WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MICHAEL FIORE, *Applicant*

vs.

LOS ANGELES COMMUNITY COLLEGE DISTRICT, permissibly self-insured, administered by ADMINSURE, *Defendants*

Adjudication Number: ADJ9647382

Marina del Rey District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the "Findings of Fact and Award" (F&A) issued on September 29, 2021, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant sustained industrial injury in the form of fibromyalgia which caused 65% permanent partial disability.

Applicant argues that the WCJ erred in not following the opinions of applicant's vocational expert, erred in calculating her permanent disability rating, and erred in not finding that the Combined Values Chart (CVC) was rebutted based upon the reporting of applicant's vocational expert, and thus, his permanent disability rating should have been added and not combined to reach 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

[1] Deputy Commissioner Schmitz was on the panel that granted reconsideration, but was unavailable to participate in this decision. Another panelist was appointed in her place.

below, as our Decision After Reconsideration we will rescind the WCJ's September 29, 2021 F&A and amend the August 11, 2021 Order Vacating Submission to clarify that the Findings and Award that issued on July 23, 2021 is rescinded, and return the matter to the trial level for further proceedings consistent with this decision.

FACTS

1. Procedural History

Applicant worked for defendant as a photocopy machine operator when he sustained industrial injury to his bilateral wrists, right shoulder, lumbar spine, and bilateral lower extremities during the cumulative period ending on September 17, 2014. (Minutes of Hearing and Summary of Evidence, May 29, 2019, p. 2, lines 10-15.) Applicant claimed further injury to his psyche, upper digestive tract, colon, and in the form of sleep disorder and fibromyalgia. (*Ibid*.)

This matter initially proceeded to trial on May 29, 2019 on the primary issues of body parts injured, permanent disability, and apportionment. (*Id*. at p. 3.) The WCJ thereafter vacated submission to develop the record. (Order Vacating Submission of Case, July 11, 2019.)

The matter proceeded to trial again on June 22, 2020. On August 7, 2020, the WCJ issued a Findings of Fact and Award, which found in pertinent part, that applicant sustained injury to both wrists, right shoulder, lumbar spine, both lower extremities, colon and upper digestive tract, and in the form of sleep disorder, but did not sustain injury to his psyche. (Findings of Fact and Award, August 7, 2020.) The WCJ ordered development of the record on the issue of injury in the form of fibromyalgia, ordered the appointment of a regular physician per Labor Code section 5701, and deferred the issue of permanent disability and apportionment. (*Ibid*.)

The matter proceeded to trial again on April 12, 2021, on the issues of injury via fibromyalgia, need for further medical treatment, permanent disability and apportionment, and attorney's fees. (Minutes of Hearing and Summary of Evidence, April 12, 2021, p. 2, lines 12-18.) According to the trial briefing, applicant claimed permanent total disability based on the vocational expert reporting and via rebuttal of the CVC. (*Id*. at p. 2, line 17, through p. 3, line 6.)

The WCJ vacated submission to obtain a rating from the Disability Evaluation Unit (DEU). (Order Vacating Submission and Referral to the Disability Evaluation Unit, May 24, 2021.) The order referring the matter to the DEU for rating contained no rating instructions and no rating instructions appear to have been served upon the parties at the time. (See generally, *id*.)

The DEU issued a formal rating on May 26, 2021, finding that applicant sustained 65% permanent partial disability when applying the Permanent Disability Ratings Schedule (PDRS). (DEU Rating, May 26, 2021.) It does not appear that the parties dispute the calculation of permanent disability under the PDRS; instead, the dispute is whether applicant successfully rebutted the PDRS.

On July 23, 2021, the WCJ issued a Findings of Fact and Award, which found, in pertinent part that applicant sustained injury in the form of fibromyalgia and awarded 65% permanent partial disability, finding that the PDRS was not rebutted.

On August 10, 2021, applicant filed a petition for reconsideration from the July 23, 2021 Findings of Fact and Award.

On August 11, 2021, the WCJ issued an order vacating submission under WCAB Rule 10961. (Cal. Code Regs., tit. 8, § 10961.) The WCJ noted that there was an error because the rating instructions were never served upon the parties.

On August 11, 2021, the parties were served with the formal rating instructions.

On August 13, 2021, applicant objected to the formal rating instructions, in pertinent part, because it did not include an instruction as to rebuttal of the CVC.

The WCJ reissued a Findings of Fact and Award on September 29, 2021, which again found that applicant's injury to fibromyalgia is industrial, and awarded applicant 65% permanent partial disability. Again, the WCJ found that the PDRS was not rebutted. It is from this award of permanent partial disability that applicant seeks reconsideration. Applicant presents two arguments: first, applicant argues complete rebuttal of the Permanent Disability Ratings Schedule (PDRS) through vocational reporting; next, applicant argues rebuttal of the CVC through vocational reporting, which, if found, would independently lead to a finding of permanent total disability.

2. Medical Evidence

Applicant was evaluated in three specialties: orthopedic, internal medicine, and rheumatology.

Applicant sustained impairment to his lumbar spine, right shoulder, bilateral upper extremities, and bilateral lower extremities. Applicant's orthopedic evaluator found no basis for apportionment. (Joint Exhibit XX, p. 21.) Orthopedic work restrictions were assigned as follows: "No repetitive overhead reaching or overhead work with right arm." (*Id*. at p. 24.) Applicant was

precluded from climbing. (*Ibid*.) Applicant was limited to standing, walking, forward bending, and twisting no more than 2 to 4 hours in a day. (*Ibid*.) Applicant was limited to lifting no more than 30 pounds. (*Ibid*.)

Applicant's upper gastrointestinal complaints were apportioned 50% due to nonindustrial obesity. (Applicant's Exhibit 11, p. 11.) His lower gastrointestinal complaints were found 100% industrial. (*Ibid*.) Applicant was assigned work restrictions from the internal medicine doctor as follows: "He should be restricted/precluded from undue emotional stress/stressful work environment outside the usual course and scope of employment[.]" (*Ibid*.)

While applicant had prior evaluations in rheumatology, the WCJ previously found that the prior reports were not substantial medical evidence and appointed a regular physician to evaluate applicant. The regular physician did not assign work restrictions, but instead stated: "Mr. Fiore is unable to performed [*sic*] usual and customary occupation." (WCAB Exhibit 1, p. 21.)

As to rebuttal of the CVC, the medical evidence in this case is devoid of any discussion of CVC rebuttal. (See e.g., Applicant's Exhibits 1 through 24, Defendant's Exhibits A through C, Joint Exhibits AA through DD, XX, and YY, and WCAB Exhibits 1 and 2.)

In his Petition for Reconsideration, applicant cites heavily to the deposition of the regular physician, Jeffrey Hirsch, M.D., For example, applicant argues:

> When questioned about the Kite case on page 27, [Dr. Hirsch] indicated that he thought it was restricted to cases of bilateral hip injury. When he was asked questions about how other cases interpret Kite, and about the background of the Combined Values Chart, he felt it was getting more into a legal area and deferred to the WCJ.

(Petition for Reconsideration, October 25, 2021, p. 6, lines 8-11.)

While it appears that Dr. Hirsch's testimony also does not address rebuttal of the CVC, only five pages of Dr. Hirsch's testimony were admitted into evidence. (See WCAB Exhibit 2.) The remainder of Dr. Hirsch's testimony, including the citations from applicant, are not in evidence and we have not been able to review the citations above.

3. Vocational Evidence

Applicant was evaluated by vocational expert Paul Broadus, who authored two reports in evidence. (Applicant's Exhibits 1 and 24.) Mr. Broadus conducted no vocational testing of applicant. (Applicant's Exhibit 1, p. 9.)

Mr. Broadus took a history of applicant's work restrictions and concluded that applicant was effectively limited to sedentary work. (*Id*. at p. 14.) Mr. Broadus further found that applicant was not capable of rehabilitation and not capable of competing on the open labor market. (*Id*. at p. 18.)

Mr. Broadus commented upon use of the CVC as follows:

> I am aware that the Whole Person Impairments do not add up to 100% when using the Combined Values Chart. I have general knowledge of the 2005 Permanent Disability Rating Schedule. I am familiar with the Combined Values Chart and its applicability to evaluating a permanent disability. I understand that it generally compresses the final disability ratings for each part of the body resulting in an overall lower level of permanent disability.
>
> In my role as a vocational expert, it is my job to assess the injured worker's ability to compete in the open labor market. I am similarly familiar with the Guzman case, and the progeny of cases thereafter (i.e. Kite) that discuss the ability to rebut the combined values chart from the permanent disability rating schedule and calculation.
>
> In this case as I have noted herein, the multiple disabilities sustained by Mr. Fiore actually have a synergistic or additive effect on his overall level of disability and ability to compete in the open labor market.
>
> As such, in addition to my vocational analysis herein, I believe the most accurate way to determine this injured worker's level of disability is to in fact add the disabilities, rather than to reduce them by way of the combined values chart calculation.

(*Id*. at p. 16.)

Defendant produced vocational reporting from Ray Largo, who agreed that applicant was limited to sedentary work. (Defendant's Exhibit C, p. 34.) Mr. Largo disagreed as to the requirements of sedentary work. (*Ibid*.) Mr. Largo reviewed the medical restrictions and found that applicant was amenable to rehabilitation and capable of competing on the open labor market. (*Id*. at p. 37.)

DISCUSSION

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).)

Labor Code[2] section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton, supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton, supra*, at p. 475.)

We will first address whether applicant rebutted the CVC. In a recent en banc decision, the Appeals Board clarified the process for CVC rebuttal as follows:

> 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),

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

> 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.)5 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.)

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 vocational evidence may be used to address issues relevant to the determination of permanent disability, however, the vocational expert is not a doctor and they may not opine on areas that require medical evidence. Accordingly, Mr. Broadus' opinion as to rebutting the CVC is irrelevant to these proceedings and the WCJ was correct to disregard them.

Here, applicant produced no *medical* evidence addressing rebuttal of the CVC. Applicant's argument as to CVC rebuttal relies solely upon the testimony of a non-medical expert. Although applicant failed to prove rebuttal of the CVC, as we are ordering development of the record on the issue of PDRS rebuttal and we have very recently clarified the procedure for CVC rebuttal, it would appear prudent to allow further development of the record on this issue as well. (See *Gangwish v. Workers' Comp. Appeals Bd*. (2001) 89 Cal.App.4th 1284.)

On this issue, the deposition of the regular physician that is in evidence omits most of the doctor's testimony. (WCAB Exhibit 2.) Upon return, the entire deposition needs to be included as part of the record. This is particularly so as it appears his testimony formed the basis for the WCJ's findings.

The next question is whether applicant rebutted the entirety of the PDRS. 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 above, the purpose of the AMA Guides is 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, doctors generally assign causation based on the causation of the rated impairment in the AMA Guides. Here the rating of 65% permanent disability after apportionment reflects the causation of disability under the AMA Guides.

What appears to be a point of confusion in many cases is that the focus of causation and 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, causation and 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 may 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 posed that question to any of the doctors. This proof requires medical evidence. As we are clarifying this issue and in keeping with our duty to accomplish substantial justice, the prudent course is to return this matter to the trial level for further discovery.

We would further note that the record in this matter requires a significant amount of clarification upon return. The parties must provide the vocational expert with applicant's present work restrictions. To the extent that there is disagreement between the primary treater and the QME as to work restrictions, the parties, or ultimately the WCJ, must determine whose opinion on work restrictions constitutes substantial medical evidence so that the vocational expert can properly evaluate applicant's vocational feasibility. In the alternative, and particularly in cases where there is disagreement as to applicant's functional capacity, the parties may consider obtaining a functional capacity evaluation.

If different doctors assign different work restrictions, the vocational expert cannot take it upon themselves to determine whose restrictions to follow. They may offer alternative opinions dependent upon whose medical opinion is found most accurate. For the same reasons they cannot provide expert medical testimony, a vocational expert cannot take upon themselves the role of trier of fact.

Finally, we note that WCAB Rule 10961 (Cal. Code Regs., tit. 8, § 10961) provides that jurisdiction remains with the district office for 15 days after the timely filing of a petition for reconsideration and sets forth the following actions that a WCJ may take in response: (1) The WCJ may prepare a report and transfer jurisdiction to the Appeals Board to address the merits of the petition (Cal. Code Regs., tit. 8, § 10961(a); see Cal. Code Regs., tit. 8, § 10962); (2) The WCJ may rescind the entire order, decision or award and initiate proceedings within 30 days (Cal. Code Regs., tit. 8, § 10961(b)); or (3) The WCJ may rescind the order, decision or award and issue an amended order, decision or award, and a new petition for reconsideration must be filed in response to the amended order, decision or award (Cal. Code Regs., tit. 8, § 10961(c)). Here, the WCJ issued a Findings and Award on July 23, 2021, and applicant timely filed a Petition for Reconsideration on August 10, 2021. Thereafter, on August 11, 2021, the WCJ issued the "Order Vacating Submission (Rule 10961)." It is clear from the subsequent proceedings in this case that she took action in response to the Petition for Reconsideration of the July 23, 2021 Findings and Award and intended to rescind the July 23, 2021 Findings and Award. Thus, we will amend the Order to reflect that the July 23, 2021 decision is rescinded.

Accordingly, as our Decision After Reconsideration we will rescind the WCJ's September 29, 2021 F&A, amend the August 11, 2021 Order to clarify that the Findings and Award that issued on July 23, 2021 is rescinded, and return the matter to the trial level for further proceedings consistent with this opinion.

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 September 29, 2021, is **RESCINDED**.

IT IS FURTHER ORDERED that Order Vacating Submission issued on August 11, 2021, is **AFFIRMED** except that it is **AMENDED** as follows:

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IT IS ORDERED that the prior submission as set forth in the disposition of the case in chief is hereby VACATED and the Findings and Award issued on July 23, 2021 is RESCINDED.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for further proceedings in accordance with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 22, 2024

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

MICHAEL FIORE
GOLDSCHMID, SILVER & SPINDEL
MICHAEL SULLIVAN & ASSOCIATES LLP

EDL/mc

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