WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MARIA PANTOJA, *Applicant*

vs.

JACK IN THE BOX / SBF FOODS, LLC;
CIGA by its servicing facility SEDGWICK for CASTLEPOINT NATIONAL INSURANCE COMPANY, in liquidation, *Defendants*

Adjudication Number: ADJ9104101

San Luis Obispo 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, Award, Orders and Opinion on Decision" (F&A) issued on June 1, 2023, 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 68% permanent partial disability.

Applicant argues that the WCJ erred in not awarding permanent total disability because applicant established that she is not amenable to vocational rehabilitation due to the industrial injury and that her industrial injury precludes her from employment on the open labor market.

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 June 1, 2023 F&A and substitute a new Findings and Award, which finds that applicant has sustained 100% permanent total disability.

FACTS

Applicant worked for defendant as a cook when she sustained industrial injury to her back, right shoulder, and psyche on July 9, 2012. (Minutes of Hearing and Summary of Evidence, April 3, 2023, p. 2, lines 2-3.) This matter was previously decided wherein applicant was awarded 59% permanent partial disability. (*Id*. at p. 2, lines 15-16.) Thereafter, applicant filed a timely petition to reopen. The matter proceeded to trial on applicant's petition to reopen with applicant alleging that she sustained permanent total disability. (*Id*. at p. 2, lines 18-23.)

1. Medical Evidence

Applicant's history of injury was taken as follows:

> The applicant was injured on 07/09/2012 while employed at Jack in the Box in Lompoc, CA. Mrs. Pantoja was walking out of her work to go on a break, carrying coffee and her lunch, when she slipped and fell. She landed on her buttocks and her right shoulder hit the wall.

(Joint Exhibit 1, Report of Jeffrey Friedman, Ph.D., May 18, 2022, p. 2.)

Applicant was evaluated for her orthopedic injuries by qualified medical evaluator (QME) Steven Pearson, M.D., who authored three reports in evidence as pertains to applicant's petition to reopen. (Joint Exhibits 2 through 4.) Dr. Pearson noted a history of cervical strain, lumbar fusion L4-S1 and right rotator cuff repair with distal clavicle excision. (Joint Exhibit 4, Report of Steven Pearson, M.D., November 10, 2017, p. 10.) Dr. Pearson recommended a trial for a spinal cord stipulator, and after a successful trial, applicant subsequently had a spinal cord stimulator surgically implanted. (Joint Exhibit 4, *supra* at p. 12; Joint Exhibit 1, *supra* at p. 13.)

Dr. Pearson assigned the following work restrictions:

> The patient can maximally lift 30 pounds, occasionally lift and carry 20 pounds, and frequently lift and carry 20 pounds. She can only stand and walk a total of four hours out of an eight hour day. She requires a 30 minute sitting break out of every hour of work. She can only sit a total of four hours per an 8 hour day, requires a break after sitting continuously for 30 minutes. She can only maximally push and pull 40 pounds. She can only occasionally climb, balance, stoop, kneel, crouch, crawl, and twist.

(Joint Exhibit 4, supra at pp. 12-13.)

Dr. Pearson commented upon apportionment as follows: "There is no history of previous problems with her neck, back, or right shoulder. Thus, apportionment is not applicable in this case." (*Id*. at p. 12.)

Dr. Pearson addressed the issue of vocational feasibility as follows:

> If she did not have any psychiatric issues[,] she certainly would be a candidate for vocational rehabilitation just based on her musculoskeletal impairment. So, the question comes down to how severe is her mental status that prevents her from being appropriately vocationally rehabilitated.

(Joint Exhibit 3, Report of Steven Pearson, M.D., January 28, 2021, p. 2.)

Applicant was initially evaluated for psychological injury by qualified medical evaluator Rita Hyman, Ph.D., who authored six reports and was deposed. (Applicant's Exhibits 19 through 25.) However, Dr. Hyman retired and the parties thereafter selected Jeffrey Friedman, Ph.D., as an agreed medical evaluator (AME) to replace Dr. Hyman. Dr. Friedman authored one report in evidence. (Joint Exhibit 1, Report of Jeffrey Friedman, Ph.D., May 18, 2022.)

Dr. Friedman reviewed applicant's history and noted that she frequently cries, experiences headaches, has problems with memory, has bouts of trembling, experiences pain from her orthopedic injury, has difficulty sleeping. (*Id*. at p. 3.)

Dr. Friedman diagnosed applicant with the following: "Adjustment disorder with mixed anxiety and depression, persistent [F43.23]; Somatic symptom disorder with multisite pain [F45.l)." (*Id*. at p. 19.) He assigned applicant a Global Assessment of Functioning (GAF) score of 56, which equated to 21% whole-person impairment. (*Id*. at p. 20.) Dr. Friedman concurred with the findings of Dr. Hyman and found 100% industrial causation of applicant's psychological disability. (*Id*. at p. 21.)

Dr. Friedman noted that applicant's psychological testing "produced a valid profile with no evidence of malingering." (*Id*. at p. 20.)

Dr. Friedman commented upon applicant's disability status as follows:

> It is my clinical opinion that the applicant's multiple psychological problems and concomitant psychiatric diagnosis, secondary to her 07/09/2012 industrial injury, have increased and she has suffered new and further psychological disability. Additionally, there continues to be a need for medical treatment that has yet to be provided. The advocacy letter furnished by Defense Attorney Brock L. Roverud, Esq stated: "The parties have had difficulty securing treatment on a psychological basis as there is no treater within a reasonable geographic distance that will accept the case."
>
> The applicant continues to experience significant depression, anxiety, and psychological sequelae which have increased over time and with reasonable

> medical probability, would prevent her from returning to her prior employment or to work in any capacity.

(*Id*. at p. 21, (emphasis added).)

2. Vocational Evidence

The parties obtained competing vocation experts.

Applicant retained Laura Wilson, MBA, as her vocational expert. Ms. Wilson authored five reports in evidence as pertains to the petition to reopen. (Applicant's Exhibits 14 through 19.)

Ms. Wilson took a history of applicant's work restrictions as noted by the medical record, including the following restrictions discussed by Dr. Hyman:

> With the above restrictions in mind, there is no question that Ms. Pantoja would be considered a Qualified Injured Worker on a psychological basis alone, regardless of her physical preclusions, where her usual and customary occupational role as a Cook in a fast-food eatery is concerned. In fact, this evaluator can think of no occupations that would be appropriate for her beyond working in a sheltered workshop type of environment. However, she should have access to a consultation with a vocational counselor, who would be more equipped to identify certain employment opportunities that she may be able to effectively manage with her numerous work restrictions on a physical and psychological basis.

(Applicant's Exhibit 18, Report of Laura Wilson, MBA, November 10, 2020, p. 40.)

Ms. Wilson noted that the record lacked any finding of non-industrial apportionment. (*Id*. at p. 19, pp. 21-22.)

Ms. Wilson concluded:

> After careful review and consideration of Ms. Pantoja' physical and emotional work limitations, the dosage of medications that she is currently taking and its side effects, along with her transferable skills, determined by SkillTRAN it is my professional opinion that solely based on her industrial related impairments and her industrial physical limitations that were provided in the medical reports of Qualified Medical Examiner Dr. Rita Hyman and Qualified Medical Examiner Steven W. Pearson, Ms. Pantoja is not amenable to vocational rehabilitation. Ms. Pantoja is not able to sustain gainful employment and therefore she is not able to compete in the open labor market. As a direct result of her industrial related impairments provided by considering her pre-injury capacity and abilities, Ms. Pantoja has at present no consistent and stable future earning capacity.

(*Id*. at p. 29.)

Defendant retained Steven Koobatian, Ph.D. as its vocational expert. Dr. Koobatian authored three reports in evidence as relates to applicant's petition to reopen.

Dr. Koobatian noted that applicant's vocational testing scores were below average with her only score in the average range being mechanical reasoning and comprehension. (Defendant's Exhibit D, Report of Steven Koobatian, Ph.D., May 26, 2021, p. 9.)

Dr. Koobatian noted that no issues of apportionment existed in applicant's case. (*Id*. at p. 19.) He commented upon applicant's vocational feasibility as follows:

> Due to Ms. Pantoja's limited transferable skills, in order for her to benefit from vocational rehabilitation and be considered amenable/feasible, she would likely need to undergo vocational/academic training to enhance her skills and abilities to secure employment within the parameters of Drs. Pearson and Hyman medical/psychological restrictions.
>
> Vocational testing revealed severe deficiencies in English and Spanish literacy/proficiencies. Also, her math, numerical reasoning, clerical aptitudes and hand dexterity were significantly below average as outlined in our April 16, 2021 testing report.
>
> Through a dedicated effort by Ms. Pantoja, she ***may*** be feasible/amenable in participating in extended English-second-language training and vocational business skills training. She may have the capacity to become marketable to access occupations such as General Office Clerks, Shipping, Receiving and Inventory Clerks, Bookkeeping Clerks, and Order Clerks.
>
> Maria also faces the issue of limiting non-industrial factors of "general economic conditions." She resides in the City of Lompoc, California. In this relatively small community, she is restricted to remaining in this community and she has no interest or plans to relocate from Lompoc to a larger metropolitan area. A smaller community equates to a smaller labor market with a relatively lower number of available jobs. Therefore, she will need to consider commuting to other cities like Santa Maria, California to access viable jobs.

> It is the opinion of Vocational Designs, Inc. that **these impermissible/nonindustrial factors create definite challenges to Ms. Pantoja's vocational feasibility/amenability for employment in the open labor market.**

(*Id*. at p. 20, (emphasis added).)

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.)
>
> 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.)

Here, applicant presented substantial evidence establishing permanent total disability both through vocational evidence and direct medical preclusions. Both the psychological AME and the prior psychological QME agreed that applicant's untreated psychological impairments effectively preclude her from gainful employment. 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 the opinion unpersuasive. (*Ibid.*) Here, defendant presented no evidence establishing good cause to ignore the opinions of the AME.

Next, the reporting of defendant's vocational expert is not substantial evidence. Defendant's expert provided an equivocal opinion. Defendant's expert states that applicant "may" be feasible for vocational rehabilitation, but then goes on to say that applicant has "definite challenges" to vocational rehabilitation. The question is not whether applicant *may* work on the open labor market. Instead, we must determine to a reasonable degree of probability whether applicant *can* work on the open labor market. Defendant expert's use of equivocation is not substantial evidence upon which a finding of fact may issue.

A careful reading of defendant's evidence shows that the finding of defendant's expert is based upon applicant's lack of formal education and her lack of English as a native language. Defendant's expert suggests that applicant *may* be able to rehabilitate if she were smarter and spoke English. First, this opinion is speculative and not supported by substantial evidence.

Next, the expert's opinion is not supported by law, which we addressed directly in *Soormi*, *supra*:

> To be abundantly clear, a person's ethnic origin is not a disability. A person's immigration status is not a disability. Whether a person can speak the English language is not generally a disability. A person's lack of education is not a disability. [The vocational expert's] focus on applicant's lack of education and lack of English skills is not proper because neither of these factors were caused by

> a pre-existing disability and [they] did not explain why these factors were the sole cause of applicant's loss of earnings post-injury.
>
> It may be true that an unskilled worker is more susceptible to sustaining permanent total disability because such a person begins the analysis with a limited labor market. However, that is not a basis to discount applicant's level of disability. To be clear, the employer receives a discount in such cases. However, the discount is found, not in the percentage of disability, but in the rate of the permanent total disability award. Defendant will pay the permanent total disability award at a rate that is significantly lower than the state average because applicant was unskilled and paid at or around minimum wage.
>
> The analysis changes if applicant's pre-existing education or language ability is due to a disability. Like many states, California encourages employers to hire disabled workers. The State assures employers that they will not be held liable for pre-existing disabilities through multiple avenues. First, we have apportionment based on causation and apportionment based on prior awards. (§§ 4663, 4664.) Next, we have the Subsequent Injuries Benefits Trust Fund ("SIBTF"), which covers the employer for any increase in permanent disability that was amplified by a prior disability. (§§ 4751, et. seq.)
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> Here, applicant is simply an unskilled worker. No issue of apportionment exists. The AME found the disability was 100% industrial. The work restrictions were 100% industrial. Defendant failed to show that any prior disability existed. Defendant received the benefit of cheap unskilled labor. Applicant's limitation on the open labor market was a risk that defendant assumed. Defendant must now accept the consequences.

(*Soormi*, *supra* at *15-17.)[1]

[1] 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 citeable 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.

Here, applicant established through direct medical evidence of multiple evaluators that her untreated psychological condition precluded her from returning to work. Applicant further established through vocational reporting that her work restrictions precluded her from vocational rehabilitation and from competing upon the open labor market. Under either of these factors, applicant successfully rebutted the PDRS and an award of 100% permanent total disability must issue.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's June 1, 2023 F&A and substitute a new Findings and Award, which finds that applicant has sustained 100% permanent total disability.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact, Award, Orders and Opinion on Decision issued on June 1, 2023 is **RESCINDED** with the following **SUBSTITUTED** therefor:

FINDINGS OF FACT

1. Maria Pantoja, who was 56 years old on the date of injury, while employed on July 9, 2012, as a cook at Lompoc, California, by Jack in the Box/SBF Foods, LLC, sustained injury arising out of and in the course of employment to her back, right shoulder, and psyche.

2. At the time of the injury, the employer's workers' compensation carrier was Castlepoint National Insurance Company, in liquidation, currently represented by California Insurance Guarantee Association by its servicing facility Sedgwick.

3. The periods of temporary disability and permanent disability previously paid are deferred to the parties to adjust.

4. Applicant has been adequately compensated for all periods of temporary disability through December 14, 2022.

5. The issue of costs is deferred.

6. As a result of applicant's injury, she has sustained new and further disability.

7. Due to the effects of applicant's industrial injury, and pursuant to the opinion of the Agreed Medical Evaluator, applicant is medically precluded from return to work on an industrial basis, and thus, applicant has sustained 100% permanent total disability.

8. Due to the effects of applicant's industrial work restrictions from both the orthopedic and psychological injuries, applicant is not amenable to vocational rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. Applicant is precluded from competing on the open labor market, and thus, applicant has sustained 100% permanent total disability.

9. There is no basis for apportionment.

10. Applicant requires future medical care to cure or relieve from the effects of the industrial injury.

11. Applicant's attorney has performed services reasonably valued at 15% of the benefits awarded herein, less credit for prior attorney's fees paid, the exact amount of which is deferred to the parties to adjust. Any request for commutation of fees is deferred and should be submitted through an appropriate petition.

AWARD

AWARD IS **MADE** in favor of **MARIA PANTOJA** against **CALIFORNIA INSURANCE GUARANTEE ASSOCIATION**, for **CASTLEPOINT NATIONAL INS. CO.,** in liquidation of:

A. Permanent total disability, the exact amount of which is deferred to the parties to adjust with jurisdiction reserved in the event of a dispute.

B. Further medical treatment to cure or relieve from the effects of the industrial injury.

C. Attorneys' fees, the exact amount of which is deferred to the parties to adjust with jurisdiction reserved in the event of a dispute.

ORDER

IT IS ORDERED THAT exhibits 14, 19, 20, 21, 22, 23, 24, 25 are admitted into evidence.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ JOSÉ H. RAZO, 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.

MARIA PANTOJA
WILLIAM A. HERRERAS, ESQ.
MULLEN & FILIPPI
LAW OFFICES OF SCOTT C STRATMAN

EDL/mc

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