WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ERNESTO RUIZ, ***Applicant***

vs.

ROTO ROOTER OF IMPERIAL COUNTY, INC.; REPUBLIC UNDERWRITERS INSURANCE COMPANY, administered by AmTrust North America, Inc., ***Defendants***

Adjudication Number: ADJ9195893
San Diego District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.

Both applicant and defendant seek reconsideration of the Findings & Award (F&A) issued on October 21, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part, that applicant, while employed as a plumber on April 23, 2012, sustained industrial injury to his back, right foot and psyche resulting in 100% permanent disability.

Applicant contends that the WCJ failed to include a start date for payment of permanent disability indemnity and should have found that payment of permanent disability indemnity commenced on February 27, 2014, in accordance with *Brower v. David Jones Construction* (2014) 79 Cal.Comp.Cases 550, 560–562 (Appeals Board en banc).

Defendant contends that the WCJ erred in relying on the Panel Qualified Medical Evaluation (PQME) reports of John Lane, M.D., and Shari Mednitsky, Ph.D., as well as the vocational expert (VE) report of Alejandro Calderon, M.A., in awarding applicant 100% permanent disability, on the grounds that they are not substantial medical evidence and failed to consider the apportionment opinion of PQME Dr. Mednitsky.

We have not received Answers from either applicant or defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending we deny reconsideration.

We have considered the allegations in the Petitions and the contents of the WCJ's Report with respect thereto. Based on our review of the record and the reasons discussed below, as our Decision After Reconsideration, we amend the F&A to reflect that permanent disability begins on February 27, 2014 (Finding of Fact 2). We otherwise affirm the F&A.

BACKGROUND

Applicant, while employed as a plumber on April 23, 2012, sustained industrial injury to his back and psyche.

Pursuant to the stipulation of the parties, defendant paid temporary disability at $416.33 per week during the period April 26, 2012 to February 26, 2014. (Minutes of Hearing / Summary of Evidence (MOH/SOE), 01/04/2022, 2:11-14.)

Applicant submitted into evidence the PQME reports of Dr. Mednitsky (App. Exs. 2-5) and the VE report of Mr. Calderon dated March 15, 2021. (App. Ex. 1.) Defendant submitted into evidence the PQME reports of Dr. Lane (Def. Exs. A-B) as well as the VE report of Ray Largo dated July 15, 2021. (Def. Ex. F.)

In his report dated September 17, 2015, PQME Dr. Lane, after evaluating applicant, took a history that applicant sustained a work-related low back injury on April 23, 2012 while employed by Roto-Rooter as a plumber when he lifted a snake machine weighing over 100 pounds and immediately experienced back pain. He initially treated with Frederick Arbenz, M.D., who diagnosed a sacroiliac joint and lumbosacral sprain. An MRI dated May 26, 2012 by Donald Wade, M.D., showed a broad-based disc protrusion at L3-4 with mild central canal stenosis and moderate lateral recess stenosis and a broad-based disc bulge at L4-5. Travis Calvin, M.D., took over treatment for applicant, provided him electrodiagnostic testing, and, ultimately, a two-level decompression and fusion at L3-4 and L4-5 on January 28, 2013. The surgery led to a poor outcome and he continued to require substantial medication. (Def. Ex. A, p. 2.)

Medical records relating to applicant's treatment include reports by Dr. Arbenz noting ongoing pain, limited improvement, use of a cane, and inability to perform regular work, while imaging revealed multi-level disc pathology with stenosis and nerve root involvement. (*Id.* at pp. 2-3.) Despite extensive conservative care and ultimately surgery performed January 28, 2013 by Dr. Calvin, applicant continued to experience persistent lumbosacral and radicular pain requiring narcotic medication and further treatment. (*Id.* at pp. 4-5.) Subsequent evaluations

continued to document chronic symptoms, functional limitations, and the need for ongoing pain management, including diagnoses such as post-laminectomy pain syndrome, lumbar radiculopathy, and spinal stenosis. (*Id.* at p. 8.) On February 6, 2014, Larry D. Dodge, M.D., found applicant permanent and stationary with work restrictions of no lifting greater than 15 to 20 pounds and no repetitive bending and stooping with ongoing severe low back and right leg pain. (*Id.* at pp. 7-8.)

In his report dated September 17, 2020, PQME Dr. Lane, after reevaluating applicant, took a history that, on December 9, 2019, Kamshad Raiszadeh, M.D., performed a complex multi-level spinal procedure at Alvarado Hospital involving the removal of existing instrumentation at L4-L5 and a new L3-L4 laminectomy, decompression, and discectomy. The surgery included a minimally invasive transforaminal lumbar interbody fusion at L3-L4 utilizing cancellous allograft, supported by posterior spinal fusion with instrumentation at both the L3-L4 and L4-L5 levels. (Def. Ex. B, p. 2.) Despite the surgery, applicant still had a drop foot and right leg pain requiring orthosis and bracing to address several falling incidents. (*Id.*, at pp. 2-3.)

Regarding permanent disability, PQME Dr. Lane restricted applicant from lifting more than 10 pounds as well as prolonged weight bearing, bending and stooping. (*Id.* at p. 7.) In addition, PQME Dr. Lane assessed 42% WPI for the lumbar spine using the Range of Motion (ROM) method for multiple-level pathology. Pursuant to the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides), he calculated 16% WPI for disorder impairment, consisting of 12% WPI for a single-level spinal fusion with or without decompression with residual signs and symptoms (Category IV-D), 1% WPI for an additional level of involvement, 2% WPI for a second operation and 1% WPI for a third operation. (Category IV-E) (Table 15-7, p. 404). He further assessed 18% WPI for ROM deficits, measuring 20° of forward bending with, from his September 17, 2015 report, 30° of sacral flexion (7% WPI) and 10° of backward extension (5% WPI). (Table 15-8, p. 407), alongside 15° of left lateral bending (3% WPI) and 10° of right lateral bending (3% WPI). (Table 15-9, p. 409) (*Id.* at pp. 5, 7.) For neurological impairment, PQME Dr. Lane graded a 50% sensory loss and 100% motor loss (Table 15-18, p. 424) of the L5 nerve root, which carries a 5% maximum loss for sensory deficit and a 37% maximum loss for motor deficit. (Table 15-18, p. 424). Multiplying these maximum allowances by the 50% and 100% clinical grades yielded a 3% lower extremity (LE) sensory impairment and a 37% LE motor impairment, which convert to 1% WPI and 15% WPI, respectively (Table 17-3, p. 527), resulting

in 16% WPI neurological deficit. Applying the Combined Values Chart (CVC), PQME Dr. Lane aggregated the disorder, ROM, and neurological impairments (16% C 18% C 16%) to 42% WPI. (*Id.* at p. 7.)

Regarding apportionment, PQME Dr. Lane attributed 100% of the permanent disability to the October 21, 2022 industrial injury. (*Id.* at p. 8.)

In her report dated May 25, 2018, PQME Dr. Mednitsky, after evaluating applicant, took a history that, despite conservative treatment and a subsequent lumbar laminotomy and fusion surgery, applicant developed "failed back syndrome" with chronic, severe pain radiating down his right leg. (App. Ex. 3, pp. 3-4.) Consequently, he has become highly reliant on opiate medications, including Percocet and Oxycodone. (*Id.* at p. 5.) An exacerbation of his pain led to a profound psychological decompensation, resulting in a suicide attempt wherein he lacerating his wrist and subsequently received a 72-hour involuntary psychiatric hold. (*Id.* at pp. 4-5.) PQME Dr. Mednitsky diagnosed him with a Pain Disorder and Major Depressive Disorder (Severe without Psychotic Features), and noted that applicant suffers from feelings of hopelessness, severe anxiety, and panic attacks. (*Id.* at p. 24.)

In her report dated May 23, 2020, PQME Dr. Mednitsky, after reevaluating applicant, took a subsequent history that he had two additional back surgeries and engaged in both psychological and psychiatric treatment, including a L4–L5 repeat laminectomy and L4–L5 posterior lumbar interbody fusion with instrumentation performed by Kamshad Raiszadeh, M.D., on August 9, 2018. His psychiatric condition has notably improved. (App. Ex. 5, pp. 10, 28.) He is no longer suicidal, experiences fewer panic attacks, and demonstrates better emotional adjustment, though he remains heavily reliant on Percocet and Gabapentin. (*Id.* at p. 24.)

With respect to permanent disability, applicant has marked functional limitations that effectively "render him essentially unable to return to the workforce overall." (*Id.* at p. 34.) He has a marked impairment in sustained concentration and persistence, making him "unlikely to complete even a half day of work without notable interruptions." (*Id.* at p. 35.) Furthermore, his distractibility, delayed response times, mild confusion, and daily reliance on opiate medications render him unsafe to operate the machinery necessary for his customary work as a plumber. (*Id.* at p. 34). His adaptation is also markedly impaired, as he requires a highly restricted, heavily rested daily schedule to minimize stress and manage his physical pain. (*Id.* at p. 35.)

PQME Dr. Mednitsky assigned him a Global Assessment of Functioning (GAF) score of 62 or 13% WPI (*Id.* at pp. 23, 25.)

With respect to apportionment, PQME Dr. Mednitsky attributes 85% of the permanent disability to the October 21, 2022 industrial injury with 12.5% to applicant's marital discord due to his wife's infidelity and deciding against filing for divorce and 2.5% to his daughter's previous drug problems following a motor vehicle accident. (*Id.* at p. 33.)

In his report dated March 15, 2021, VE Mr. Calderon, after evaluating applicant, opined that applicant is permanently totally disabled on a vocational basis and not amenable to vocational rehabilitation, based on the combined impact of his medically documented orthopedic and psychological impairments, which eliminate his ability to compete in the open labor market. (App. Ex. 1, p. 1.) VE Mr. Calderon relies on medical evidence documenting severe lumbar spine pathology and chronic pain following surgery, including reduced lumbar range of motion, neurological symptoms, and persistent pain consistent with failed back syndrome, which significantly limits functional capacity. (*Id.* at pp. 18-21.) PQME Dr. Lane determined that applicant cannot return to his usual and customary work as a plumber and imposed permanent work restrictions including lifting limitations and prohibitions against repetitive bending, stooping, or other activities that stress the lumbar spine, reflecting substantial loss of functional capacity due to the lumbar injury. (*Id.* at p. 23-24.) PQME Dr. Mednitsky diagnosed major depressive disorder and somatic symptom disorder, concluding that applicant has permanent psychological impairment characterized by depression, reduced concentration, and diminished ability to cope with work demands. (*Id.* at p. 34.) During the vocational evaluation, applicant demonstrated, over a three-day period, significant pain behaviors and limited sitting tolerance, requiring frequent position changes and difficulty completing portions of the testing process, which further illustrated the functional limitations caused by his chronic pain condition. (*Id.* at pp. 1-2.) Transferable-skills and labor-market analysis showed that even sedentary occupations require consistent attendance, productivity, and physical tolerances that are incompatible with his need to change positions frequently, limited stamina, and ongoing pain and psychological symptoms. (*Id.* at pp. 34–37.) Considering these medical restrictions together with his work history in a physically demanding skilled trade, VE Mr. Calderon concluded that applicant cannot meaningfully participate in vocational retraining or sustain competitive employment, and therefore 100% of his loss of earning capacity is attributable to his industrial injury, rendering him permanently totally disabled from a

vocational standpoint. (*Id.* at pp. 37-40). In support of his opinion rejecting psychological apportionment, VE Mr. Calderon stated as follows:

> [A]bsent the industrial low back injury resulting in a diagnosis of "Failed Back Syndrome" and residual and incapacitating chronic pain disorder, despite adherence to heavy narcotic medication regimen and use of a cane for ambulation, Mr. Ruiz now has significant limitations with basic activities of daily living, in addition to extremely limited physical and mental tolerances/stamina as documented in the medical file and observed during the 3 separate days of vocational testing; it can be concluded by all reasonable vocational assessment. Mr. Ruiz would have been able to continue to carry out his job duties without incident and/or significant impact to his pre-injury earning capacity absent the industrial injury of 04/23/2012 and residual chronic pain disorder and heavy narcotic medication intake, despite his family related difficulties which resulted in a 15% apportionment of his overall psych impairment to nonindustrial causes per QME in Psychology, Dr. Mednitsky (05/23/2020).

(*Id.* at p. 39.)

In his report dated July 15, 2021, VE Mr. Largo, after evaluating applicant, concluded that he is amenable to vocational rehabilitation and can return to the competitive labor market. (Def. Ex. F, p. 39.) Applicant received his high school diploma in 1990 with no further academic or vocational training and limited computer skills (*Id.* at pp. 5-6.) Orthopedically, PQME Dr. Lane restricted applicant from lifting over 10 pounds and from prolonged weight bearing, bending, and stooping. VE Mr. Largo notes that, while these restrictions limit applicant's options, they do not preclude all employment and are strictly compatible with sedentary work. (*Id.* at pp. 39-40.) Psychologically, while PQME Dr. Mednitsky opined that applicant could not return to the workforce, she assigned a GAF score of 62, which indicates only mild symptoms and implies he is generally functioning well. (*Id.* at p. 44.) Additionally, although he takes Gabapentin, Lisinopril, Metformin and Nortriptyline, he is no longer reliant on opioid pain medications, effectively removing a major barrier to maintaining a consistent, productive schedule. (*Id.*at p. 41.) Finally, vocational labor market research identified multiple viable sedentary occupations compatible with his restrictions and minimal transferable skills, including Maintenance Service Dispatcher, Information Clerk, and Order Clerk. (*Id.* at p. 43.)

The parties proceeded to trial on January 4, 2022. Applicant testified, in relevant part, that he has not worked since sustaining his industrial back injury, although he had been a healthy plumber for 15 years prior to the incident with no medical restrictions. (MOH/SOE, 01/04/2022, 7:19–21.) He experiences constant back and leg pain, numbness, and right foot drop requiring the

use of a brace and cane. He can walk only short distances and is unable to drive more than a few blocks. (MOH/SOE, 01/04/2022, 7:21–25.) On some days, the pain prevents him from getting out of bed, and he spends most of his time lying down or sitting in a recliner watching television. (MOH/SOE, 01/04/2022, 8:1–2, 8:24–25.) He is unable to exercise, perform household chores, or participate in prior activities such as fishing or bicycling, and his wife now handles cooking and cleaning while also working full time. (MOH/SOE, 01/04/2022, 7:24, 8:4–7, 8:10–11.) He testified that his chronic pain has led to sleep disturbance, depression, panic attacks, and a prior suicide attempt, and that he currently receives Social Security Disability benefits. (MOH/SOE, 01/04/2022, 8:2–4, 8:19–21.) Due to these limitations, he stated that his back pain and related symptoms prevent him from performing any work and render him unable to maintain employment. (MOH/SOE, 01/04/2022, 8:19–20.)

On October 21, 2022, the WCJ issued his F&A awarding applicant 100% permanent disability without apportionment to nonindustrial factors. In his Opinion on Decision, the WCJ stated that "numerous cases have required that the vocational expert consider the issue of vocational apportionment in making his determination . . . even after applicant's minor nonindustrial psychiatric issues are removed from the picture, applicant's industrial orthopedic and psychiatric disabilities are severe enough to completely preclude him from competing in the open labor market." (Opinion on Decision, p. 4.)

It is from this F&A that both applicant and defendant seek reconsideration.

DISCUSSION

I. PERMANENT DISABILITY

Permanent disability refers to the lasting, irreversible effects of an injury. It includes conditions that impair earning capacity, limit the normal use of a body part, or create a competitive disadvantage in the labor market. Permanent disability payments compensate workers for both physical loss and the reduction, partial or total, of their future earning potential. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565].)

Labor Code section 4650[1] governs when an injured worker becomes entitled to permanent disability indemnity. (*Brower*, *supra*, at pp. 560-562 (Appeals Board en banc).) When an injury results in permanent disability, a defendant must begin permanent disability payments within

[1] Unless otherwise stated, all further statutory references are to the Labor Code.

14 days after the last payment of temporary disability. (Lab. Code, § 4650(b)(1).) If the extent of permanent disability remains undetermined, a defendant must nevertheless commence timely payments and continue them until it has paid its reasonable estimate of permanent disability indemnity, and, once determined, the full amount due. (*Ibid.*) If an employee later proves permanent total disability, the defendant must retroactively adjust any permanent partial disability payments to the correct rate. (*Id.* at p. 562; *Barnard v. Schellinger Constr. Co.* [2016 Cal. Wrk. Comp. P.D. LEXIS 629, *4-5].)[2] Therefore, since applicant was last paid temporary disability on February 26, 2014, we will amend the F&A to award permanent disability beginning on February 27, 2014, pursuant to *Brower*.

Turning to the issue of permanent disability, it is permissible to depart from the scheduled rating based on a VE opinion that an injured employee has a greater loss of future earning capacity than reflected in a scheduled rating. (*Fitzpatrick v. Workers' Comp. Appeals Bd.* (2018) 27 Cal.App.5th 607, 613-614 and 618-620 [83 Cal.Comp.Cases 1680]; see *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746, 758 [80 Cal.Comp.Cases 1119]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587, 594].)

In LeBoeuf, the Supreme Court applied a standard of labor market reality stating that, "A permanent disability rating should reflect as accurately as possible an injured employee's diminished ability to compete in the open labor market. The fact that a worker has been precluded from vocational retraining is a significant factor to be taken into account in evaluating his or her potential employability." (Ibid.) The court concluded, "This is to ensure that the permanent disability rating upon which an award is based accurately reflects both the permanent medical and vocational disabilities." (Id. at p. 243.)

To rebut the PDRS and establish permanent total disability, applicant must prove the following:

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[2] 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 we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, 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].) Here, we refer to these panel decisions because they considered a similar issue.

1) Applicant has received 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.

(*Valdovinos v. Universal Site Services, Inc.* [2025 Cal. Wrk. Comp. P.D. LEXIS 76, *14].)

Finally, the law requires the Appeals Board to base its decisions on 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].) To constitute substantial evidence, a medical or vocational opinion must state its conclusions in terms of reasonable probability, avoid speculation, rely on pertinent facts and an adequate examination and history, and explain the reasoning supporting its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) Medical or vocational reports and opinions do not constitute substantial evidence when they contain known errors or rely on facts that are no longer germane, inadequate medical histories or examinations, or incorrect legal theories. Likewise, a medical or vocational opinion cannot support the Board's findings if it rests on surmise, speculation, conjecture, or guesswork. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) Accordingly, the Board may reweigh the evidence and reach a decision different from the WCJ's determination when other evidence of substantial probative value supports a contrary conclusion. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274, 281 [39 Cal.Comp.Cases 310]; *Garza v. Workers' Comp. Appeals Bd.* (1970) 3 Cal.2d 312, 318-319 [35 Cal.Comp.Cases 500].)

Here, upon independent review of the record, we conclude that the opinions of PQME Dr. Lane and PQME Dr. Mednitsky are substantial medical evidence because they are predicated on accurate histories, objective clinical findings, and a correct application of the AMA Guides. PQME Dr. Lane's 42% WPI orthopedic assessment is supported by a detailed longitudinal history of a specific heavy-lifting industrial mechanism of injury, verified by

multi-level disc pathology on MRI and a documented "poor outcome" following three separate spinal surgeries. His rating is legally sound as it utilizes the ROM method to account for multi-level involvement and meticulously calculates specific deficits for spinal disorder, ROM, and neurological motor/sensory loss in the form of a L5 nerve root with foot drop pursuant to Chapter 15 of the AMA Guides. Similarly, PQME Dr. Mednitsky's psychiatric reporting provides a reasoned clinical correlation between applicant's "failed back syndrome," chronic opiate reliance, and resulting Major Depressive Disorder. PQME Dr. Mednitsky provides a transformative functional analysis, moving beyond a mere GAF score of 62, or 13% WPI to detail specific work preclusions, such as impaired concentration and adaptation, that explain why applicant is incapable of completing a workday.

We also find that VE Mr. Calderon's opinion on permanent disability constitutes substantial evidence because it provides a well-reasoned bridge between the medical restrictions and the practical realities of the open labor market, satisfying the requirements of *LeBoeuf*. VE Mr. Calderon bases his finding of 100% loss of earning capacity on a synthesis of the orthopedic preclusions from PQME Dr. Lane and the psychological functional impairments documented by PQME Dr. Mednitsky, specifically noting how the combination of "failed back syndrome" and impaired concentration render applicant non-amenable to vocational rehabilitation. VE Mr. Calderon's opinion is grounded in objective observations from three separate days of vocational testing, where applicant demonstrated an inability to sustain the sitting tolerances or cognitive persistence required for even sedentary work. Furthermore, by demonstrating that the industrial chronic pain and medication regimen are the actual gatekeepers preventing employment, VE Mr. Calderon provides a factual basis for finding applicant permanently and totally disabled.

In contrast, VE Mr. Largo's report fails to constitute substantial evidence because it is predicated on a selective reading of the medical record and involves an impermissible reinterpretation of expert medical findings. VE Mr. Largo improperly dismisses the explicit work preclusions of PQME Dr. Mednitsky who found applicant "essentially unable to return to the workforce" by substituting a lay interpretation of a GAF score of 62 to suggest he is "functioning well." This constitutes an unauthorized medical conclusion that exceeds a vocational expert's scope of expertise. Furthermore, VE Mr. Largo's conclusion lacks a logical foundation by proposing technology-dependent clerical roles, such as Maintenance Service Dispatcher and Order Clerk, for a 52-year-old laborer with no computer literacy and no transferable clerical skills.

Finally, although no longer taking opioids for chronic pain, applicant is not free from the sedative medication barriers of Gabapenin and Nortriptyline. Because VE Mr. Largo's opinion relies on speculative job placements and a rejection of documented medical impairments, it cannot legally support the finding of vocational feasibility.

Therefore, we will not disturb the WCJ's decision that applicant sustained 100% permanent disability. However, pursuant to *Brower*, with temporary disability last paid on February 26, 2014, we amend the F&A to award permanent disability beginning on February 27, 2014.

II. APPORTIONMENT

Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors, to allocate legal responsibility fairly. (*Brodie*, *supra*, 40 Cal.4th at p. 1321; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 911 [70 Cal.Comp.Cases 787.].)

The mere fact that a medical report assigns approximate percentages of industrial and nonindustrial causation does not make the report reliable medical evidence by itself. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].) Instead, apportionment of permanent disability is "based on causation" and the "employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Lab. Code, §§ 4663(a) and 4664(a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (Appeals Board en banc) (*Escobedo*).) Apportionment now includes pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial evidence establishing that these other factors have caused permanent disability. Pursuant to *Escobedo*, a physician's opinion must rely on reasonable medical probability, cannot be speculative, must rely on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of its conclusions. (*Id.* at p. 621.) That is, a physician must explain the "how and why" of their apportionment opinion (*Ibid.*) and consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or

condition. (Benson v. Permanente Med. Group (2007) 72 Cal.Comp.Cases 1620, 1622 (Appeals Board en banc).)

The burden of proof to establish apportionment falls on defendant. (*Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) In other words, an employee does not have the burden of disproving apportionment while defendant remains passive. (*Alcantar v. Martinez* [2025 Cal. Wrk. Comp. P.D. LEXIS 231, *9]; *Moraido v. County of San Diego* [2024 Cal. Wrk. Comp. P.D. LEXIS 375, *13, fn. 3]; *Arias v. William Roofing Co.* [2024 Cal. Wrk. Comp. P.D. LEXIS 29. *5]; *Matias v. Naturipe Berry Growers* [2024 Cal. Wrk. Comp. P.D. LEXIS 52, *4]; *Herrera v. Maple Leaf Foods* [2018 Cal. Wrk. Comp. P.D. LEXIS 430, *15].)

With respect to vocational expert evidence, pursuant to *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc) (*Nunes I*), the Appeals Board held as follows:

1. Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."

2. Vocational evidence may address issues relevant to the determination of permanent disability.

3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

(*Id.* at pp. 743-744.)

In addition, "[v]ocational evidence may also be used to parse permanent disability caused by multiple body parts or systems" to determine if applicant's permanent total disability was related to a single body part. (*Id.* at pp. 751-752.) In other words, "a finding of permanent and total disability notwithstanding the presence of valid nonindustrial apportionment is permissible, so long as the medical and vocational evidence establishes that the permanent and total disability arises solely out of industrial conditions or factors, that is, exclusive of nonindustrial or prior industrial conditions or factors." (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894, 900 (Appeals Board en banc) (*Nunes II*); see *Pacific Compensation Insurance Co. v. Workers' Comp. Appeals Bd. (Nilsen)* (2013) 78 Cal.Comp.Cases 722, 726-727

(writ denied). ("[T]he fact that there is apportionment of the disability as to one (or more) parts of body does not mean that the totality of purely industrial factors cannot by themselves render a worker totally disabled.")

Finally, the Appeals Board noted that it "does not require the application of invalid apportionment by the parties or by the WCJ, and in those instances where there is a significant question as to the validity of a physician's medical apportionment opinion, the vocational expert is free to offer their analysis in the alternative." (*Nunes II, supra*, 78 Cal.Comp.Cases at p. 903.)

Our en banc decision in *Nunes I* issued on June 22, 2023, after our Opinion and Order Granting Petition for Reconsideration dated January 6, 2023, and is mandatory authority on all WCJs and WCAB panels. (Cal. Code Regs., tit. 8, § 10325(a); *City of Long Beach v. Workers' Comp. Appeals Bd. (Garcia)* (2005) 126 Cal.App.4th 298, 316, fn. 5; *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1424, fn. 6; see also Govt. Code, § 11425.60(b).)

Accordingly, to constitute substantial evidence, the opinions of both the evaluating physician and the vocational expert must set forth the history and evidentiary basis for their conclusions, including an explanation of "how and why" a condition or factor results in permanent disability. (*Nunes I*, *supra*, at p. 896.)

Here, PQME Dr. Mednitsky breaks down her 15% nonindustrial apportionment into two categories: 12.5% for applicant's marital discord and infidelity and 2.5% for his daughter's previous drug problems. However, PQME Dr. Mednitsky acknowledges that both nonindustrial stressors were in the past and had been completely resolved by the time of the 2020 evaluation. She notes the daughter had been "abstinent from drugs since December of 2019" and that both the drug issue and the marital infidelity "have been resolved and his relationship with his wife has improved." She further notes applicant "never filed for divorce" and has "forgiven her." (App. Ex. 5, p. 6.) In addition, PQME Dr. Mednitsky fails to articulate how these past, resolved stressors are actively contributing to applicant's current permanent psychiatric disability. Her justification for the 12.5% marital apportionment relies entirely on a speculative assumption that "[d]espite his report of resolution in terms of his relationship, I will take into consideration Mr. Ruiz's tendency to deny/minimize psychological problems." (*Id.* at p. 33.) Assuming applicant is minimizing a resolved issue is not a concrete, medical explanation of how that issue currently causes a permanent work impairment. Finally, in her May 25, 2018 report, when applicant was profoundly depressed and had recently attempted suicide due to severe pain, PQME Dr. Mednitsky noted "no reported

nonindustrial stressors that are negatively impacting his disability." (App. Ex. 3, p. 34.) Suddenly assigning 15% to nonindustrial factors two years later, while simultaneously admitting those factors are entirely resolved, highlights a speculative approach rather than a reasoned, evidence-based medical conclusion.

In addition to finding that PQME Dr. Mednisky's apportionment opinion lacks substantial medical evidence, VE Mr. Calderon concludes that applicant's total inability to compete in the open labor market resulted from the orthopedic injuries, failed back syndrome, and debilitating chronic pain disorder, tied exclusively to the industrial injury. This is "despite his family related difficulties which resulted in a 15% apportionment of his overall psych impairment." (App. Ex. 1, p. 39.) Because the 100% industrial physical and pain impairments independently eliminate applicant's earning capacity, the psychological apportionment becomes moot from a purely vocational standpoint.

For these reasons, we affirm the WCJ's finding of no apportionment to nonindustrial factors.

Accordingly, as our Decision After Reconsideration, we amend the F&A to reflect that permanent disability begins on February 27, 2014 (Finding of Fact 2). We otherwise affirm the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings & Award dated October 21, 2022 is **AFFIRMED** except that it is **AMENDED** as follows:

FINDINGS OF FACT

* * *

2. Applicant's injury caused permanent disability of 100%. Payments of permanent disability indemnity shall commence on February 27, 2014, to be adjusted by the parties, with jurisdiction to the WCJ in the event of a dispute.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ ANNE SCHMITZ, DEPUTY COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 1, 2026

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

ERNESTO RUIZ
SAMUELSEN, GONZALEZ, VALENZUELA & BROWN, LLP
ZUCKERMAN LEGAL

DLP/oo

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