

**WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA**

EUGENE CLANCY, *Applicant*

vs.

SAVE MART, *Permissibly Self-Insured, Defendant*

**Adjudication Number: ADJ8456662
Oakland District Office**

**OPINION AND DECISION
AFTER RECONSIDERATION**

We granted reconsideration in this matter to provide an opportunity to further study the legal and factual issues raised by the Petition for Reconsideration. Having completed our review, we now issue our Decision After Reconsideration.

Defendant Save Mart, permissibly self-insured, filed a Petition for Reconsideration from the January 25, 2021 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant Eugene Clancy sustained permanent total disability as a result of an admitted August 29, 2011 industrial injury to his low back, psyche, sleep, sexual dysfunction, irritable bowel syndrome and bladder, while employed as a stocker. Applicant was awarded lifetime permanent disability indemnity at the rate of \$487.44 per week.

Defendant contests the finding that applicant is permanently totally disabled, contending that the WCJ did not adequately justify his determination, and that substantial evidence in the record does not justify the WCJ's determination that applicant rebutted the scheduled rating of his permanent disability. Defendant argues that the opinion of applicant's vocational expert is not substantial evidence because he did not adequately address the findings of the Agreed Medical Examiner in orthopedics, and because he relied upon the opinion of the Agreed Medical Examiner in psychiatry, which defendant asserts do not support the finding of permanent total disability. Defendant argues that findings regarding applicant's vocational capacity should be based upon the reporting of its vocational expert, who found applicant capable of returning to the labor market.

Applicant filed an Answer to defendant's Petition for Reconsideration, arguing that there is substantial evidence in the record, both medical and vocational, that justifies the WCJ's

determination that applicant is permanently totally disabled based upon the absence of any vocational capacity.

Applicant also filed a Petition to Augment the Record, requesting that the July 24, 2019 medical report from Dr. Larsen, the AME in psychiatry, be admitted into the record, as it was inadvertently not admitted, despite being identified as an exhibit at the Pre-Trial Conference.

The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied, but recommends that Dr. Larsen's July 24, 2019 medical report be admitted as Exhibit 102.

We have considered the allegations and arguments of the Petition for Reconsideration, as well as the answer thereto, and have reviewed the record in this matter and the WCJ's Report and Recommendation on Petition for Reconsideration of March 22, 2021, which considers, and responds to, each of the defendant's contentions. Based upon our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate as the decision of the Board, we will affirm the WCJ's Findings and Award. We shall also grant applicant's request to augment the record, and will order that Dr. Larsen's July 24, 2019 medical report be admitted as Exhibit 102.

With regard to defendant's contention that the WCJ's Opinion on Decision failed to provide a clear and concise explanation of the reasons for his determination, we note that the WCJ's Report cured any alleged defect in satisfying the requirements of Labor Code section 5313. (*Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal. Comp. Cases 1026; *Arana v. Workers' Comp. Appeals Bd.* (1999) 64 Cal. Comp. Cases 1251.)

Additionally, we are persuaded that the WCJ correctly determined that applicant is permanently totally disabled, based upon substantial evidence that establishes that applicant is unable to benefit from vocational rehabilitation or return to full time employment in the labor market.

Labor Code section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), the proper application of the Permanent Disability Rating Schedule in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate

workers for both physical loss and the loss of some or all of their future earning capacity”]; *Department of Corrections & Rehabilitation v. Workers’ Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers’ Comp. Appeals Bd. (Guzman)* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].) It may also be shown by rebutting the diminished future earning capacity factor supplied by the PDRS. (*Ogilvie v. Workers’ Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers’ Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119]; c.f. *LeBoeuf v. Workers’ Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587].)

To rebut a scheduled permanent disability rating, applicant must establish that his future earning capacity is actually less than that anticipated by the scheduled rating. The court in *Ogilvie, supra*, addressed the question of: “What showing is required by an employee who contests a scheduled rating on the basis that the employee’s diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating?” (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the scheduled rating is based upon a determination that the injured worker is “not amenable to rehabilitation and, for that reason, the employee’s diminished future earning capacity is greater than reflected in the scheduled rating.” The employee’s diminished future earnings must be directly attributable to the employee’s work-related injury and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee’s lack of education. (*Ogilvie*, 197 Cal.App.4th at pp. 1274–1275, 1277.)

The issue here is whether the vocational evidence the WCJ relied upon constitutes substantial evidence to support the conclusion that applicant is permanently totally disabled due to his inability to benefit from vocational rehabilitation, per *Ogilvie, Dahl* and *LeBoeuf*.

In *Dahl*, the Court of Appeal held that to rebut the scheduled rating, applicant must prove that the industrial injury precludes vocational rehabilitation, writing in pertinent part as follows:

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. This necessarily requires an individualized approach...It is this individualized assessment of whether industrial factors

preclude the employee's rehabilitation that *Ogilvie* approved as a method for rebutting the Schedule.
(*Dahl*, 80 Cal.Comp.Cases at 1128.)

The vocational evidence the WCJ relied upon, the reporting of Mr. Malmuth, indicates that applicant is not amenable to vocational rehabilitation and that the AMEs medical work restrictions preclude applicant from returning to full time employment. Mr. Malmuth's assessment of the vocational factors affecting applicant's ability to return to work shows that the medical restrictions do preclude applicant from gainful employment. His analysis of applicant's vocational limitations constitutes substantial evidence that supports the WCJ's determination.

Defendant, citing *Meza v. Perma Steel*, 2013 Cal. Wrk. Comp. P.D. LEXIS 441, a panel decision adopting a WCJ's Report and Recommendation on Petition for Reconsideration, argues that applicant's vocational expert's opinion is insufficient to prove applicant's permanent total disability, since the AMEs work restrictions would not preclude applicant from performing work.

In *Meza*, the WCJ found the opinion of a vocational expert unpersuasive as she lacked credentials from any vocational expert associations and had no prior experience testifying about vocational evaluation reports. Here, in contrast to the vocational expert in *Meza*, Mr. Malmuth has long been an expert witness in vocational rehabilitation before the Workers' Compensation Appeals Board.

While *Meza* recognizes the authority of a WCJ to determine which expert evidence is most persuasive (see *Jones v. Workers' Comp. Appeals Bd.* (1968) 86 Cal.2d 476 [33 Cal.Comp.Cases 221]), the factors cited there for rejecting the opinion of a vocational expert are not relevant to these proceedings. Mr. Malmuth is qualified to offer his expert vocational opinion, upon which the WCJ reasonably relied.

We concur with the WCJ that the vocational expert evidence he relied upon met the requirements of *LeBoeuf* and *Ogilvie* to establish that applicant had effectively rebutted the ratings derived from application of the Permanent Disability Rating Schedule, such that applicant established he was not amenable to participate in vocational rehabilitation and had lost his ability to return to gainful employment as a consequence of the effects of his industrial injury.

Accordingly, we affirm the Findings and Award, but amend it to order the admission of Dr. Larsen's report into the record.

For the foregoing reasons,

IT IS ORDERED that, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the January 25, 2021 Findings and Award is **AFFIRMED**.

IT IS FURTHER ORDERED that Dr. Larsen's July 24, 2019 medical report is admitted into the record as Exhibit 102.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER



DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

November 23, 2021

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

**EUGENE CLANCY
GEARHART & SONNICKSEN
TESTAN LAW**

SV/pc

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