descriptions, measurements, and corresponding percentages in the Guides for each impairment, not their mechanical application without regard to how accurately and completely they reflect the actual impairment sustained by the patient.

(*Ibid*.)

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), which is adopted and incorporated for purposes of rating permanent disability under the 2005 PDRS. (§§ 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.) An impairment to two or more body parts is generally expected to have an overlapping effect upon the activities of daily living. For example, low back and knee impairment would likely both affect a person's physical activity, ability to travel, and potentially other ADLs; thus, per the AMA Guides and the PDRS, two impairments should be combined in a way to eliminate overlap.

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.)[2]

[2] Although the formula for the CVC is from the AMA Guides, the chart used to calculate CVC is from the PDRS as the AMA Guides' chart quite famously has errors in its CVC chart.

Under the CVC a 13% disability to the lumbar spine combines with 20% psychiatric disability to equal 30% [20 + 13(1-0.2)]. When CVC is rebutted, simply add those impairments for which rebuttal exists. In this example, 20% + 13%, which would equal 33% permanent disability.

In panel decisions, two methods have been used to rebut the CVC. The CVC has been rebutted where there was evidence showing no actual overlap between the effects on ADLs as between the body parts rated. The CVC has also been rebutted where there is overlap, but the overlap creates a synergistic effect upon the ADLs.

a. No overlap of ADLs.

The first method for rebuttal of the CVC is to show that the multiple impairments, in fact, have no overlap upon the effects of the ADLs. (See e.g., *Devereux v. State Comp. Ins. Fund*, 2018 Cal.Wrk.Comp. P.D. LEXIS 592; *Guandique v. State of California*, 2019 Cal.Wrk.Comp. P.D. LEXIS 53.) [3] One significant point of confusion on the issue of overlap is that we are focused on overlapping **ADLs**, not body parts.

In determining whether the application of the CVC table has been rebutted in the case where there is no overlap, applicant must present evidence indicating what impact applicant's impairments have had upon the ADLs. Where the impact upon the ADLs overlap, the CVC table should be used. Where there is effectively an absence of overlap, the CVC table is rebutted, and it should not be used.

Here, Dr. Levine's testimony appears more in line with rebuttal based upon no ADL overlap. The problem is that Dr. Levine never analyzed the ADLs that supported the rating of each impairment. He focused improperly upon the body systems and by doing that, he created a false analogy.

The fact that two body systems are different does not by itself rebut the CVC table. The fact that two separate chapters of the AMA Guides are referenced does not by itself rebut the CVC table. To the contrary, the AMA Guides was written on the assumption that impairment to multiple

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal. App. 4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and the Workers' Compensation Appeals Board may consider these decisions to the extent that their reasoning is found persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal. Comp. Cases 228, fn. 7 (Appeals Board En Banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal. App. 3d 1260, 1264, fn. 2, [54 Cal.Comp.Cases 145].) The panel decisions discussed herein are referred to because they considered a similar issue. Practitioners should proceed with caution when citing to a panel decision and verify its subsequent history.

body systems will have overlapping impacts on ADLs. Thus, the CVC may be rebutted by showing that there is no overlapping impact upon ADLs as between the rated impairments.

b. Overlapping ADLs with a Synergistic Effect

The next method for rebutting the CVC was first discussed in *East Bay Municipal Utility District v. Workers' Compensation Appeals Board*, (*Kite*), where applicant was awarded permanent disability by adding the permanent disability to each hip and not by combing the disabilities as ordinarily required by the PDRS under the CVC. ((2013), 78 Cal.Comp.Cases 213 (writ den.).) In *Kite*, the CVC was rebutted by substantial medical evidence showing a synergistic effect of the two injuries upon applicant.

'Synergy' is "the interaction or cooperation of two or more organizations, substances, or other agents to produce a combined effect greater than the sum of their separate effects." ("Synergy", Google Dictionary, retrieved February 26, 2024, from http://www.google.com.) In some cases, two impairments overlap with one another in their effect on ADLs to the extent that they amplify one another to cause further impairment than what is anticipated in the AMA Guides. Thus, it is permissible to add impairments where a synergistic amplification of ADLs is shown.

We cannot emphasize enough that to constitute substantial evidence ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, **and it must set forth reasoning in support of its conclusions**." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc), (emphasis added).) The word 'synergy' is not a magic word that immediately rebuts the use of the CVC. Doctors must set for a reasoned analysis explaining why synergistic ADL overlap exists. If parties are searching for a magic word to use during a doctor's deposition, that word is "Why?". Instead of focusing on verbiage or reaching a conclusion, it is imperative that parties focus on an **analysis** that uses critical thinking and review of the facts to support a conclusion.

Here, Dr. Levine does not suggest at all that there is a synergistic effect of applicant's ADLs. Dr. Levine did not even discuss applicant's ADL's in drawing his conclusions on CVC rebuttal. Accordingly, his opinion does not constitute substantial medical evidence.

3. Medical Apportionment under the AMA Guides Rating

Stipulations are binding on the parties unless, on a showing of good cause, the parties are given permission to withdraw from their agreements. (*County of Sacramento v. Workers' Comp.*

Appeals Bd. (*Weatherall*) (2000) 77 Cal.App.4th 1114, 1121 [65 Cal.Comp.Cases 1] (*Weatherall*).) As defined in *Weatherall*, "A stipulation is 'An agreement between opposing counsel . . . ordinarily entered into for the purpose of avoiding delay, trouble, or expense in the conduct of the action,' (Ballentine, Law Dict. (1930) p. 1235, col. 2) and serves 'to obviate need for proof or to narrow range of litigable issues' (Black's Law Dict. (6th ed. 1990) p. 1415, col. 1) in a legal proceeding." (*Weatherall*, supra, 77 Cal.App.4th at p. 1119.)

Applicant raises the issue of apportionment in the petition for reconsideration. We agree with the WCJ's analysis on this issue. Applicant stipulated that absent a finding of 100% permanent total disability, applicant's disability rated to 80% after apportionment. Applicant has not alleged good cause to be relieved of the stipulation. Accordingly, we will not disturb this stipulation of the parties and need not address the issue of apportionment under the AMA Guides. The parties stipulated to a minimum of 80% permanent disability in this case and we expect that applicant will continue to receive disability per this stipulation until a final order issues addressing the question of whether applicant is 100% permanently totally disabled.

However, as described below, the parties must be cognizant that the issue of causation of total disability via vocational reporting must be analyzed separately from the issue of causation of impairment under the AMA Guides, which the parties have stipulated.

4. 'Vocational Apportionment' and Rebuttal of the PDRS under *Ogilvie*

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 an apportionment determination and prescribes the standard for apportionment, and that the Labor Code makes no statutory provision for "vocational 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 such evidence may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. The Board explained that an analysis of whether there are valid sources of apportionment is still required, even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent disability reflected in applicant's inability to meaningfully participate in vocational

retraining arises solely out of the industrial injuries. The Board affirmed these holdings in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes II*").

In 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 apportionment. 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. As explained in *Nunes* 'vocational apportionment' is not a valid concept in workers' compensation. Having failed to properly analyze apportionment, the expert's report does not constitute substantial evidence.

In order to properly analyze apportionment when applicant is rebutting the PDRS, you 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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> * * *
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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.)

As explained in section 2, above, the purpose of the AMA Guides to assign impairment based upon a person's loss of ADLs. Most workers' compensation cases do not involve total disability. Most cases involve assignment of partial disability via the AMA Guides. Thus, by habit, doctors assign medical apportionment based on the causation of the rated impairment in the AMA Guides. Here the parties' stipulation to 80% permanent disability after apportionment reflects the causation of disability <u>under the AMA Guides</u>.

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

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

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

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

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

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

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

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

Here, applicant failed to prove that the work restrictions assigned are 100% industrial because no party asked that question to any of the doctors. This requires medical evidence. As we are clarifying this issue for the first time and keeping with our duty to accomplish substantial justice, the prudent course is to return this matter to the trial level for further discovery.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's February 11, 2022 F&A and return the matter to the trial level for further proceedings and development of the record.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact and Award" (F&A) issued on February 11, 2022 is **RESCINDED** and this matter is **RETURNED** to the trial level for further proceedings and development of the record in accordance with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ _KATHERINE A. ZALEWSKI, CHAIR_______

I CONCUR,

/s/ _CRAIG SNELLINGS, COMMISSIONER______

/s/ _JOSÉ H. RAZO, COMMISSIONER___________

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

May 3, 2024

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

KELLY HAVANIS
OZUROVICH & SCHWARTZ
STATE COMPENSATION INSURANCE FUND

EDL/oo

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