WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

DENNIS ORR, *Applicant*

vs.

HAYWARD UNIFIED SCHOOL DISTRICT;
permissibly self-insured, administered by
SCHOOLS INSURANCE AUTHORITY, *Defendants*

Adjudication Numbers: ADJ3359423; ADJ7688594; ADJ6732602
Oakland District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

We have considered the allegations of the Petition for Reconsideration and the contents of the Report and the Opinion on Decision of the workers' compensation administrative law judge (WCJ) with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision, both of which we adopt and incorporate, we will deny reconsideration.

The WCJ properly relied upon the opinion of the agreed medical evaluator (AME), who the parties presumably chose because of the AME's expertise and neutrality. The WCJ was presented with no good reason to find the AME's opinion unpersuasive, and we also find none. (See *Power v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].)

For the foregoing reasons,

IT IS ORDERED that the Petition for Reconsideration is **DENIED**.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

April 27, 2021

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

DENNIS ORR
LAW OFFICE OF ROBERT E. WOOD
LAUGHLIN, FALBO, LEVY & MORESI

abs

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

INTRODUCTION

1. Applicant's Occupation:	Custodian
Applicant's Age:	42 (ADJ6732602); 43 (ADJ7688594)
Date of Injury:	July 26, 2005 (ADJ6732602); CT to December 26, 2006 (ADJ7688594)
Parts of Body Injured:	Back
2. Identity of Petitioner:	Applicant
Timeliness:	Yes
Verification:	Yes
3. Date of Findings and Award:	February 3, 2021[1]
4. Applicant's Contentions:	Although the Petition was filed in the three case numbers listed above, applicant only seeks reconsideration of the Findings and Award that issued in case numbers ADJ6732602 and ADJ7688594. Specifically, applicant contends that he determinations that case number ADJ6732602 caused permanent disability of 4% and that case number ADJ7688594 caused permanent disability of 24% should be set aside because the apportionment determinations made by the agreed medical evaluator (AME) did not constitute substantial evidence, and those determinations should have been based upon the functional capacity evaluation (FCE) and the report from Frank Diaz, which reflect that applicant is permanently totally disabled and that apportionment is not indicated.

[1] The F&A was amended on February 19, 2021

II.
FACTUAL BACKGROUND

Applicant had three injuries to his back while employed by defendant as a custodian as follows: a specific injury on February 27, 2002, which settled via stipulations with request for award at 25% (ADJ3359423); a specific injury on July 26, 2005 (ADJ6732602); and a cumulative injury during the period ending on December 26, 2006 (ADJ7688594).

On March 5, 2003, Fulton Chen, M.D., applicant's primary treating physician for the 2002 injury, stated that applicant should "avoid lifting anything greater than 35-40 pounds," and that applicant should avoid repeated bending. (Exhibit H, Reports of Fulton Chen, pp. 1, 3.) Applicant told Dr. Chen that he could break down objects so that he would not lift more than 20 pounds. (*Id*. at p. 4.)

On November 2, 2003, Janet Lord, M.D., the panel qualified medical evaluator for the 2002 injury, stated that applicant told her that his job required him to occasionally lift up to 50 pounds, and he was usually able to ask for ask for assistance with such lifting. (Exhibit E, Report of Janet Lord, p. 1.) Dr. Lord recommended a prophylactic restriction from heavy lifting and stated that applicant was not a qualified injured worker. (*Id*. at p. 1.)

On February 25, 2005, Dr. Chen issued a report reviewing Dr. Lord's initial report and subpoenaed records. (Exhibit H, pp. 1-2.) As relevant herein, those records reflected that: In 1993, applicant sought medical treatment and received a disability form related to spondylolisthesis at L4-L5. (*Id*. at p. 11.) In 1995 disability forms were filled out for chronic low back pain. (*Ibid*.) Dr. Chen stated that he would agree that applicant had a preclusion from very heavy lifting, that 60% of applicant's impairment was caused by the 2002 injury, and that the remaining 40% was caused by non-industrial factors. (*Id*. at pp. 13-14.)

On July 6, 2017, Peter Mandell, M.D., the AME, issued a report stating in relevant part that on July 26, 2005, applicant fell at work, and that attempted to keep working until Christmas 2006. (Joint 104, Report of Peter Mandell, M.D., July 6, 2017, p. 2.) He further stated that on February 17, 2009, applicant underwent a L4-S1 fusion, which was "somewhat helpful," and that applicant also had a hardware removal. (*Ibid*.) Dr. Mandell stated that applicant's diagnosis was "symptomatic lumbar disc disease superimposed on spondylolysis and spondylolisthesis, status post two-level fusion from L4 to the sacrum with subsequent removal of hardware." (*Id*. at p. 7.) Dr. Mandell also stated that apportionment was challenging, and that he would attribute 25% of the causation to applicant's developmental and congenital problems, 10% to the 2002 injury, 10% to the 2005 injury and the remaining 55% to the cumulative injury. (*Id.* at p. 8.) Dr. Mandell further stated that applicant's impairment was most accurately described at 31% whole person impairment based on a 28% impairment pursuant to DRE Category V and a 3% add on for pain. (*Ibid*.)

On April 30, 2018, Michael J. Fenno, P.T. issued a report dated April 30, 2018 summarizing the results of applicant's FCE. As relevant herein, Mr. Fenno stated that applicant,

> has difficulty with manipulating and moving objects with dexterity or force, as well as functional limitations with maintaining repetitive or fixed positions. Mr. Orr also demonstrated the inability to maintain a consistent

> work routine and inability to maintain appropriate pace and persistence, requiring numerous breaks and/or position changes throughout testing due to physical limitations. Testing also revealed that, even with numerous unscheduled breaks, as low back pain and fatigue levels increased throughout the duration of the day, his tolerance to functional activity and prolonged positioning declined significantly.
>
> Based on the FCE findings and results, it is my professional opinion to a reasonable degree of probability, that Mr. Orr does not meet the physical demands for the Sedentary work classification as defined by U.S. Department of Labor.
> (Exhibit 2 at p. 25.)

On September 1, 2018, Dr. Mandell issued a supplemental report after review the FCE. (Exhibit 103, Report of Peter Mandell, M.D., p. 1.) As relevant herein, Dr. Mandell stated that the FCE was "quite useful in characterizing Mr. Orr's impairment" and that he would adopt its findings regarding applicant's capacity to perform some physical activities. (*Id*. at pp. 1-2.) Dr. Mandell also stated that,

> You then go on to ask whether there is a need for further clarification or explanation of the FCE. I would like to know whether not meeting the definition of sedentary work is the same as being totally 100% disabled. It does not appear that that's the case here.
>
> Apportionment is always challenging. â€¦What I have relied on here is my training, experience, judgment, and skill, and I have no changes to make to the apportionment I do agree that Mr. Orr's total permanent disability was a result of his injuries, including the one he sustained in 2002, the one he sustained on 7 /26/05, and cumulative trauma through December 2006, when he stopped working.
>
> …the issue of whether or not there is a job that Mr. Orr can do is best addressed by a vocational rehabilitation counselor.
> (*Ibid*.)

On August 28, 2019, Frank Diaz, CDMS, performed a vocational assessment of applicant at applicant's request. As relevant herein, Mr. Diaz stated that based on the medical opinions and FCE, applicant is functioning at a level below sedentary and this results in a significant erosion of the labor market. (Exhibit 1, Report of Frank Diaz, August 28, 2018, pp. 9-11.) Mr. Diaz further stated that the myriad of accommodations that applicant would require to return to work in the open labor market would not be "reasonable," and that necessary accommodations would include a personal attendant, and flexible work hours. (*Id*. at p. 16.) Mr. Diaz stated that applicant was not able to maintain a consistent work routine or maintain an appropriate pace while performing either the FCE or his

program at Laney College. (I. at p. 18.) Mr. Diaz did not believe applicant was amenable to vocational rehabilitation. (*Id*. at p. 20.)

As relevant herein, Mr. Diaz addressed apportionment as follows,

> In 2002 Mr. Orr sustained an industrial injury to his low back requiring him to perform Light duty for approximately one year. However, thereafter Mr. Orr was able to return to work full duty. From a vocational standpoint, Mr. Orr' pre-existing industrial injury to his low back did not affect his ability to perform work within his individualized labor market. Therefore, I apportion zero percent (0%) of Mr. Orr's loss of labor market access determination to his industrial injury of 2002.
>
> On July 26, 2005 Mr. Orr slipped and fell while working as a Janitor for Hayward Unified School District injuring his low back. Following his July 26, 2005 industrial injury, Mr. Orr attempted to return to work; however, he was unable to continue working and was terminated on December 25, 2006.
>
> In all vocational probability, were it not for the industrial injury of July 26, 2005, Mr. Orr would have continued working in his usual and customary occupation. Therefore, I am of the opinion that zero percent (0%) of Mr. Orr's LeBoeuf determination is attributable to any pre-existing non-industrial or pre-existing industrial impairments, and one hundred percent (100%) of Mr. Orr's LeBoeuf determination is attributable to his industrial injury of July 26, 2005.
>
> Whether or not the cumulative trauma industrial injury through December 26, 2005 would have eventually taken Mr. Orr out of the labor market is a moot point as Mr. Orr was unable to continue working in his usual and customary occupation following his industrial injury July 26, 2005.
>
> **Therefore, I am of the opinion that zero percent (0%) of Mr. Orr's LeBoeuf determination is attributable to any pre-existing non-industrial or pre-existing industrial disabilities, and one hundred percent (100%) of Mr. Orr's LeBoeuf determination is attributable to his industrial injury of July 26, 2005.**
> (*Id*. at pp. 21-22, emphasis in original.)

On June 13, 2020, Dr. Mandell issued a supplemental report stating in relevant part that,

> … Mr. Wood indicates that just because Mr. Orr worked until December 2006 does not support a cumulative trauma injury. I would disagree with that. Obviously, if Mr. Orr was getting paid for or doing basically no work at all, such as floating motionless in a swimming pool, then there would be no cumulative trauma; otherwise, there would, Also, just because someone is identified as a surgical candidate doesn't immunize them from absorbing

> cumulative trauma. … The question is what support is there for cumulative trauma occurring between August 2005 and December 2006. My answer to that is being on the job and not being in complete control of one's ability to respond to the warning signs of pain.
>
> …
>
> You ask whether or not Mr. Orr's 'unsuccessful surgery' is a cause of his current disability. The surgery was designed to improve his condition. The cause of his disability is the various work injuries, not the surgery.
> (Joint Exhibit 102, Report of Peter Mandell, M.D., June 13, 2020, pp. 2-3.)

On July 18, 2020, Ira Cohen, M.A., issued a defense vocational evaluation of applicant, and as relevant herein, Mr. Cohen stated that he believed that applicant was employable and amendable to vocational rehabilitation. (Exhibit C, Report of Ira Cohen, July 18, 2020, p. 49.)

On January 26, 2021, the matter proceeded to trial. As relevant herein, applicant testified as follows: His job duties required heavy lifting, including lifting galvanized trash cans that weighed over 60 pounds. In 2002, he hurt his back while working for defendant and he should not have returned to work after that injury. He never fully recovered from that injury, and tried to self-modify his work by hiding in classrooms and leaving work for the night shift. He estimated that after the 2002 injury, he performed half of his job duties. He engaged in this self-modification for three or four years before he resigned in 2006. After his second industrial injury in 2005, he would call in sick and at times he would crawl at home because he could not walk, which was embarrassing to him. His symptoms worsened because of the labor that his job required. He resigned because he was going to be fired for not doing his job. He attended a culinary program at Laney College, but his pain prevented him from completing it.

III.
DISCUSSION

The AME's Apportionment Determinations

It is well established that parties choose AMEs due to their expertise and neutrality, and that therefore the opinions of those AMEs should be followed unless there is good reason to find their opinion unpersuasive. (*Power v. worker's Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775.)

Further, a physician's report on the issue of permanent disability must include an apportionment determination, and any finding of apportionment must be based on substantial evidence. (Lab. Code, §§ 4663, 4664, 5903, 5952(d);[2] *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 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

[2] All further statutory references are to the Labor Code unless otherwise stated.

in support of its conclusions." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].) Additionally, "to constitute substantial evidence regarding [whole person impairment (WPI)] a physician's opinion must comport with the AMA Guides, including as applied and interpreted in published appellate opinions and en banc decisions of the Appeals Board." (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc); *Almaraz-Guzman II*, *supra*, 74 Cal.Comp.Cases 1086-1087, 1101.) Moreover, in *County of Santa Clara v. Workers' Comp. Appeals Bd*. (*Justice*), 49 Cal. App. 5th 605, 615, the Court of Appeal discussed apportionment as follows, "Although parts of the *Hikida* opinion can be read to announce a broader rule that there should be no apportionment when medical treatment increases or precedes permanent disability, it is clear that the rule is actually much narrower. Put differently, *Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability."

Here, applicant contends that there is no substantial evidence reflecting that he suffered a cumulative trauma through December 26, 2006 (ADJ7688594) and that Hikida precludes apportionment in this matter because his disability is a result of a failed laminectomy. However, at trial, the admitted facts in ADJ7688594 reflected that applicant had a cumulative injury through December 26, 2006. (Minutes of Hearing and Summary of Evidence (MOH/SOE), January 26, 2021, p. 3.) Applicant does not acknowledge that stipulation or provide good cause to set aside that stipulation. (*County of Sacramento v. Workers Compensation Appeals Bd*., (*Weatherall*) (2000) 65 Cal. Comp. Cases 1.) Moreover, applicant himself testified that after his 2002 injury he only performed half of his job duties, that his symptoms worsened as a result of working, and that "the work was wearing him down." (MOH/SOE, pp. 8-9, 12.) Similarly, Dr. Mandell explained that he would find there was a cumulative trauma because applicant was not in "complete control" of his ability to respond to the warning signs of pain. (Joint Exhibit 102, Report of Peter Mandell, M.D., June 13, 2020, pp. 2-3.) Further, *Hikida* does not preclude apportionment in this matter because Dr. Mandell stated that the cause of applicant's disability was applicant's "various work injuries, not the surgery." (Joint Exhibit 102, *supra*, p. 3; *Justice*, *supra*, 49 Cal. App. 5th 605, 615). Accordingly, Dr. Mandell's apportionment determinations constitute substantial evidence and defendant has met its burden of proving apportionment.

Rebutting the Scheduled Rating

Applicant contends that Mr. Diaz's report and the FCE rebut the scheduled rating and reflect that he is 100% disabled. Applicant bears the burden of proving this contention. As explained above, a finding that the scheduled rating is rebutted must be supported by substantial evidence. Additionally, a vocational expert must consider, and cannot ignore, medical evidence of apportionment. (*Kirkwood v. WCAB* (2015) 80 Cal.Comp.Cases 1082 (writ denied).)

Here, applicant has significant permanent disability. This is supported by the FCE, whose findings were adopted by Dr. Mandell and also reflected that applicant could not meet the demands for sedentary work. (Exhibit 103 pp. 1-2; Exhibit 2 at p. 25.) Further, applicant testified that his pain prevented him from completing a culinary arts program and that he has a low level of

functioning. (MOH/SOE, p. 11.) However, Mr. Diaz's determinations that applicant's prior injury "did not affect his ability to work" and that there should not be apportionment, do not constitute substantial evidence. Applicant received disability related to his low back 1993 and 1995. Also, after the 2002 injury, which settled via Stipulations at 25%, Dr. Chen and Dr. Lord both stated that applicant required work restrictions to prevent further injury and that applicant would self-accommodate those restrictions. (Exhibit H, pp. 1-3, 13-14; Exhibit E, p. 1.) Applicant testified that he self-accommodated by leaving approximately half his work for the night shift and that he never should have returned to work after the 2002 injury. (MOH/SOE, pp. 8, 11.) Further, as explained above, there is substantial evidence reflecting that applicant had a cumulative injury in addition to the 2005 injury. Accordingly, I determined that applicant had failed to meet his burden of rebutting the scheduled rating and based the Findings of Fact and Award solely upon Dr. Mandell's reporting.

Based on the above, I recommend that applicant's Petition for Reconsideration be denied.

Date: March 8, 2021

Alison Howell
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE

OPINION ON DECISION

FACTUAL BACKGROUND

Applicant had three injuries to his back while employed by defendant as a custodian as follows: a specific injury on February 27, 2002, which settled via stipulations with request for award (ADJ3359423); a specific injury on July 26, 2005 (ADJ6732602); and a cumulative injury position during the period ending on December 26, 2006 (ADJ7688594).

On March 5, 2003, Fulton Chen, M.D., applicant's primary treating physician for the 2002 injury, stated that an x-ray of applicant's lumbar spine, which was taken in October of 2002, was "remarkable" for "marked degenerative changes at the L5-S1 level," that applicant should "avoid lifting anything greater than 35-40 pounds," and that applicant should avoid repeated bending. (Exhibit H, Reports of Fulton Chen, pp. 1, 3.) Applicant told Dr. Chen that he could break down objects so that he would not lift more than 20 pounds. (*Id.* at p. 4.)

On November 2, 2003, Janet Lord[1] the panel qualified medical evaluator for the 2002 injury, stated that applicant told her that his job did not require him to lift anything that weighed over a 100 pounds, that he was only required to lift 50 pounds on an occasional basis, and he was usually able to ask for ask for assistance with such lifting. (Exhibit E, Report of Janet Lord, p. 1.) Dr. Lord recommended a prophylactic restriction from heavy lifting and stated that applicant was not a qualified injured worker. (*Id*. at p. 1.)

On February 25, 2005, Dr. Chen issued a report reviewing Dr. Lord's initial report and subpoenaed records. (Exhibit H, pp. 1-2.) As relevant herein, those records reflected that: In 1993, applicant sought medical treatment and received a disability form related to spondylolisthesis at L4-L5. (*Id*. at p. 11.) In 1995 disability forms were filled out for chronic low back pain. (*Ibid*.) In 1996, applicant's physicians discussed posterior spinal fusion, but in 1998 and 1999 applicant's low back pain was reduced. (*Ibid*.) Dr. Chen stated that he would agree that applicant had a preclusion from very heavy lifting, that 60% of applicant's impairment was caused by the 2002 injury, and that the remaining 40% was caused by nonindustrial factors. (*Id*. at pp. 13-14.)

On January 26, 2006, a WCJ approved Stipulations with Request for Award resolving applicant's 2002 injury at 25%. (Exhibit – Stipulations with Request for Award

On July 6, 2017, Peter Mandell, M.D., the agreed medical evaluator (AME), issued a report stating in relevant part that in 2002 applicant had an injury which caused him to be on light duty for approximately a year, that on July 26, 2005, applicant fell at work, and that attempted to keep working until Christmas day 2006. (Joint 104, Report of Peter Mandell, M.D., July 6, 2017, p. 2.) He further stated that on February 17, 2009, applicant underwent a L4-S1 fusion, which was "somewhat helpful," and that applicant had a hardware removal on August 11, 2001. (*Ibid*.) Dr. Mandell stated that applicant's diagnosis was "symptomatic lumbar disc disease superimposed on spondylolysis and spondylolisthesis, status post two-level fusion from L4 to the sacrum with subsequent removal of hardware." (*Id*. at p. 7.) Dr. Mandell also stated that apportionment was

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[1] Dr. Lord's initial report was not admitted as an exhibit, but Dr. Chen summarized that report in his February 25, 2005 report. (Exhibit H, pp. 10-14.)

challenging, and that he would attribute 25% of the causation to applicant's developmental and congenital problems, 10% to the 2002 injury, 10% to the 2005 injury and the remaining 55% to the cumulative injury. (*Id*. at p. 8.) Dr Mandell further stated that applicant's impairment was most accurately described at 31% whole person impairment based on a 28% impairment pursuant to DRE Category V and a 3% add on for
pain. (*Ibid*.)

Michael J. Fenno, P.T., performed a functional capacity evaluation (FCE) of Applicant and issued a report dated April 30, 2018 summarizing the results of that evaluation. As relevant herein, Mr. Fenno stated that applicant,

> has difficulty with manipulating and moving objects with dexterity or force, as well as functional limitations with maintaining repetitive or fixed positions. Mr. Orr also demonstrated the inability to maintain a consistent work routine and inability to maintain appropriate pace and persistence, requiring numerous breaks and/or position changes throughout testing due to physical limitations. Testing also revealed that, even with numerous unscheduled breaks, as low back pain and fatigue levels increased throughout the duration of the day, his tolerance to functional activity and prolonged positioning declined significantly. Based on the FCE findings and results, it is my professional opinion to a reasonable degree of probability, that Mr. Orr does not meet the physical demands for the Sedentary work classification as defined by U.S. Department of Labor.
> (Exhibit 2 at p. 25.)

On September 1, 2018, Dr. Mandell issued a supplemental report after review the FCE. (Exhibit 103, Report of Peter Mandell, M.D., p. 1.) As relevant herein, Dr. Mandell stated that the FCE was "quite useful in characterizing Mr. Orr's impairment" and that he would adopt its findings regarding applicant's capacity to perform some physical activities. (*Id*. at pp. 1-2.) Dr. Mandell also stated that,

> You then go on to ask whether there is a need for further clarification or explanation of the FCE. I would like to know whether not meeting the definition of sedentary work is the same as being totally 100% disabled. It does not appear that that's the case here. Apportionment is always challenging. …What I have relied on here is my training, experience, judgment, and skill, and I have no changes to make to the apportionment I do agree that Mr. Orr's total permanent disability was a result of his injuries, including the one he sustained in 2002, the one he sustained on 7 /26/05, and cumulative trauma through December 2006, when he stopped working. … the issue of whether or not there is a job that Mr. Orr can do is best addressed by a vocational rehabilitation counselor.
> (*Ibid.)*

On August 28, 2019, Frank Diaz, CDMS, performed a vocational assessment of applicant at applicant's request. As relevant herein, Mr. Diaz provided the following background information: Applicant has been sober for three years. (Exhibit 1, Report of Frank Diaz,

August 28, 2018, p. 2.) In 2009, applicant obtained a degree in culinary arts from Laney College, but his disability caused him to take an extra six months to obtain that degree and he was not able to complete the in-field training. (*Id*. at p. 3.) Mr. Diaz stated that based on the medical opinions and FCE, applicant is functioning at a level of functioning below sedentary and this results in a significant erosion of the labor market. (*Id*. at pp. 9-11.) Mr. Diaz further stated that the myriad of accommodations that applicant would require to return to work in the open labor market would not be "reasonable," and that necessary accommodations would include a personal attendant, and flexible work hours. (*Id*. at p. 16.) Mr. Diaz stated that applicant was not able to maintain a consistent work routine or maintain an appropriate pace while performing either the FCE or his program at Laney College. (*Id*. at p. 18.) Mr. Diaz did not believe applicant was amenable to vocational rehabilitation. (*Id.* at p. 20.)

As relevant herein, Mr. Diaz addressed apportionment as follows,

> Mr. Orr's developmental and congenital problems did not affect his ability to work within his individualized labor market. Therefore, I apportion zero percent (0%) of Mr. Orr's loss of labor market access determination to his development and congenital problems.
>
> …
>
> In 2002 Mr. Orr sustained an industrial injury to his low back requiring him to perform Light duty for approximately one year. However, thereafter Mr. Orr was able to return to work full duty. From a vocational standpoint, Mr. Orr' pre-existing industrial injury to his low back did not affect his ability to perform work within his individualized labor market. Therefore, I apportion zero percent (0%) of Mr. Orr's loss of labor market access determination to his industrial injury of 2002.
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> On July 26, 2005 Mr. Orr slipped and fell while working as a Janitor for Hayward Unified School District injuring his low back. Following his July 26, 2005 industrial injury, Mr. Orr attempted to return to work; however, he was unable to continue working and was terminated on December 25, 2006.
> In all vocational probability, were it not for the industrial injury of July 26, 2005, Mr. Orr would have continued working in his usual and customary occupation. Therefore, I am of the opinion that zero percent (0%) of Mr. Orr's LeBoeuf determination is attributable to any pre-existing non-industrial or pre-existing industrial impairments, and one hundred percent (100%) of Mr. Orr's LeBoeuf determination is attributable to his industrial injury of July 26, 2005.
>
> Whether or not the cumulative trauma industrial injury through December 26, 2005 would have eventually taken Mr. Orr out of the labor market is a moot point as Mr. Orr was unable to continue working in his usual and customary occupation following his industrial injury July 26, 2005.
>
> Therefore, I am of the opinion that zero percent (0%) of Mr. Orr's LeBoeuf determination is attributable to any pre-existing non-industrial or pre-

> existing industrial disabilities, and one hundred percent (100%) of Mr. Orr's LeBoeuf determination is attributable to his industrial injury of July 26, 2005.
> (*Id.* at pp. 21-22, emphasis in original.)

On June 13, 2020, Dr. Mandell issued a supplemental report stating in relevant part that,

> With regard to the 25% apportionment, I stand by my medical opinion in that regard.
>
> … [i]f it is determined that the 10% assigned to the 2002 injury was under the 1997 Permanent Disability Rating Schedule, then Section 4664 does not apply. I would definitely leave this up to the judge.
> Mr. Wood indicates that any preexisting pathology would be non-labor disabling. The answer to that from a medical perspective is no, I would not agree. Mr. Wood indicates that just because Mr. Orr worked until December 2006 does not support a cumulative trauma injury. I would disagree with that. Obviously, if Mr. Orr was getting paid for or doing basically no work at all, such as floating motionless in a swimming pool, then there would be no cumulative trauma; otherwise, there would, Also, just because someone is identified as a surgical candidate doesn't immunize them from absorbing cumulative trauma. … The question is what support is there for cumulative trauma occurring between August 2005 and December 2006. My answer to that is being on the job and not being in complete control of one's ability to respond to the warning signs of pain.
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> …
>
> You ask whether or not Mr. Orr's 'unsuccessful surgery' is a cause of his current disability. The surgery was designed to improve his condition. The cause of his disability is the various work injuries, not the surgery. (Joint Exhibit 102, Report of Peter Mandell, M.D., June 13, 2020, pp. 2-3.)

On July 18, 2020, Ira Cohen, M.A., issued a defense vocational evaluation of applicant, and as relevant herein, Mr. Cohen stated that: Applicant told Mr. Cohen that he was not in shape when the FCE took place, that applicant believed being overweight affected his performance, applicant did not take any pain medications before the FCE, and that applicant did not believe his resulting symptomatology from the FCE represented his usual pain levels. (Exhibit C, Report of Ira Cohen, July 18, 2020, p. 6.) After reviewing the records related to applicant's functional restoration program, Mr. Cohen did not find any evidence reflecting that applicant's functioning was at a level that precluded post injury retraining and employment, especially at sedentary or semi-sedentary levels. (Id. at p. 22.) Mr. Cohen stated that the FCE demonstrated that applicant was able to sit, stand, and walk on an intermittent and as needed basis. (Id. at p. 28.) Mr. Cohen stated that he believed that applicant was employable and amendable to vocational rehabilitation. (Id. at p. 49.)

On September 12, 2020, Dr. Mandell issued a report stating that it was his understanding that after the 2002 injury, applicant went back to full duty and that he would rate the 2002 injury

at an 8% whole person impairment pursuant to DRE Category II. (Joint 101, Report of Peter Mandell, September 12, 2020, p. 1.)

On January 26, 2021, the matter proceeded to trial. As relevant herein, applicant testified as follows: His job duties required heavy lifting, including lifting galvanized trash cans that weighed over 60 pounds. In 2002, he hurt his back while working for defendant and he should not have returned to work after that injury. He was never 100% after that injury, and tried to self-modify his work by hiding in classrooms and leaving work for the night shift, and be estimated that he was performing half of his job duties. He engaged in this self-modification for three or four years before he resigned in 2006. After his second industrial injury in 2005, he would call in sick and at times he would crawl at home because he could not walk, which was embarrassing to him. His symptoms worsened because of the labor that his job required. He resigned because he was going to be fired for not doing his job. He drinks vodka to cope with his pain. He attended a culinary program at Laney College, but his pain prevented him from completing it.

DISCUSSION

The Scheduled Rating

It is well established that parties choose Agreed Medical Evaluators (AME) due to their expertise and neutrality, and that therefore the opinions of those AMEs should be followed unless there is good reason to find their opinion unpersuasive. (*Power v. Worker's Comp. Appeals Bd* (1986) 179 Cal.App.3d 775.)

Further, decisions by the Appeals Board must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d);[2] *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 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).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd*. (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93, 97].) Additionally, "to constitute substantial evidence regarding [whole person impairment (WPI)] a physician's opinion must comport with the AMA Guides, including as applied and interpreted in published appellate opinions and en banc decisions of the Appeals Board." (*Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613 (Appeals Board en banc); *Almaraz-Guzman II, supra*, 74 Cal.Comp.Cases 1086-1087, 1101.)

Additionally, a physician's report on the issue of permanent disability, must include an apportionment determination and employers are only liable for the percentage of permanent disability that directly results from a particular industrial injury. (Lab. Code, §§ 4663, 4664.) If an injured worker received a prior award of permanent disability, it is conclusively presumed that the prior disability exists at the time of any subsequent injury. (Lab. Code, § 4664.) However, for

[2] All further statutory references are to the Labor Code unless otherwise stated.

that presumption to apply, defendant must show that the prior and subsequent disabilities overlap. (*Kopping v. Workers' Comp. Appeals Bd*. (2006) 142 Cal.App.4th 1099). Overlap is not presumed if the prior permanent disability was calculated using a different standard than the subsequent disability. In *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*), 49 Cal. App. 5th 605, 615, the Court of Appeal discussed apportionment as follows, "Although parts of the *Hikida* opinion can be read to announce a broader rule that here should be no apportionment when medical treatment increases or precedes permanent disability, it is clear that the rule is actually much narrower. Put differently, *Hikida* precludes apportionment only where the industrial medical treatment is the sole cause of the permanent disability."

Here, Dr. Mandell apportioned 25% of applicant's impairment to applicant's developmental and congenital problems, 10% to the 2002 injury, 10% to the 2005 injury and the remaining 55% to the cumulative injury. (Joint 104 at p. 8.) Applicant argues that Dr. Mandell's opinion regarding the existence of a cumulative trauma is not substantial evidence, and he points to *Hikida* in support of that argument. Applicant also claims that he sustained an injury in the form of "post laminectomy syndrome," and that Dr. Chen's reports support that diagnosis. (See e.g. applicant's Exhibit 4, p. 3.) Dr. Chen's diagnosis is different than the one Dr. Mandell provided of "symptomatic lumbar disc disease superimposed on sponyloysis and spondylolisthesis, status post two-level fusion from L4 to the sacrum with subsequent removal of hardware." (Exhibit 104 at p. 7.) However, both diagnoses affect applicant's back. Further, Dr. Mandell provided a well-reasoned explanation for his determination that applicant sustained a cumulative injury, which was supported by applicant's trial testimony that his condition deteriorated as he continued to perform his job duties. (Joint Exhibit 102, pp. 2-3.) Additionally, there is no evidence reflecting that applicant's permanent disability was the sole result of his medical treatment or that applicant would receive a higher impairment rating depending upon her diagnosis. Rather, Dr. Mandell stated that, "[t]he cause of [applicant's] disability is the various work injuries, not the surgery." (*Id*. at p. 3.)

Dr. stated that in his opinion the 2002 injury caused a whole person impairment of 8% and that he would apportion 10% of applicant's whole person impairment to the 2002 injury. Section 4664 apportionment does not apply to the 2002 injury because the 2002 injury was rated and settled under a different standard. Additionally, Dr. Mandell's retroactive rating was not the basis of the Stipulations with Request for Award. Further, Dr. Mandell did not retract his opinion that the prior industrial injury caused 10% of the current permanent disability. Accordingly, 10% of applicant's impairment is attributed to the 2002 injury. Moreover, Dr. Mandell's other apportionment determinations are also substantial evidence. The medical reports that he and Dr. Chan reviewed document that applicant had a history of back pain which caused disability dating back to at least 1993, and in 1998, applicant was a candidate for lumbar surgery. Additionally, in 2003 applicant's x-rays were "remarkable" for "marked degenerative changes" in the lumbar spine. (Exhibit H, pp. 1.)

Moreover, Dr. Mandell stated that the most accurate description of applicant's permanent impairment would be 31%. (Joint Exhibit 104 at p. 8.) Subsequently, he stated that applicant's "total permanent disability" was a result applicant's three industrial injuries. (*Ibid*.) This statement is insufficient to determination that applicant is permanently and totally disabled pursuant to Dr. Mandell's reporting because it is in direct conflict with a statement he made in that same report that applicant's inability to meet the definition of sedentary work did not appear to be the same as being permanently and totally disabled. (*Ibid*.) Accordingly, the scheduled rating for the 2005

injury is: .1(15.03.01.00 - 31 - [5] - 39 - 340G - 42 – 44) 4, and the scheduled rating for the cumulative injury ending in 2006 is: .55(15.03.01.00 - 31 - [5] – 39 - 340G - 42 – 44) 24%.

Rebutting the Scheduled Rating

Applicant contends that Mr. Diaz's report rebuts the scheduled rating and reflect that he is 100% disabled. Applicant bears the burden of proving this contention. As explained above, a finding that the scheduled rating is rebutted must be supported by substantial evidence.

Labor Code section 4660.1(d) provides that the scheduled rating is prima facie evidence of an employee's permanent disability. However, as explained in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, that rating is " effectively rebutted...when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating."

Additionally, a vocational expert must consider, and cannot ignore, medical evidence of apportionment. (*Kirkwood v. WCAB* (2015) 80 CCC 1082 (writ denied).) In discussing apportionment, the Court of Appeal recently stated that,

> Under the current law, the salient question is whether the disability resulted from both nonindustrial and industrial causes, and if so, apportionment is required. (See *Brodie, supra, 40 Cal.4th at p. 1328*; *Jackson, supra, 11 Cal.App.5th at pp. 116-117*; *Acme Steel, supra, 218 Cal.App.4th at p. 1142*.) Whether or not an asymptomatic preexisting condition that contributed to the disability would, alone, have inevitably become manifest and resulted in disability, is immaterial. (*City of Petaluma v. Workers' Comp. Appeals Bd*. (*Lindh*) (2018) 29 Cal.App.5th 1175, 1193 [83 Cal.Comp.Cases 1869].)

Here, the functional capacity evaluation revealed that applicant had significant limitations, and Dr. Mandell stated that he would adopt its findings with regards to how long applicant could sit, how much applicant could lift, how long applicant could be on his feet, "etc." (Joint Exhibit 103 at p. 2.) His use of the term "etc." reflects that he adopted all of the limitations described in the FCE, and defendant did not present any evidence reflecting that Dr. Mandell excluded some of the limitations. (Lab. Code, § 3202.) Dr. Mandell further stated that he would defer the issue of whether there were jobs applicant could perform to a vocational expert. Applicant's expert Frank Diaz, issued a report stating that applicant was not amenable for vocational rehabilitation and pointed to the extra accommodations, including a waiver of on-the-field training to complete the culinary program at Laney. (Exhibit 1, p. 20.) However, Mr. Diaz's determinations that there is no apportionment to pre-existing factors or the 2002 injury do not constitute substantial evidence because they are not based on a correct history. Mr. Diaz stated that the 2002 injury did not affect applicant's ability to work. However, both Dr. Chen and Dr. Lord stated that as a result of that injury, applicant required a preclusion from heavy lifting, but that he was not a qualified injured worker because he was able to self-accommodate. (Exhibit H, p. 13-14; Exhibit E, p. 1.) Similarly, applicant testified that he never recovered from that injury, that he never should have continued working after that injury, and after that injury he was facing termination because his self-

accommodation consisted of leaving half of his work for the night shift. Further, Mr. Diaz stated that applicant's developmental and congenital problems did not affect applicant's ability to work, but the medical reports reviewed by the physicians reflect that in the 1990s, applicant applied for disability related to his pre-existing back problems. Accordingly, applicant has not met his burden of rebutting the scheduled rating.

Reimbursement of Costs

Defendant is liable for the costs associated with Mr. Fenno's FCE. Dr. Mandell stated that it was "quite useful," and defendant has not presented any evidence reflecting why it would not be liable for the costs of the FCE. Similarly, defendant is liable for the costs associated with Mr. Diaz's reporting. As explained in cases such as *Dahl, LeBouef, Ogilvie,* and the *Almaraz/Guzman* line of cases, injured workers are permitted to attempt to rebut the scheduled rating. There is no evidence reflecting that applicant's attempts to do so in this matter were unreasonable. The issue of the amount of defendant's liability for those costs are deferred with Board jurisdiction reserved.

DATE: February 3, 2021

Alison Howell
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE