WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

CAROLINE HARDMAN, *Applicant*

vs.

VETERINARY CENTERS OF AMERICA, *Defendants*

Adjudication Number: ADJ7755855
Salinas District Office

OPINION AND DECISION AFTER RECONSIDERATION

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

Defendant seeks reconsideration of the Findings of Fact and Award (F&A), issued by the workers' compensation administrative law judge (WCJ) on July 27, 2022, wherein the WCJ found in pertinent part that there is no factual basis for apportionment, permanent disability indemnity was payable beginning September 17, 2008, and applicant was entitled to state average weekly wage (SAWW) increases on January 1st of each year beginning January 1, 2009.

Defendant contends that the WCJ improperly applied apportionment, assigned the wrong start date for permanent disability indemnity payments, and incorrectly identified the start date for SAWW increases.

We received an answer from applicant.

The WCJ issued a Report and Recommendation on Petition for Reconsideration (Report) recommending that the Petition be granted for the limited purpose of correcting the start date for indemnity payments and SAWW increases.

We have considered the allegations in the Petition, the answer, and the contents of the Report with respect thereto.[1]

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[1] Commissioner Caplane and Commissioner Brass, who were on the panel that issued a prior decision in this matter are no longer members of the Appeals Board. Other panel members have been assigned in their place.

Based on our review of the record, and for the reasons stated in the WCJ's Report and Opinion on Decision,[2] which are both adopted and incorporated herein, we will amend the F&A as follows: permanent total disability payable at the temporary total disability (TTD) rate per week, beginning April 17, 2014, with SAWW increases January 1st of each year beginning January 1, 2015, to be paid every other week, less credit for attorney's fee, credit for indemnity benefits paid, and credit for sums earned, all in amounts to be adjusted by the parties subject to proof, with jurisdiction reserved at the trial level if there is any dispute. Otherwise, we will affirm the F&A of July 27, 2022.

DISCUSSION

Because applicant's injury resulted in both temporary disability and permanent disability, and because it occurred on or after January 1, 2008, Labor Code sections[3] 4650, 4656, 4659, and 4661 are all relevant to an evaluation of temporary disability indemnity, permanent disability indemnity, and cost of living adjustments (COLAs).

As a preliminary matter, we note that temporary disability indemnity and permanent disability are separate and distinct benefits, designed to compensate for different losses. (Lab. Code, § 4661; *Sea-Land Serv. v. Workers' Comp. Appeals Bd*. (*Lopez*) (1996) 14 Cal.4th 76, 87 [61 Cal.Comp.Cases 1360].) Temporary disability is "an impairment reasonably expected to be cured or improved with proper medical treatment." (*Signature Fruit Co. v. Workers' Comp. Appeals Bd. (Ochoa)* (2006) 142 Cal.App.4th 790, 795 [71 Cal.Comp.Cases 1044]; see also *Chavira v. Workers' Comp. Appeals Bd*. (1991) 235 Cal.App.3d 463 [56 Cal.Comp.Cases 631].) In contrast, permanent disability is the irreversible residual of a work-related injury that causes impairment in earning capacity, impairment in the normal use of a member or a handicap in the open labor market and thus permanent disability indemnity payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity. (Lab. Code, § 4660(a); *Brodie v. Workers' Comp. Appeals Bd*. (2007) 40 Cal. 4th 1313, 1320; *Livitsanos v. Superior Court* (1992) 2 Cal.4th 744, 753 [57 Cal.Comp.Cases 355].)

Section 4650 provides for the coordination of temporary disability indemnity payments and permanent disability indemnity payments. In 2004, in Senate Bill 899 (SB 899), the Legislature made sweeping changes to the entire workers' compensation system, including adding

[2] The Opinion on Decision formatting has been modified for accessibility purposes.

[3] All further statutory references are to the Labor Code, unless otherwise noted.

a 104-week cap on temporary disability indemnity for injuries occurring on or after April 19, 2004. (Lab. Code, § 4656(c).) As amended in 2004, section 4650(b) incorporates by reference the 104-week statutory cap in section 4656(c), which we discuss in greater detail infra. Section 4650(b)(1) now states:

> If the injury causes permanent disability, the first payment shall be made within 14 days after the date of last payment of temporary disability indemnity, except as provided in paragraph (2). When the last payment of temporary disability indemnity has been made pursuant to subdivision (c)[4] of Section 4656, and *regardless of whether the extent of permanent disability can be determined at that date*, the *employer nevertheless shall commence the timely payment required by this subdivision* and shall continue to make these payments *until the employer's reasonable estimate of permanent disability indemnity due has been paid*, and if the amount of permanent disability indemnity due has been determined, until that amount has been paid. (Lab. Code, § 4650(b)(1) [italics added].)

Effective January 1, 2013, the Legislature further amended section 4650(b), paragraph 2, to clarify that an employer is not required to commence permanent disability indemnity after the last payment of temporary disability if the employee has returned to work or been offered work at certain wage thresholds. However, if the employee is eventually awarded permanent disability, "the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, *whichever is earlier*." (Lab. Code, § 4650(b)(2)[5] [italics added].)

The Appeals Board en banc decision in *Brower v. David Jones Constr*. (2014) 79 Cal.Comp.Cases 550 is instructive. In *Brower*, the Appeals Board held (1) when a defendant stops paying temporary disability indemnity pursuant to section 4656(c) before an injured worker is determined to be permanent and stationary, defendant shall commence paying permanent disability indemnity based on a reasonable estimate of the injured worker's ultimate level of permanent disability; (2) when an injured worker who is receiving permanent disability payments pursuant to

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[4] Relevant here, section 4656(c)(2) limits temporary disability to 104 compensable weeks within a period of five years from the date of injury. (Lab. Code, § 4656(c)(2).)

[5] Prior to an award of permanent disability indemnity, a permanent disability indemnity payment shall not be required if the employer has offered the employee a position that pays at least 85 percent of the wages and compensation paid to the employee at the time of injury or if the employee is employed in a position that pays at least 100 percent of the wages and compensation paid to the employee at the time of injury, *provided that when an award of permanent disability indemnity is made, the amount then due shall be calculated from the last date for which temporary disability indemnity was paid, or the date the employee's disability became permanent and stationary, whichever is earlier*. (Lab. Code, § 4650(b)(2) [italics added].)

section 4650(b)(1) becomes permanent and stationary and is determined to be permanently totally disabled, the defendant shall pay permanent total disability indemnity retroactive to the date its statutory obligation to pay temporary disability indemnity terminated; and (3) cost of living adjustments begin on the first day in January after an injured worker becomes entitled to receive permanent disability indemnity pursuant to sections 4650(b)(1) or (b)(2). (*Brower v. David Jones Constr*. (2014) 79 Cal.Comp.Cases 550, 552 (Appeals Bd. en banc) [6].)

Unlike an applicant with a lesser degree of disability, if the permanent disability is total, applicant is entitled to permanent disability indemnity payments at the temporary total disability rate for life. (Lab. Code, §§ 4659(b), 4453(a); *Brower, supra*, at 561-562.)

Applicant contends she is entitled to annual cost of living adjustments (COLA) pursuant to section 4659(c) commencing on either January 1, 2012 or January 1, 2018, while defendant contends that COLA should not commence until January 1, 2023.

Although no model of clarity, section 4659(c) states that:

> For injuries occurring on or after January 1, 2003, an employee who becomes entitled to receive a life pension or total permanent disability indemnity as set forth in subdivisions (a) and (b) shall have that payment increased annually commencing on January 1, 2004, and each January 1 thereafter, by an amount equal to the percentage increase in the "state average weekly wage" as compared to the prior year. (Lab. Code, § 4659(c).)

In *Baker v. Workers' Comp. Appeals Bd*. (2011) 52 Cal.4th 434, the California Supreme Court considered three possible interpretations of section 4659(c) and concluded that "the Legislature intended that COLA's be calculated and applied prospectively commencing on the January 1 following the date on which the injured worker first becomes entitled to receive, and actually begins receiving, such benefit payments, i.e., the permanent and stationary date in the case of total permanent disability benefits ... ." (*Baker v. Workers' Comp. Appeals Bd*. (2011) 52 Cal.4th 434, 439 [76 Cal.Comp.Cases 701].) However, the *Baker* Court expressly excluded post-SB 899 injuries from its holding:

> Our discussion of total permanent disability benefits pertains only to those payable for injuries occurring before April 19, 2004. For later injuries, it may be

[6] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (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 [70 Cal.Comp.Cases 109]; *Gee v. Workers' Comp. Appeals Bd*. (2002) 96 Cal.App.4th 1418, 1424, fn. 6 [67 Cal.Comp.Cases 236].)

> that an injured worker would become entitled to total permanent disability payments, and corresponding COLA's, before the worker's medical condition is permanent and stationary. (See §§ 4650, subd. (b), 4656, subd. (c).) We express no view on that question, which is not presented under the facts of this case." (*Baker, supra*, at 439, fn. 2.)

In interpreting section 4659(c), "[o]ur fundamental task…is to determine the Legislature's intent so as to effectuate the law's purpose. We first examine the statutory language, giving it a plain and commonsense meaning. We do not examine that language in isolation, but in the context of the statutory framework as a whole in order to determine its scope and purpose and to harmonize the various parts of the enactment. If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*People v. Czirban* (2022) 77 Cal.App.5th 1050, 1064 [87 Cal.Comp.Cases 393], quoting *Smith v. LoanMe, Inc*. (2021) 11 Cal.5th 183, 190, internal quotation marks omitted.)

As discussed in *Brower*, the transition from temporary disability to permanent disability may happen because the applicant is declared permanent and stationary or, as here, because applicant reached the statutory cap on temporary disability pursuant to section 4656(c). However, based on our understanding of *Baker*, we are persuaded that the principle remains the same that it is the transition to permanent disability that triggers COLA. (*Brower, supra*; *Vertis Communications v. Workers' Comp. Appeals Bd. (Garietz)* (2019) 84 Cal.Comp.Cases 427, 429 (writ denied).)

Here, the parties stipulated that the last payment of temporary disability occurred on April 16, 2014, therefore, applicant was entitled to permanent disability indemnity based on a reasonable estimate of her ultimate level of permanent disability within 14 days. (Lab. Code, § 4650(b)(1).) Once applicant became permanent and stationary and was determined to be permanently totally disabled, permanent total disability indemnity was owed retroactively. (Lab. Code, § 4650(b)(2); *Brower, supra*, at 552, 561-562.) As noted by the WCJ, defendant is entitled to seek credit for temporary and permanent disability indemnity payments previously made. Moreover, applicant was entitled to COLA retroactive to January 1 the year after she was entitled to permanent disability indemnity, i.e., January 1, 2015. (Lab. Code, §§ 4650(b)(2), 4656(c).)

Accordingly, we will amend the F&A solely to reflect that applicant is entitled to permanent total disability payable at the TTD rate per week, beginning April 17, 2014, with SAWW increases January 1st of each year beginning January 1, 2015, to be paid every other week,

less credit for the attorney's fee, less credit for indemnity benefits paid, and less credit for sums earned, all in amounts to be adjusted by the parties subject to proof, with jurisdiction reserved at the trial level if there is any dispute. Otherwise, we affirm the F&A of July 27, 2022.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings and Award of July 27, 2022 is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

* * *

AWARD IS MADE in favor of **CAROLINE HARDMAN** against
ZURICH INSURANCE COMPANY

A. Permanent total disability payable at the TTD rate per week beginning April 17, 2014, with SAWW increases January 1st of each year beginning January 1, 2015, to be paid every other week, less credit for sums earned, less credit for indemnity benefits paid, and less credit for the attorney's fee set forth in paragraph C of the Award, all in amounts to be adjusted by the parties, with jurisdiction reserved at the trial level if there is any dispute.

* * *

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ MARGUERITE SWEENEY, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

October 21, 2022

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

JB/abs

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

SERVICE LIST

CAROLINE HARDMAN
WILSON & WISLER
STOCKWELL HARRIS
BRADFORD & BARTHEL

WORKERS' COMPENSATION APPEALS BOARD
OF THE
STATE OF CALIFORNIA

WCAB Case No.: ADJ 7755855

CAROLINE HARDMAN	**vs.**	**VETERINARY CENTERS OF AMERICA**

Workers' Compensation Administrative Law Judge: **JOHN E. DURR**

DATES OF INJURY: **September 17, 2008**

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Zurich Insurance Company by and through their attorney of record, filed a timely and verified Petition for Reconsideration challenging the decision issued by WCJ John Durr alleging that the decision failed to properly apply apportionment; assigned the wrong start date for indemnity payments and incorrectly identified the start date for SAWW increases. There was also an insignificant scrivener error to the combined values computation analysis without the application of *Athens Administrators v. Workers' Comp. Appeals Bd. (Kite)* (2013) 78 Cal. Comp. Cases 213. Based on the following it is recommended that reconsideration be granted to correct the start date for indemnity payments and the start date for the SAWW increases consistent with the discussion below. It is recommended that there be no change to the apportionment decision.

II
FACTS

The applicant suffered an admitted injury on September 17, 2008 while employed as a veterinary technician by Veterinary Centers of America.

The claim was admitted for the back, lower extremities, foot/ankle and left knee.

The applicant claimed additional injury to the right knee, incontinence, sexual dysfunction and anorectal issues and a psychiatric injury.

The applicant took a subsequent job with the Society for the Prevention of Cruelty to Animals.

When the applicant's condition progressed, she went off work on approximately July 18, 2014 and has not returned to meaningful employment since that time.

The employer paid temporary disability at the rate of $230.00 per week between 7/18/13 and 4/16/14; they also paid permanent disability advances at the rate of $230.00 per week from 2/3/15 to 10/19/17.

III
DISCUSSION

The defendant's petition for reconsideration is focused on three specifically delineated issues and that will be the scope of this report and recommendation. The defendant also identified a scrivener error.

CORRECT THE START DATE FOR INDEMNITY PAYMENTS:

The evidence in this case was somewhat less than clear as to the dates that the applicant worked for the subsequent employer SPCA. However, the parties stipulated that the last payment of temporary disability occurred on April 16, 2014. Therefore, the correct date for the start of indemnity payments based on 100% permanent disability would be April 17, 2014. As previously stated, the defendant would be entitled to credit for any amounts paid and any offset for wages paid to the applicant subsequent to that date. This is to be informally adjusted between the parties with WCAB jurisdiction retained.

Therefore, it is recommended that reconsideration be granted as to this issue.

START DATE FOR THE SAWW INCREASES:

In the Findings of Fact, Orders, and Opinion on Decision dated July 27, 2022, the index date for SAWW increases was incorrectly tied to the date of injury. The correct date is January 1 of the year after the applicant became permanent and stationary. Based upon the stipulation of the parties, temporary disability was last paid on April 16, 2014. Therefore, pursuant to *Baker v WCAB* (2011) 52 Cal.4th 434, 76, CCC 701 the start date for SAWW increases is January 1, 2015. This date is being used because payments became due and are retroactively to be made effective April 17, 2014.

Therefore, it is recommended that reconsideration be granted as to this issue.

PROPER APPLICATION OF APPORTIONMENT:

The orthopedic AME reporting finds that there is legal basis for apportionment of 20% to a period of subsequent employment as it relates to the back and bilateral knees. AME David Graubard stated in his report of September 20, 2019 (Joint 1):

> *I also agree with the assessment provided by PQME Dr. Kuyt that there was a reasonable medical probability that the applicant would need to have close access, within 2 minutes walking distance to a restroom because of her urinary and fecal incontinence. I also agree with Dr. Abaci's assessment that the applicant requires use of a cane and that is due entirely to the injury in September of 2008.[WORK RESTRICTIONS]*
>
> *I continue to agree with both Dr. Abaci and Mr. Simon that there is more than a reasonable medical probability that the applicant is incapable of consistently and reliably engaging in competitive work due to the effect of her 2008 injury and based on her overall disability caused by all conditions related to the injury in 2008, I do not feel she is capable of engaging in competitive work on a regular basis.*
>
> *I felt that 20 percent of her total impairment or disability is present as the result of the cumulative trauma of her job duties at the ASPCA.(Subsequent employer)*

That opinion of the orthopedic AME does not indicate that that 20% apportionment additionally impacts the activities of daily living, for the 2008 date of injury, which are part of the basis of the reliance upon the vocational rehabilitation expert.

As reliance is being made on the opinion of the vocational rehabilitation expert, a separate look at apportionment as related to the inability to compete in the labor market:

Labor Code §4664 (a) states, the employer's 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. Incorporating the comments made by the vocational rehabilitation expert:

> *In this case there was no clear evidence in the record indicating that there would have been any labor disabling component to the currently assigned WPI's. Ms. Hardman was able to perform the full scope of her job duties as a veterinary technician up through the date of her 2008 injury which ended her career and prevents her from engaging in vocational rehabilitation.*
>
> *Accordingly, since we are looking here at a case under LC4662 and the entire disability rating string is rebutted, I see the confluence of these WPI's arising directly from the industrial injury as wholly causative of the applicant's inability to return to work.*

Accordingly, with respect to apportionment, as we know, "impairments" correlate to activities of daily living. In my capacity as a vocational expert I am asked to offer an opinion to a trier of fact regarding an individual's "disability." In other words, I am seeking to understand the holistic effect of impairment or impairments upon the individual's capacity to earn money and return to work.

In this case, I have offered my opinion as a vocational expert regarding the apportionment which may be distinct from a medically impairment-based assessment that is based upon ADL's and excludes work capacity, as noted in Chapters I and II of the AMA Guides.

In *Target Corporation v Workers' Comp. Appeals Bd. (Estrada)* (W/D-2016) 81 Cal. Comp. Cases 1192, the Appeals Board held that vocational apportionment is separate and distinguishable from medical apportionment:

"Vocational apportionment is not the same as medical apportionment....Many individuals that have medical impairments are able to function effectively in the work place without impediment. Although he may have had some preexisting medical
*impairments, these impairments do not seem to have resulted in any work disability." (*Estrada, supra, p. 81 Cal. Comp. Cases at p. 1195*.)*

In reliance on the foregoing opinions of vocational rehabilitation expert, viewed through the lens of *Estrada supra*, there were no factors of apportionment in existence at the time of the career ending injury in 2008 and the opinion of the AME who although finding a subsequent 20% cumulative trauma, opines that "there is more than a reasonable medical probability that the applicant is incapable of consistently and reliably engaging in competitive work due to the effect of her 2008 injury and based on her overall disability caused by all conditions related to the injury in 2008." As a result it is found that there is no basis for apportionment.

Therefore, it is recommended that reconsideration be granted as to this issue.

IV
RECOMMENDATION

It is recommended that reconsideration be granted to correct the start date for indemnity payments and the start date for the SAWW increases consistent with the discussion above. It is further recommended that the scrivener error in the Opinion on Decision be corrected to indicate that analysis of disability without the application of Kite supra, the level of permanent disability after adjusting for age and occupation would have been 90%. It is recommended that there be no change to the apportionment decision.

It is recommended that the AWARD be amended as below:

A. Permanent total disability payable at the TTD rate (to be adjusted by the parties) per week beginning April 17, 2014, with SAWW increases January 1st of each year beginning January 1, 2015, to be paid every other week, less credit for sums earned, indemnity benefits paid and less credit for the attorney's fee set forth below.

Respectfully submitted,

August 29, 2022
DATE

/s/ JOHN E. DURR
JOHN E. DURR
Workers' Compensation Judge

OPINION ON DECISION[7]

Table 1 UN-EDITED CHRONOLOGICAL EXHIBIT NOTES BY JUDGE

Exhibit	Document	Date	Notes
J-6	AME Dr. Graubard	8/21/2013	Identified by the court reporter as previously admitted Exhibit W-13. However, on further review, it is believed that the parties intended to submit the initial agreed medical examination, dated July 17, 2012. Previously submitted as W-4. Took a history injury, reviewed records, listed current complaints, took a medical history and did a physical examination. The diagnosis is a degenerative disc disease of lumbar spine with left sciatica and chronic low back pain as well as chronic strain of the left knee with chronic knee pain. No periods of total temporary disability. Concurs with the reporting of Dr. Weiss that the applicant became permanent and stationary as of November 21, 2011. The Dr. lists objective and subjective findings and provides impairment ratings, which are DRE Lumbar Category III of 13% WPI, additionally using *Almaraz/Guzman*, there would be a gait disorder resulting in a Class I with an additional 7% WPI. The left knee does not appear to be ratable at this time. The doctor feels that the impairment of the low back and the gate disorders are synergistic and a reduction in impairment, which would occur by using the Combined Values Chart is not appropriate. There appears to be no basis for apportionment at this time.
J-5	AME Dr. Graubard	2/9/2015	Follow-up comprehensive medical evaluation. Interim history regarding additional treatments. Review of bilateral knee issues and treatment. Review of the applicant's attempts to return the work. Review of updated MRI study on the right knee. Applicant continuing to work restricted duties at the ASPCA through September 2014 when put on medical leave. The applicant discontinued horse demonstrations and teaching at several locations in the middle 2014, but occasionally does some teaching and boards some horses. Dr. does a thorough examination specifically to the back and knees. There is a finding that the applicant has remained permanent and stationary for the back, but had additional treatment to the knees and therefore is again permanent and stationary as of February 3,

[7] The formatting has been modified and column headers have been added for accessibility purposes.

Exhibit	Document	Date	Notes
			2015. Impairment of the back: No change in prior opinion. Impairment of the knees: Using table 13-15, Class l with a 9% impairment for each knee Causation of the back: The incident at work on September 17, 2008 at VCA - no apportionment at this time. Causation of the left knee: 80% at VCA and 20% to a CT at ASPCA. Causation of the right knee: Compensable consequence to follow the apportionment of the left knee.
J-4	AME Dr. Graubard	5/28/2015	Dr. indicating that psychiatric as well as fetal and urinary incontinence were outside his area of expertise and reporting would be required by experts in those fields. The doctor also felt that this time he could not give specific work restrictions for the vocational expert based on the complexity of the case and the conflicting reports.
A-28	VR Simon	7/15/2015	Preliminary report as the record is still being developed including an upcoming AME evaluation. This includes a review of the current records and a background history on the injured worker. A discussion is made regarding the activities of daily living, and the results of the assessment tests that he had administered to the injured worker. The applicant is still exploring possible ways to return to work at this time but clearly describes an increasing level of severe pain and decreasing functionality and Mr. Simon believes it may be necessary to get a supplemental report regarding the need for a more precise quantification of her vocational capacities and potential to attend work on a consistent, predictable basis.
J-22	QME Dr. Tamarin	4/9/2016	This was a review of records. Dr. determined that there were no records regarding the complaints of urinary and fecal incontinence. Clarifying that he is going to see her for the urinary incontinence also clarifying as there are no reports: The history and physical exam are extremely important in this case.
J-24	QME Dr. Tamarin	4/9/2016	Duplicate report of Joint Exhibit #22
J-23	QME Dr. Tamarin	4/11/2016	The doctor indicates that during the history taken, and the review of the records, that based on the symptoms and physical findings no workup or treatment is indicated on the industrial basis for urinary incontinence.
J-16	QME Dr. Russell	4/19/2016	PQME evaluation, including history, family history, medical history, psychological testing leading to a diagnosis including mood disorder, associated with general medical condition;

Exhibit	Document	Date	Notes
			generalized anxiety disorder; chronic pain disorder as it relates to her psychological condition. He also finds that the applicant was Temporarily Partially Disabled but believes additional treatment with a psychiatrist and psychologist would be necessary prior to becoming permanent & stationary.
A-27	VR Simon	7/19/2016	Supplemental report after review of the psychological panel QME report issued by Dr. Peter Russell. He notes that Dr. Russell does not find the applicant permanent and stationary as of April 19, 2016. Mr. Simon defers pending a permanent stationary report from the panel QME in psychology.
J-3	AME Dr. Graubard	8/4/2016	Extensive review of witness deposition transcripts, medical records and his prior reporting. This includes a further explanation as to the change in opinion on February 3, 2015 regarding the impact of the applicant's work at the ASPCA on her knees, which he felt was 20% of the impairment related to her knees. The AME then discussed the low back impairment and comes to the updated conclusion that the DRE Lumbar Category III finding of 13% WPI fails to fully capture the applicant's level of impairment pursuant to *Almaraz/Guzman* and finds an additional 10% whole person impairment based on the analogous use of the hernia tables.
J-19	QME Dr. Shorr	9/27/2016	Initial PQME evaluation neurology. The doctor begins with taking a complete injury, social and medical history. The doctor performed a neurological evaluation and reviewed the provided medical records. The doctor makes the following assessments: Chronic lumbar myoligamentous sprain/strain; Possible early bilateral carpal tunnel syndrome; Possible left L4 and LS radiculitis; Urinary and fecal incontinence, deferred to the appropriate specialist; Insomnia secondary to pain; and, Anxiety and depression, deferred to psychiat1y. There was a finding of industrial causation to the urinary and bowel incontinence along with anxiety, depression and pain related, insomnia, however, in a subsequent report the Dr. identifies this as a typographical error and these were nonindustrial. The applicant is not at maximum medical improvement, pending further evaluation with a colorectal surgeon, gynecologist and probably different urologist.
J-25	QME Dr. Tamarin	11/15/2016	A follow-up evaluation-the applicant has now been seen by a neurologist. The doctor indicates that the original report which issued in this case was apparently incorrect and places the blame on the transcribing company. The doctor now feels that a diagnostic workup is indicated for both the urinary and fecal incontinence and the possible opioid induced constipation. Purposes of the work up is to address causation and apportionment. There is a request made for 6 tests/specific

Exhibit	Document	Date	Notes
			records necessary to complete the work up. No additional opinions were offered in this report.
D-2	VR Tincher	2/21/2017	Vocational assessment to determine if the DFEC in this case exceeds the 2005 PDRS formula for determining diminished capacity. This assessment is for both the 9/17/2008 specific injury and for a companion injury of a cumulative trauma ending on 4/10/14. Ms. Tincher correctly identifies that the CT claim, if found, would be under the 2013 PDRS and not have the ability to rebut the schedule as to the DFEC portion of the formula. Ms. Tincher reviewed the records up through 7/19/2016. There is a discussion regarding the Ogilvie III methodology, a brief discussion of LeBoeuf and the Dahl case. The vocational assessment methodology was discussed, and analysis of the record review, including depositions. A vocational interview was held Ms. Hardeman. Observed behaviors/presentation were consistent with the remaining history that was given. History continued regarding education language and vocational experience including self-employment activities. At this time the applicant indicated that she was intending to continue training horses on a part-time basis. A battery of vocational assessment tests were given. A further analysis was done including a LeBoeuf evaluation with the opinion that Ms. Hardeman would be able to perform sedentary and light strength jobs which allow sit/stand options. The vocational rehabilitation expert, finds that the applicant is amenable to returning to work. Specifically sedentary jobs in animal shelters and animal hospitals, unskilled sit/stand jobs and high motivation to continue her self-employment as a writing instructor and animal trainer. And as a result finds her amenable to vocational rehabilitation. Regarding the DFE see she believed that the 50% that is consistent with the modifier "8" in the 20005 PDRS is sufficient. As there is no ongoing claim for the cumulative trauma, those findings are not germane to the ongoing analysis
J-18	QME Dr. Shorr	3/9/2017	PQME supplemental report in neurology. The doctor makes the following assessments: Chronic lumbar myoligamentous sprain/strain; Possible early bilateral carpal tunnel syndrome; Possible left L4 and LS radiculitis; Urinary and fecal incontinence, deferred to the appropriate specialist; Insomnia secondary to pain; and, Anxiety and depression, deferred to psychiatry.

INJURED PARTS OF THE BODY:

Defendants admit industrial injury to Applicant's back, lower extremities, foot/ankle, and left knee. Applicant also alleges injury to her right knee, incontinence, sexual dysfunction and anorectal issues, and psychiatric injury. Based upon the Applicant's testimony and the medical reporting of AME Dr. Graubard; QME Dr. Kuyt; AME Dr. Nacouzi; QME Dr. Shorr; QME Dr. Russell; and, QME Dr. Tamarin as listed in the table above, it is found that Applicant sustained injury to her back, lower extremities, foot/ankle, and right knee, and as a compensable consequence suffered injury resulting in incontinence, sexual dysfunction, injury to the left knee, anorectal issues, and a psychiatric injury.

PERMANENT DISABILITY:

The factors of permanent disability evolved in this case as the applicants condition worsened subsequent to the date of injury. Therefore, the chronology of the medical reporting was illustrative as to the progressive changes in the applicant's condition over time.

Greater deference is given to the opinions of Agreed Medical Evaluator's and here there (awkward) was both an orthopedic and an internal AME. The parties presumably chose (chose) these AME's because of the AME's expertise and neutrality. (P*ower v. Workers' Comp. Appeals Bd*. (1986) 179 Cal.App.3d 775, 782 [51 Cal.Comp.Cases 114].) The Appeals Board will follow the opinions of the AME unless good cause exists to find the opinion unpersuasive. (Ibid.)

Orthopedic AME Dr. Graubard:

Back:	.8(15.03.01.00 – 23 [5] 29 – 311G – 32 – 36) 29
R. Knee:	.8(17.05.00.00 – 9 [2] 10 – 311 F – 10 – 11) 9
L. Knee:	.8(17.05.00.00 – 9 [2] 10 – 311 F – 10 – 11) 9

Internal AME Dr. Nacouzi:

Bladder:	07.03.00.00 – 8 [2] 9 – 311F – 9 – 10
Sexual dysfunction:	07.05.00.00 – 2 [2] 2 – 311F – 2 – 2
Rectal urgency:	06.02.00.00 – 12 [6] 16 – 311F – 16 – 18

Psychological QME Dr. Russell, PhD:

14.01.00.00 – 46 [8] 64 – 311J – 75 – 78

Is it appropriate to add the applicants multiple levels of permanent disability?

The medical reporting raises several issues as to whether or not the impairments should be combined or added. The WCAB has explained that, while impairments to different body parts should ordinarily be combined utilizing the CVC to prevent pyramiding, impairments may be added when addition more accurately reflects the extent of an employee's disability:

> "The Combined Values Chart (CVC), which is contained in the AMA Guides, combines WPI or permanent disability ratings for multiple injured body parts based on a reduction formula. (*Foxworthy v. State of Calif., Dept. of Parks & Recreation* 2016 Cal.Wrk.Comp. P.D. Lexis 634; *Los Angeles County Metropolitan Transportation Authority v. Workers' Comp. Appeals Bd.* (*La Count*) (2015) 80 Cal. Comp. Cases 470; *Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal. Comp. Cases 213.) Utilizing the CVC prevents overlapping or pyramiding permanent disability for each injured body part due to addition, or exceeding 100% permanent disability for a single work injury. (*Foxworthy*, supra, 2016 Cal. Wrk. Comp. P.D. Lexis 634; *La Count*, supra, 80 Cal. Comp. Cases 470; *Kite*, supra, 78 Cal. Comp. Cases 213.) The CVC is ordinarily applied unless there is some overriding reason to use a different method of determining WPI or permanent disability for multiple injured body parts. (*Ogilvie*, supra, 197 Cal. App. 4th at pp. 1274–1277, 129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624; *Almaraz Guzman*, supra, 187 Cal. App. 4th at pp. 818–830; *Foxworthy*, supra, 2016 Cal. Wrk. Comp. P.D. Lexis 634.)
>
> The reporting physician may determine that the injured employee's WPI or permanent disability is more accurately measured by adding rather than combining WPI or permanent disability ratings under the CVC. (*La Count*, supra, 80 Cal. Comp. Cases 470; *Kite*, supra, 78 Cal. Comp. Cases 213.) The reporting physician may add WPI or permanent disability that results in a synergistic effect. (*La Count*, supra, 80 Cal. Comp. Cases 470; *Kite*, supra, 78 Cal. Comp. Cases 213.) The reporting physician may also add WPI or permanent disability based on the extent the injured employee's ability to perform activities of daily living is affected. (*Kite*, supra, 78 Cal. Comp. Cases 213.)"
> *ACE American Insurance Co. v. Workers' Comp. Appeals Bd.* (*Botto*), 2020 Cal. Wrk. Comp. LEXIS 28, *6-7 (Cal. App. 1st Dist. March 16, 2020).

Furthermore, the use of the term "synergistic" to advocate for the use of the additive method is not determinative of the validity of using this method. The impairments maybe added if substantial evidence supports the physician's opinion that adding them will result in a more accurate rating of applicant's level of disability than the rating resulting from the use of the CVC (see *De La Cerda v. Martin Selko & Co.*, 2017 Cal. Wrk. Comp. P.D. LEXIS 533, 83 Cal. Comp. Cases 567).

The reporting of QME Dr. Russell, PhD of May 23, 2018 (exhibit J-14), provided an analysis of the basis of his decision citing the medical studies that he was relying upon and the methodology of his application of the concept of synergistic effect. His medical opinion is that there were multiple injuries, there were the orthopedic injuries and spinal problems as well as the psychological issues. He indicates a finding of a synergistic relationship in this case based on the medical literature and the anticipated changes in the neurotransmitters as a result. This analysis would provide an additive rating of:

78+29+18+10+9+9+2=155% Permanent Disability

The most recent report of AME of Dr. Graubard of September 20, 2019 (joint exhibit 1), seems to state that regarding the back, hip and both lower extremities that he was unable to segregate an individual pain add-on for each individual body parts. However, in his explanation, contained in joint Exhibit 2, he limited his opinion to the addition of the impairment for the lumbar spine. To wit, he indicated that he believed that the DRE lumbar category III should be "added" to additional impairment, pursuant to *Almaraz/Guzman*. He indicated it remained his opinion that the applicant's whole person impairment should be added per the *Kite* decision. There was no explanation of the synergistic effect between the various orthopedic injuries, internal injuries and psychological impairment/disability. Therefore, although the addition is allowed pursuant to *Almaraz/Guzman* the current record fails to indicate a synergistic effect as required by *Kite* based on the reporting of AME of Dr. Graubard. This analysis would provide a combined rating of:

78 c 29=84 c 18=86 c 10=87 c 9=88 c 9=89% Permanent Disability

Internal AME Dr. Nacouzi in his reporting does not opine as to the synergistic nature of the applicant's injuries and any resulting additive effect.

Defendant's Vocational rehabilitation expert Emily Tincher authored one report dated February 17, 2017. At that time. Ms. Tincher properly relied upon the sit/stand limitations laid out by the primary treating physician, Dr. Abaci. However, those restrictions have increased to: 10 minute breaks every hour; elevate both legs if sitting longer than 10 minutes, and the need to lie down or recline for 20 minutes every hour. Additionally there is reasonable medical probability applicant would miss more than 4 days a month from work require the use of a cane. Also the applicant would need to be within 2 minutes of a restroom at all times. There were discussions regarding earning capacity in "regular" employment which may not be available based on the additional work restrictions. Also, emphasis was placed on the applicant's ability to self-

employ as an equine instructor and animal trainer. The applicant testified at time of trial that she stopped doing this type of work in 2019 due to the amount of pain she was experiencing and she was unable to be dependable because of pain and depression. Therefore, the reporting of Ms. Tincher is no longer based on accurate history and could not be relied upon for its conclusions.

Applicant's Vocational rehabilitation expert Scott Simon authored a total of 5 reports. After the initial evaluation and testing (applicants 28), Mr. Simon indicated he was unable to render an opinion as the applicant describes an increasing level of severe pain and decreased functionality. He made no recommendations pending an update as to further medical legal evaluation. His next report (applicants 27) indicated that he needed additional medical legal reporting on both an orthopedic and psychological basis in addition to the reported internal complaints.

There is a comprehensive report by vocational expert Simon dated April 26, 2018 (applicants 26). In this report, there is a thorough analysis by the vocational rehabilitation expert of the medical reporting at that time. A transferable skills assessment was made and vocational rehabilitation was addressed based on four (4) criteria including self-employment, and additionally home-based employment. An assessment was made regarding amenability to rehabilitation, which looked at the potential to rebut the 2005 Permanent Disability Rating Schedule. Here the expert finds that due, in part, to QME Dr. Russell assigning a GAF of 42, which corresponds to 46% whole person impairment, the applicant would not be amenable to rehabilitation. The expert goes on and walks through the *Montana* factors. There is an opinion that the applicant has lost the ability to work, that her age of 57 is a negative factor in the analysis and the medical limitations and restrictions are extreme and increasing. Ultimately, Mr. Simon reaches a conclusion that based on the orthopedic and the psychological injuries, not taking into consideration the internal injuries, that the applicant, Ms. Hardman, has lost 100% of her labor market access.

Cases have long recognized that a scheduled rating has been 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. This is the rule expressed in (*LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234).

As the court in *Dahl* stated: "The first step in any *LeBoeuf* analysis is to determine whether a work-related injury precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force." (*Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 80 Cal.Comp.Cases 119].) The evidence here establishes applicant's industrial

injury does prevent her from benefiting from vocational rehabilitation programs to enable her to return to the labor market.

Additionally, in support of the findings of the vocational rehabilitation expert, those reports were reviewed by the medical experts. In this case, the orthopedic AME opined based on reasonable medical probability that he did not feel that the applicant is capable of engaging in competitive work on a regular basis. The psychiatric QME reviewed the two conflicting vocational rehabilitation experts and left the decision to the trier of fact. The internal AME only opined as to the ability to return to work based solely on the internal problems, not the applicant's overall condition. *Escobedo v. San Luis Coastal Unified*, 2021 Cal. Wrk. Comp. P.D. LEXIS 213 (W.C.A.B. August 27, 2021.

Taking all of the above analyses into consideration, the psychological impacts, the orthopedic injuries and restrictions, the internal injuries and restrictions, as well as the applicant's lack of amenability to vocational rehabilitation it is found that the logic applied by vocational rehabilitation expert Scott Simon best encapsulates the actual permanent disability of this applicant. Therefore, it is found the applicant is 100% permanently disabled. As described below there is no basis for apportionment based on the applicant's inability to access the labor market as a result of her current condition following the 2008 injury.

APPORTIONMENT:

It should be noted that if reliance were made upon the orthopedic AME reporting it finds that there is legal basis for apportionment of 20% to a short period of subsequent employment as it relates to the back and bilateral knees.

As reliance is being made on the opinion of the vocational rehabilitation expert, a separate look at apportionment as related to the inability to compete in the labor market:

Labor Code §4664 (a) states, the employer's 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. Incorporating the comments made by the vocational rehabilitation expert:

> In this case there was no clear evidence in the record indicating that there would have been any labor disabling component to the currently assigned WPI's. Ms. Hardman was able to perform the full scope of her job duties as a veterinary technician up through the date of her 2008 injury which ended her career and prevents her from engaging in vocational rehabilitation.

> Accordingly, since we are looking here at a case under LC4662 and the entire disability rating string is rebutted, I see the confluence of these WPI's arising directly from the industrial injury as wholly causative of the applicant's inability to return to work.
>
> Accordingly, with respect to apportionment, as we know, "impairments" correlate to activities of daily living. In my capacity as a vocational expert I am asked to offer an opinion to a trier of fact regarding an individual's "disability." In other words, I am seeking to understand the holistic effect of impairment or impairments upon the individual's capacity to earn money and return to work.
>
> In this case, I have offered my opinion as a vocational expert regarding the apportionment which may be distinct from a medically impairment-based assessment that is based upon ADL's and excludes work capacity, as noted in Chapters I and II of the AMA Guides.

In reliance on the foregoing opinions of vocational rehabilitation expert that there were no factors of apportionment in existence at the time of the career ending injury in 2008, it is found that there is no basis for apportionment.

DEFENDANT HAS THE BURDEN ON APPORTIONMENT

The injured employee has the burden of affirmatively establishing the extent of his or her permanent disability. (§§ 3202.5, 5705.) Thereafter, however, the burden shifts to defendant to prove apportionment. (*Pullman Kellogg* v. *Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456; *Kopping* v. *Workers'Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115; *Escobedo* v. *Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc) (*Escobedo*).)

NEED FOR FURTHER MEDICAL TREATMENT:

Based upon the medical report(s) of AME Dr. Graubard; AME Dr. Nacouzi; and, QME Dr. Russell;, it is found that Applicant is in need of further medical treatment to cure or relieve from the effects of the injury herein.

ATTORNEY'S FEE:

Based on the WCAB Rules of Practice and Procedure § 10844 and the guidelines for awarding an attorney's fee set forth in Policy and Procedure Manual § 1.140, a reasonable attorney's fee is found to be 15% of applicant's permanent disability award to be adjusted between the parties and paid subject to a Uniform Reduction Method, with a commutation request to be submitted to the DEU by the Applicant Attorney. Board Jurisdiction reserved.