WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

MAXAMILLION HILLENBRAND, ***Applicant***

vs.

CAL CABINETS AND STORE FIXTURES;
ENDURANCE ASSURANCE CORPORATION, ***Defendants***

Adjudication Number: ADJ8195851
Sacramento District Office

OPINION AND ORDERS DENYING DEFENDANT'S PETITION FOR RECONSIDERATION, GRANTING APPLICANT'S PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Maxamillion Hillenbrand, and defendant Cal Cabinets and Store Fixtures, by and through its insurer, Endurance Assurance Corporation, have each filed a Petition for Reconsideration from the November 18, 2020 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a cabinet maker on October 13, 2009, sustained an industrial injury to his right knee/lower extremity and psyche. The WCJ found that as a result of his injury, applicant has sustained 84% permanent disability and need for further medical treatment. Applicant was awarded permanent disability indemnity in the sum of $203,728.98, payable at the weekly rate of $270, from January 24, 2012 through July 6, 2013, and then at the rate of $310.50, until paid in full. Thereafter, applicant was awarded a life pension of $185.54. Applicant's benefits were ordered reduced and commuted to pay reasonable attorney fees.

Applicant contests the finding of permanent disability, contending that substantial medical and vocational evidence establishes that he is permanently totally disabled, as he is not amenable to vocational rehabilitation and has suffered a total loss of his earning capacity. Applicant further argues that the WCJ erred by relying upon a DEU rating that was based upon rating instructions that contained a significant error regarding apportionment of his psyche disability.

Defendant contests the award of a 15% increase in permanent disability under Labor Code section 4658(d)(2), arguing the WCJ improperly raised the issue *sua sponte* and applicant did not establish his entitlement to the increased indemnity with evidence that the employer employed more than 50 employees. Defendant further argues that the WCJ erred in failing to apportion applicant's psyche disability to applicant's non-industrial marital issues, as found by the Agreed Medical Examiner in psychiatry, Dr. Shaffer. Defendant asserts that the WCJ incorrectly found that Dr. Shaffer had rescinded his apportionment determination.

We have received and reviewed Answers filed by both parties. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that applicant's Petition be denied and defendant's Petition be granted and the matter returned to the trial level for further proceedings on the Labor Code section 4658(d)(2) issue.[1]

We have considered the Petitions for Reconsideration, the Answers thereto, the contents of the WCJ's Report, applicant's Response thereto, and we have reviewed the record in this matter. For the reasons discussed below, we will grant applicant's Petition for Reconsideration, amend the Findings and Award to find applicant is permanently totally disabled, and return this matter to the trial level to recalculate the award of permanent disability. We will deny defendant's Petition for Reconsideration, as an award of permanent total disability is not subject to the 15% increase in Labor Code section 4658(d)(2), and the WCJ did not err in finding applicant was entitled to an unapportioned award.

FACTS

Applicant claimed that while employed by defendant as a cabinet maker on October 13, 2009, he sustained an industrial injury to his right knee/lower extremity and psyche. Defendant accepted applicant's claim of injury but contested whether he injured the right lower extremity, as well as the extent of his permanent disability.

At trial on September 23, 2020, applicant testified to the circumstances of his injury and the development of his regional pain syndrome in his right lower extremity. The injury occurred when applicant was pushing a cart and stepped on a screw, at which point his legs went out from under him. He kept working for three months with severe pain. He was diagnosed with a tear of

[1] Applicant has sought leave to file a Response to the WCJ's Report and Recommendation on Petition for Reconsideration. We grant applicant's request and will consider his response.

his meniscus in his right knee, for which he had arthroscopic surgery by Dr. Molitor on March 29, 2010. His knee improved a little after the surgery, but his foot and ankle began to swell. His leg then swelled and turned purple for six to eight months. He never returned to work after his surgery.

Applicant still suffers from chronic pain and swelling. He testified that as of January of 2020, his pain medications were cut off. To relieve his symptoms, he uses a pool for salt water therapy, and ices his leg 10 to 15 times per day. He continues to wear compression stockings as recommended by Dr. Molitor after his surgery, but they have been denied by the insurance company. His pain increases if he walks for 10 to 15 minutes, and then he has to lay down and elevate his leg. He estimates that his pain rates at a 7 to 8 on his best day and 8 to 9 on a bad day.

He uses an electrical stimulator. His symptoms improved with water therapy, medications and an H-wave machine. He testified that most of that treatment has been denied by defendant. But he also testified that even with all of those forms of therapy, he would not be able to tolerate a 40-hour work week.

He has been in divorce proceedings with his wife of 30 years, after she left him on September 29, 2017. Prior to his injury he did not have problems in his marriage or with his two sons. After his injury, he was unable to help around the house and his wife had to start working a full-time job, after working part-time. He testified that he has called the sheriff 4 to 5 times when his wife showed up unannounced. She sought a restraining order against him, but there was no physical violence between them, though his wife accused him of that in family law court. After they separated, his wife was unfaithful to him. He discussed two separations with Dr. Shaffer, the psychiatrist, but Dr. Shaffer got mixed up and combined two separation dates.

Dr. Hughes, the Qualified Medical Evaluator in orthopedics, reported applicant's complaints in his May 7, 2013 report.

> He has significant problems with ambulation, which is causing increasing fatigue and problem with his left leg. He ambulates with a cane. Pain is constant. He is unable to drive more than an hour in a car without ice bags and he uses a vascular elastic stocking to improve the edema in the lower leg. He has constant pain, particularly above the knee, severe pain down the anterior shin, and he feels like the leg is about to explode. He has numbness and tingling in the lateral aspect of his right foot. He is getting increasing left shoulder pain while lying on his left side or if he elevates the right leg. Icing and elevation and H-wave improves his pain. He has grinding and locking of the knee joint. (Ex. C, 5/7/13 Report, p. 3.)

With regard to applicant's work restrictions, Dr. Hughes found applicant "could not work at all. He cannot sit. He cannot work on anything about [sic] a reclining position."

> Examinee is permanent and stationary with direct causation, postsurgical complication from medial meniscectomy, venous insufficiency, causalgia, reflex sympathetic dystrophy, degenerative arthritis of medial compartment. (Ex. C, 5/7/13 Report, p. 6.)

Dr. Hughes rated applicant's orthopedic whole person impairment at 60%, without apportionment. He found applicant to be permanently totally disabled and unable to work.

Dr. Hughes agreed with Mr. Hodgson, applicant's vocational rehabilitation expert, that applicant is not employable. (Ex. 1, 12/11/14 Supplemental Report, p. 2.) He did not agree with defendant's vocational expert, Ms. Tincher, that applicant has only lost 14% of his earning capacity. He stated in his 2015 report, "I do agree it would benefit the examinee to have access to the labor market. Of course I believe he would like to return to work. However I do not agree the examinee will have access to the labor market due to his disability. I find that 14% loss of regarding earning capacity due to this injury is an impossibly low percentage." Dr. Hughes further indicated that for applicant to participate in vocational rehabilitation, he would have to do so "with his intractable pain and swelling." (Ex. C, 10/15/15 Supplemental Report, p. 2.)

Dr. Feinberg was appointed in 2017, to evaluate applicant as an Independent Medical Examiner, and he issued a report on November 22, 2017. (Ex. B, 11/22/17 Report.) Dr. Feinberg reviewed the course of applicant's medical treatment for his industrial injury, noting the development of venous insufficiency subsequent to his arthroscopic knee surgery, requiring the use of a class 2 compression stocking, and the diagnosis of reflex sympathetic dystrophy and persistent medial meniscus tear. He reviewed the reports from the AME in psychology, Dr. Shaffer, who found applicant sustained a compensable consequence injury in the form of a pain disorder and depression arising from a complex regional pain syndrome. He also reviewed the vocational expert reporting, including that of Mr. Hodgson, applicant's vocational expert, who found applicant was incapable of participation in vocational rehabilitation or returning to the labor market due to his chronic pain, medications and need for constant leg elevation and rest.

He reported applicant's continued symptoms of "considerable swelling" and pain in his right leg below the knee, noting applicant "has not only areas of increased redness but splitting of the skin, and his leg is hard and woody to touch." (Ex. B, 11/22/17 Report.))

Dr. Feinberg concluded that applicant was permanent and stationary and, without considering his psychiatric injury, "from a purely medical standpoint he would need a sedentary job with the allowance for leg elevation intermittently and the ability to sit and stand at will. When considering his overall presentation including both psychiatric and medical issues, I suspect returning to the open labor market would be problematic at best. I otherwise defer to vocational experts on issues in their realm of expertise."

Dr. Feinberg provided an impairment rating of 35% WPI, based on Station and Gait Disorders from Table 13-15.

In his deposition on May 29, 2018, Dr. Feinberg stated his belief that applicant would have great difficulty returning to the open labor market, caused mostly by the effects of his industrial injury, with some contribution from his psychiatric state.

> . . . I think he'd have great difficulty reengaging in the open labor market when all things are considered.
>
> Q. You think all those things that you're considering are basically the result of or caused by his industrial injury?
>
> A. Well, I think there's contribution from his psychiatric state, but I think his industrial injury was the nidus that caused all this.
> (Ex. E. 5/29/18 Dr. Feinberg Deposition, 26:8-15.)

Dr. Shaffer, an Agreed Medical Examiner in psychology, evaluated applicant on several occasions beginning in 2014, with his last report dated February 10, 2019. (Ex. A.) At this time, applicant was separated from his wife, and in contentious divorce proceedings. They had sold their house for no gain, after nearly losing it in foreclosure, and applicant was renting a room. His marriage fell apart in 2017, when his wife left him without warning. After she left, applicant learned that his wife had been unfaithful for a long time. His youngest son became estranged from him, while he did not lose contact with his older son. Dr. Shaffer noted that applicant was very angry about having to pay the attorney fees for the divorce. Applicant also discovered that his wife had maxed out multiple credit cards issued in his name, but he was able to place most of the liability for the debt on her.

After an interview and a battery of psychological testing, Dr. Shaffer diagnosed applicant with Pain Disorder, Depressive Disorder, Insomnia, Caffeine/nicotine dependence in partial remission, and Partner Relational Problem, related to his divorce. Applicant appeared for his

examination without wearing his compression stockings, which caused him to become "progressively … more distressed, and again demonstrated that pain intensity increased along with swelling of the lower limb. Mr. Hillenbrand was in such pain and lying on the floor talking to me that it was my opinion he could not continue to sit through hours of completing questionnaires." (Ex. A. 2/10/19, p.52)

Dr. Shaffer found applicant had improved psychiatrically over time, despite his social and economic adversity, and had reached permanent and stationary status. He concluded that applicant's psychological condition was caused by his reaction to his industrial injury, and is a "valid psychological injury" per Labor Code section 3208.3.

He assessed applicant with a GAF of 61, an improvement from his previous GAF score of 56, and a 14% WPI. Addressing apportionment of his impairment, Dr. Shaffer found 25% of applicant's disability from his psyche injury was caused by his marital problems. He stated:

> In regard to apportionment, previously I noted up to 25% whole person impairment as related to a marital problem impacting psychiatric factors as well as "motivational" issues. I have reconsidered the latter issue, and at this point in time, there are "no motivational factors" impacting the whole person impairment and disability rating.
>
> On the other hand, within reasonable medical probability. the marital problem has grown more intense, complicated creating demands on his Psyche such that there should be a 25% apportionment to the nonindustrial factors driving residual depression and resulting impairment. Therefore, 75% of the residual l4% WPI (10.5%) is attributable to his industrial psychiatric reaction to a rather troublesome medical issue of complex regional pain syndrome.
> (Ex. A. 2/10/19, p. 56. Emphasis in original.)

Subsequently, in his deposition testimony, Dr. Shaffer agreed that the stress of applicant's marital problems arose after his 2009 industrial injury, and prior to learning of his wife's infidelity. Dr. Shaffer agreed that he had no evidence that applicant had marital problems prior to his industrial injury.

> Q. . . . I want to know if you have anything more specific than that to establish that his problems with his marriage preceded the industrial injury? Because it's clear that the industrial injury could have caused a great deal of stress on the marriage.
>
> A. I agree.

> Q. . . . is there any evidence or clarity that there was stress on the marriage prior to the industrial injury?
>
> A. No.
>
> Q. And if, in fact, the industrial injury was the cause of the marital breakup ultimately, then that would be not a non-industrial cause but an industrial cause; correct?
>
> A. Yes.
> (Ex. D. 5/14/19 Deposition Transcript, Dr. Shaffer, 23:3-20.)

In his February 10, 2019 report, Dr. Shaffer reviewed applicant's treating physician, Dr. Dickens' reporting from 2016 to 2018. Dr. Dickens placed limitations on applicant, limiting him to sit down work, with the ability to elevate his right leg, with ability to stand and walk as needed. Dr. Dickens prescribed Norco pain medication. He also prescribed a functional restoration program for applicant, which applicant declined. Dr. Dickens requested authorization for a consultation with a vascular surgeon about applicant's right leg edema, erythema and pain, but apparently the request was denied. He also recommended that applicant be treated by a specialist in complex regional pain syndrome. In 2017, Dr. Dickens sought to wean applicant from his Norco prescription, and replacing it with Suboxone, but applicant was opposed. Applicant has been paying for his medications out of pocket. Through July of 2018, Dr. Dickens reported applicant continued to have right knee and leg pain. Applicant also has severe skin fissures in his right foot, which makes him unable to bear weight on his right foot.

Dr. Shaffer also reviewed the reports from applicant's attempted participation in a functional restoration program in February of 2017. Applicant engaged in the program initially, but was discharged due to his being disruptive because of his pain and need to keep his leg elevated.

Applicant's vocational expert, Mr. Hodgson, prepared two vocational rehabilitation reports, in 2014 and 2015. Mr. Hodgson reported that during his interview applicant was "continually moving and adjusting his position (seated) and he got up three or four times to stretch his leg, neck and shoulder." Applicant stated that his activities are limited "due to the fact that the longer he is up and about, or even sitting, the worse the pain gets." Applicant finds relief during pool therapy and reclining with his leg elevated and iced. He wears compression stocking, elevates

and ices his leg and avoids walking or standing more than 15 to 20 minutes at a time. (Ex. 3, 9/2/14, p. 17.) Applicant spends the majority of his day lying down or reclining with his leg elevated.

Assessing applicant's transferable skills, Mr. Hodgson noted that applicant "possesses the intellectual capabilities to undertake and complete an appropriate vocational rehabilitation program. However, this opinion is tempered and ultimately negated due to the severity of Mr. Hillenbrand's medical condition as opined by the medical professionals in this case." (Ex. 3, 9/2/14, p. 18.) Mr. Hodgson cited the medical reporting of Dr. Hughes, who found applicant was permanently totally disabled and unable to work as he was unable to work on anything above a reclining position. He also cited a report of a functional capacity evaluation that indicated applicant could not tolerate an 8 hour work day due to pain, and had limited tolerance for sitting more than 25 minutes continuously and standing for more than 15 minutes continuously before pain necessitated a change in position. (Ex. 3, 9/2/14, p. 21-22.)

> With respect to the medical aspects of this case, there are three medical professionals who provided opinions relative to Mr. Hillenbrand's capabilities or restrictions. The three medical professionals are Dr. Hughes, Dr. Foglar, and Dr. Molitor. Also providing information relative to Mr. Hillenbrand's capabilities was Jonathan Blue, D/P/T of Ergo Links, who administered the functional capacity evaluation to Mr. Hillenbrand. In summarizing the medical opinions of Dr. Hughes and Dr. Molitor, they both opined that Mr. Hillenbrand is permanently totally disabled and that Mr. Hillenbrand is unemployable. Dr. Foglar opined that Mr. Hillenbrand could do nothing but a sit down job, and that this would not be likely due to his chronic pain and the problems he would encounter in dealing with elevating his leg/foot, his skin breakdown, and other issues. In addition, the functional capacity evaluation basically provided a factual basis to the medical opinions set forth above.
>
> Should Mr. Hillenbrand be restricted to sedentary or sitting type occupations, this would limit him to approximately 10-12% of the labor market. Unfortunately, the limitations set forth by the medical professionals and the functional capacity evaluation would basically preclude Mr. Hillenbrand from even this 10-12% of the labor market. Should an isolated employer be identified who might be able to accommodate Mr. Hillenbrand's medical limitations (lying down or reclining with his leg elevated for the majority of the work day), based on the chronic pain and medications Mr. Hillenbrand encounters day in and day out, it is my opinion that he would not be able to compete for or hold a position on a consistent basis in the open labor market.
>
> It should also be noted that, in my opinion, the information provided by the investigative agency in this case does not set forth information that would

> indicate any contradiction to the prior medical opinions set forth previously. In addition, based on my experience as a rehabilitation counselor, there are also no ergonomic or assistive devices that would accommodate Mr. Hillenbrand in a work setting to the level that would be necessary for him to become employed and meet the needs or requirements of an employer on a consistent basis. Finally, based also on my experience, the facts of this case and the labor market, any consideration of self-employment or contract work would not be practical or realistic.
>
> Based on my interview with Mr. Hillenbrand, he appeared to be a credible individual who would return to the labor market if possible. Unfortunately, as set forth above, considering the overall aspects and combination of challenges facing Mr. Hillenbrand (medical limitations, medications, requirement to recline/lie down the majority of the day, etc.), it is my opinion he is unable to equally compete for or hold a position consistently in the labor market. (Ex. 3, 9/2/14, p. 23-24.)

Defendant's vocational expert, Ms. Tincher, issued a Future Earning Capacity Evaluation on March 19, 2015. She reviewed the medical reports that Mr. Hodgson had also relied upon, including the opinions of Dr. Molitor and Dr. Hughes who concluded that applicant was permanently totally disabled and was not employable. She noted that during her evaluation, applicant would alternate between using a chair to prop up his right leg while sitting at a table, and then drop his leg after 30 minutes. During vocational testing, he sat with his leg down in order to write, but would raise his leg every five minutes.

She noted applicant had no experience with computers, does not use the internet and has no interest in doing so. She advised applicant, that based on his "skill, aptitudes and abilities . . . I believed he might have adequate background for work doing AutoCAD drafting or drawings, particularly in the area of construction or furniture." She noted applicant's belief that he would be unable to tolerate such work activity due to his need to keep his leg elevated to avoid swelling and pain. He also indicated his inability to wear shoes in the workplace. Ms. Tincher opined that his need to recline and elevate his leg, in light or sedentary jobs, could be accommodated in the workplace or working from home, and included photographs of reclining work stations with attached computer monitors and wireless keyboards. She observed that "a similarly situated worker would have protections under federal and state law to allow the use of a reclining work station." She also recommended the use of voice activated computer software.

She found applicant was feasible to participate in vocational rehabilitation, noting he has "sufficient physical capacity to use a computer," along with the "cognitive ability to learn and

adequate educational foundation to benefit from self-directed or formal classroom training." However, she also noted that the fact that he has no prior experience with, and no interest in, using computers, would be "his greatest barrier to vocational rehabilitation."

Assuming applicant was able to find full time work in alternative employment, Ms. Tincher calculated a 14.2% loss of earning capacity, associated with the FEC modifier of five. Assuming part time work, Ms. Tincher calculated a 28.4 DFEC associated with FEC-6.

In subsequent reports, Ms. Tincher emphasized applicant's amenability to vocational rehabilitation, citing applicant's testing results showing he had some areas of strong performance, like mechanical reasoning. (Ex. H. 8/12/15 Supplemental Report, p. 2.) She indicated applicant would be amenable to a return-to-work training plan, including home based customer service jobs using a recliner and a computer, which she compiled in a supplemental report. (Ex. H. 11/13/15 Supplemental Report.) She listed multiple jobs that required computer and software experience and high speed internet access.

In her final report, Ms. Tincher reviewed additional medical reports, including Dr. Shaffer's November 25, 2015 report, wherein Dr. Shaffer indicated that applicant "cannot be vocationally retrained in anything." She cited Dr. Shaffer's conclusion that applicant's impairment should be apportioned in part to his lack of motivation to work or participate in vocational rehabilitation, and concluded therefore that his non-amenability to vocational rehabilitation was due to non-industrial factors.

> In the opinion of Dr. Schaffer, Mr. Hillenbrand is resistant to vocational rehabilitation and lacking is motivation due to non-industrial factors: As a result, Dr. Shaffer has apportioned 20% of the GAF or WPI rating to this factor and another 5% is apportioned to non-industrial relationship issues. When apportionment is hypothetically applied, there is a clear identification of non-industrial barriers to amenability to vocational rehabilitation. Based on Dr. Schaffer's report and determinations, I have concluded that Mr. Hillenbrand is unable to benefit from vocational rehabilitation due to the synergistic effect of the non-industrial factors, when combined the industrially related factors. (Ex. H. 1/16/16 Supplemental Report, p. 7-8. Emphasis added.)

In this report, she also disputed Dr. Hughes' conclusion that applicant was not capable of returning to the work force due to applicant's need to elevate his leg to relieve his pain and swelling, asserting that Dr. Hughes was insufficiently apprised of "the full range of vocational

options and training available to Mr. Hillenbrand, which are reasonably attainable vocational goals." (Ex. H. 1/16/16 Supplemental Report, p. 6.)

Mr. Hodgson prepared a supplemental report dated June 2, 2015, to comment on Ms. Tincher's reporting. (Ex. 3, 6/2/15 Supp. Report.) He noted the likely absence of success in placing applicant in an entry level job, as fulfilling the requirement to accommodate his need for a reclining chair was "highly unlikely, if not an exercise in futility." He further considered applicant's vocational options to be restricted, given his need for extensive training, since his transferable skills as an artisan craftsman were limited.

> When considering the vocational options set forth in Ms. Tincher's report and what would be necessary just to train Mr. Hillenbrand for entry level skills, all of the test results point not only to extensive training being necessary, but also a significant amount of remedial work in Mr. Hillenbrand's basic educational areas would also be necessary.
> (Ex. 3, 6/2/15 Supp. Report, p. 3.)

Addressing applicant's ability to find employment working from his home, Mr. Hodgson noted that employers would require him to "have an extensive skill and knowledge base in the targeted area in order to be able to work by one's self on an independent basis to be productive from a home-based setting, whether full-time or part-time."

> Therefore, such a home-based employee will need to have developed skills, knowledge and experience through onsite work with an employer prior to transitioning into either a full-time or part-time home-based position with an employer. It should also be noted that if one considers self-employment as a means of working from home, such an operation requires a good deal of experience and/or knowledge in the particular vocational area before targeted contract employers or customers will consider forming a working relationship. This is also not to mention such a self-employment, home-based business requires one to go out and market one's business to other targeted employers or businesses.
> (Ex. 3, 6/2/15 Supp. Report, p. 3-4.)

Mr. Hodgson further opined, with regard to applicant's amenability to vocational rehabilitation, that he did not believe applicant would be able to function in a sheltered workshop setting. He reviewed a number of factors that precluded applicant from benefiting from vocational rehabilitation. First, all of the medical evaluators questioned applicant's ability to return to work, due to his medical issues, limitations and chronic pain. Second, he noted that applicant's vocational

testing reflected "low to marginal test results that in my opinion would require remedial training in order to elevate Mr. Hillenbrand's basic academic skills to a level whereby he would be able to successfully undertake and complete a relevant and appropriate rehabilitation program." Third, requiring an employer to provide necessary accommodation for applicant's medical need to recline to elevate his leg "would greatly limit, and in my opinion, almost negate his finding an appropriate employment setting in the open labor market." Finally, Mr. Hodgson noted that applicant's medications were significant and applicant's description of their effects correlated directly with the side effects listed for his medications. (Ex. 3, 6/2/15 Supp. Report, p. 5.) He concluded:

> Based on my interview with Mr. Hillenbrand, a thorough review of the case file, and completed research, it is my opinion that Mr. Hillenbrand is not amenable to rehabilitation. Unfortunately, as set forth above, considering the overall aspects and combination of challenges facing Mr. Hillenbrand, it also is my opinion he is unable to equally compete for or hold a position consistently in the open labor market. Again, based on the information and facts set forth in my original report and this supplemental report, it is my opinion that Mr. Hillenbrand is not amenable to undertaking and successfully completing a rehabilitation program due to his industrial injury and associated issues. Subsequently, Mr. Hillenbrand is totally (100%) disabled and his DFEC is also 100% relative to his future earning capacity.
> (Ex. 3, 6/2/15 Supp. Report, p. 5-6.)

The WCJ issued rating instructions to the DEU, instructing the rater to rate the impairment ratings of Dr. Hughes, Dr. Feinberg and Dr. Shaffer, and "include Dr. Hughes' December 11, 2014, and Dr. Molitor's September 23, 2013 comments that applicant is not employable." He also indicated that there should be 25% apportionment of applicant's psychiatric disability to non-industrial causes.

The DEU issued a rating of 82%, in accordance with the WCJ's instructions to apportion applicant's psychiatric disability.

Thereafter applicant's attorney wrote to the WCJ to object to the rating, contending that Dr. Shaffer had admitted in his deposition testimony that his apportionment determination was based on speculation and rumor and there was no substantial medical evidence to support it.

The WCJ found applicant was entitled to an unapportioned award of 84% permanent disability, explaining in his Opinion on Decision that he found Dr. Shaffer's apportionment did not meet proper legal standards. He also indicated that the rater considered the factor cited in the

rating instructions, that the physicians found applicant was unemployable, and he deferred to the rater's expertise in concluding applicant was not permanently totally disabled.

DISCUSSION

Applicant contests the WCJ's award of permanent partial disability, contending that there is substantial medical and vocational evidence in the record sufficient to rebut the 84% permanent disability rating obtained through application of the AMA Guides, and establishes that he is permanently totally disabled solely as a result of his 2009 industrial injury. Applicant further argues that the WCJ's rating instructions improperly specified 25% psychiatric apportionment and foreclosed the rater from finding 100% permanent disability based upon the medical evidence.

In his Findings and Award, the WCJ agreed with applicant that there should be no apportionment of his psychiatric disability, and modified the rating issued pursuant to his rating instructions by combining the ratings without apportionment.

Applicant asserts that the WCJ erred in rating his permanent disability based on a strict application of the AMA Guides, contending that he is entitled to a finding of permanent total disability based on a rebuttal of the AMA Guides rating by the medical and vocational evidence in the record that establishes he has experienced a total loss of future earning capacity and inability to benefit from vocational rehabilitation.

On this record, based on the medical opinions of Dr. Hughes, Dr. Feinberg and Dr. Shaffer, and the vocational evidence from Mr. Hodgson, we conclude that applicant has successfully rebutted the scheduled 84% permanent disability rating, per *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] and *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587]. We will grant applicant's Petition for Reconsideration and return this matter to the trial level for an award of permanent total disability.

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 PDRS 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].)

The scheduled rating is not absolute. (*Fitzpatrick*, *supra* at 1685.) A rating obtained pursuant to the PDRS may be rebutting by showing the diminished future earning capacity is greater than the factor supplied by the PDRS. (*Ogilvie*, supra; *Contra Costa County v. Workers' Comp. Appeals Bd*. (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119].) 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 schedule 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).

As raised in applicant's Petition for Reconsideration, in addition to the medical evidence supporting a finding that applicant is permanently totally disabled, applicant's vocational expert found applicant's future earning capacity was less than reflected in a scheduled rating based upon the effects of his industrial injuries, without consideration of impermissible non-industrial factors.

As the *Ogilvie* Court acknowledged:

> [C]ases 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 [193 Cal. Rptr. 547, 666 P.2d 989].

Consistent with applicant's testimony concerning his physical limitations, all of the reporting physicians have expressed the view that applicant would not be able to return to employment in the open labor market. Dr. Hughes concluded that applicant was not employable, and his ability to participate in vocational rehabilitation was limited by his need to constantly elevate and ice his leg due to his "intractable pain and swelling." (Ex. 1, 12/11/14 Supplemental Report, p. 2; Ex. C, 10/15/15 Supplemental Report, p. 2.)

Dr. Feinberg concurred with Dr. Hughes' assessment of applicant's limitations. He opined that applicant's potential return to the labor market was "problematic at best," while deferring the issue to vocational experts.

In his November 25, 2015 report, Dr. Shaffer indicated that vocational rehabilitation was "impossible," and that applicant "cannot be vocationally retrained in anything," based on his view that applicant had limited motivation to return to the work force. (Ex. A. 11/25/15 Report, p. 43.) Dr. Shaffer subsequently concluded that applicant's lack of motivation was a symptom of his psyche disability and was not a non-industrial factor. (Ex. A. 2/10/19, p. 56.)

Mr. Hodgson concluded that applicant was unable to benefit from vocational rehabilitation due to the effects of his industrial injury, disputing defendant's vocational expert, Ms. Tincher's view that applicant was employable and amenable to vocational rehabilitation. Mr. Hodgson found it implausible that applicant would be able to find employment through ADA accommodations to meet his need to constantly elevate and ice his leg. He disagreed with Ms. Tincher that applicant would be able to secure competitive employment, either in a workplace setting or at home, by the provision of a reclining work station. He concluded that applicant would not be competitive in the open labor market in view of his physical limitations, and would not be amenable to participation in vocational rehabilitation for the same reasons.

In fact, Ms. Tincher ultimately concluded that applicant was <u>not</u> feasible to participate in vocational rehabilitation, but qualified her opinion by reference to Dr. Shaffer's view that applicant's impairment was caused in part by a non-industrial lack of motivation, which meant that his inability to benefit from vocational rehabilitation was subject to apportionment. However, as discussed above, Dr. Shaffer retracted his apportionment to a non-industrial lack of motivation. Ms. Tincher opined:

> In the opinion of Dr. Shaffer, Mr. Hillenbrand is resistant to vocational rehabilitation and lacking in motivation due to non-industrial factors: As a result,

> Dr. Shaffer has apportioned 20% of the GAF or WPI rating to this factor and another 5% is apportioned to non-industrial relationship issues. When apportionment is hypothetically applied, there is a clear identification of non-industrial barriers to amenability to vocational rehabilitation. Based on Dr. Schaffer's report and determinations, I have concluded that Mr. Hillenbrand is unable to benefit from vocational rehabilitation due to the synergistic effect of the non-industrial factors, when combined the industrially related factors. (Ex. H. 1/16/16 Supplemental Report, p. 7-8. Emphasis added.)

If the apportionment to non-industrial factors is unsupported, Ms. Tincher's conclusion that applicant is unable to benefit from vocational rehabilitation is consistent with Mr. Hodgson's conclusion and supports our finding that applicant is permanently totally disabled.

This raises defendant's contention in its Petition for Reconsideration that the WCJ erred in rejecting Dr. Shaffer's 25% apportionment to non-industrial factors related to applicant's psyche disability. Labor Code section 4663(a) provides, "Apportionment of permanent disability shall be based on causation." Labor Code section 4664(a) provides, "The employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." The defendant has the burden of proof on the issue of apportionment. (*Escobedo v Marshalls* (2005) 70 Cal. Comp. Cases 604 (Appeals Board en banc).)

In *Escobedo*, the Appeals Board held that for a medical opinion on apportionment to constitute substantial evidence, the 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*, 70 Cal.Comp.Cases at 621-622. accord: *Andersen v. Workers' Comp. Appeals Bd*. (2007) 149 Cal.App.4th 1369, 1381–1382 [72 Cal.Comp.Cases 389]; *E.L. Yeager Construction v. Workers' Comp. Appeals Bd*. (*Gatten*) (2006) 145 Cal.App.4th 922, 927–928 [71 Cal.Comp.Cases 1687]; *Marsh v. Workers' Comp. Appeals Bd*. (2005) 130 Cal.App.4th 906, 917, fn. 7 [70 Cal.Comp.Cases 787].)

Defendant argues that Dr. Shaffer's apportionment to applicant's marital problems is justified despite Dr. Shaffer's deposition testimony that he had no evidence to support his view that applicant's marital discord was a pre-existing non-industrial factor. Dr. Shaffer agreed that the stress of applicant's injury was a source of his marital problems, and he had no evidence that applicant experienced any marital stress prior to his industrial injury. The WCJ found Dr. Shaffer's testimony, where he essentially conceded that his conclusion that applicant's marriage was

problematic before his industrial injury was based on conjecture, and therefore did not constitute substantial medical evidence. To the extent that applicant's psychiatric impairment was caused by the marital discord that arose after his industrial injury, Dr. Shaffer agreed that it was caused by the effects of applicant's chronic pain from his industrial injury. Therefore, we concur with the WCJ that there is no basis to apportion any of applicant's psychiatric impairment to non-industrial factors.

Finally, with regard to defendant's argument that the WCJ erred in finding applicant entitled to the 15% bump in his permanent disability award pursuant to Labor Code section 4658, because applicant did not present evidence that defendant employed in excess of 50 employees, the issue is moot.

As applicant has established that he is entitled to an award of permanent total disability, his permanent disability award is not subject to Labor Code section 4658, as that section only applies to permanent disability awards up to 99.75%. (*Calora v. County of San Luis Obispo*, 2013 Cal. Wrk. Comp. P.D. LEXIS 596.)

Accordingly, we will grant applicant's Petition for Reconsideration to find applicant is permanently totally disabled, and will return this matter to the trial level for the determination of a new permanent disability award. We will deny defendant's Petition for Reconsideration for the reasons stated above.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the November 18, 2020 Findings and Award is **DENIED**.

IT IS FURTHER ORDERED that applicant's Petition for Reconsideration of the November 18, 2020 Findings and Award is **GRANTED**, and as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the Findings and Award is **AFFIRMED**, except it is **AMENDED** as follows:

FINDINGS OF FACT

6. Applicant sustained 100% permanent disability as a result of his industrial injury, and is entitled to an award of permanent disability indemnity in an amount to be determined, less a reasonable attorney's fee to be paid to applicant's attorney.

AWARD

AWARD IS MADE in favor of applicant **MAXAMILLION HILLENBRAND** against defendant **ENDURANCE ASSURANCE CORP**. of:

a. All further medical treatment reasonably required to cure or relieve the effects of the injury.

b. Permanent total disability indemnity, and a life pension, in an amount to be determined, less a reasonable attorney's fee payable to Raymond Wyatt, in an amount to be determined and subject to commutation as determined by the WCJ.

IT IS FURTHER ORDERED that this matter is **RETURNED** to the trial level for a new award of permanent disability indemnity, a life pension and attorney fees.

WORKERS' COMPENSATION APPEALS BOARD

/s/ MARGUERITE SWEENEY, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 8, 2021

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

MAXAMILLION HILLENBRAND
RAYMOND M. WYATT
STOCKWELL, HARRIS, WOOLVERTON & HELPHREY

SV/*pc*

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