WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

ALMA RAMIREZ, *Applicant*

vs.

STAR INSURANCE COMPANY, insurer for JAGUAR FARM LABOR CONTRACTING, INC., administrated by MEADOWBROOK, *Defendants*

Adjudication Number: ADJ10887226
Salinas District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

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

The WCJ's report, moreover, cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313. (*City of San Diego v. Workers' Comp. Appeals Bd.* (*Rutherford*) (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026 (writ den.).)

For the foregoing reasons,

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

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSÉ H. RAZO, COMMISSIONER

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 16, 2021

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

ALMA RAMIREZ
KNOPP PISTIOLAS
BRADFORD & BARTHEL

PAG/oo

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

REPORT AND RECOMMENDATION ON PETITION FOR RECONSIDERATION

I
INTRODUCTION

Applicant has filed a timely, verified Petition for Reconsideration of the Findings and Award of 4/27/2021.

II
FACTS

Applicant, Alma Ramirez, while employed on 7/5/16 as a farm laborer, Occupational Group 491, at St. Helena, California, by Jaguar Farm Labor Contracting, Inc., then insured by Star Insurance Company, sustained injury arising out of and in the course of employment to her left wrist and did not sustain injury arising out of and in the course of employment to her left hand and fingers.

The undersigned issued a Findings of Fact on 3/8/21 that gave a tentative rating of Applicant's permanent disability. Applicant's date of birth was at issue. (Findings of Fact, 3/8/21.) After augmenting the record, Applicant was determined to be 49 years old at the time of injury. The undersigned issued a final rating of 19% PD. (Findings and Award, 4/27/21.)

Applicant petitions for reconsideration contending, "The WCJ failed to engage in any analysis and articulate any rationale that supports the WCJ's conclusion that the vocational evidence did not rebut the PDRS. The failure to articulate any reasoning supporting the WCJ's decision denied applicant due process protections." (Appl's Petition for Reconsideration, 5/17/21, p. 4.)

Applicant seeks either that Findings and Award be vacated, that "Applicant be awarded permanent disability based on the range of medical and vocational evidence," or that the case be remanded for further development of the record. (Appl's Petition, p. 16, "Prayer.")

III
DISCUSSION

Applicant's single contention is that she was denied due process, because the undersigned failed to elaborate on her conclusion that Applicant failed to rebut the PDRS. Due process requires that a party have notice and the opportunity to be heard. "The Board, as a tribunal is required to afford all parties the fundamental right of due process which requires that "All parties must be fully apprised of the evidence submitted or to be considered, and must be given opportunity to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal. In no other way can a party maintain its rights or make its defense." (*Massachusetts Bonding & Ins. Co. v. Ind. Acci. Com.* (1946) 74 Cal.App.2d 911, 914.) Applicant does not maintain that she was denied due process at or before trial.

A WCJ's report "cures any technical or alleged defect in satisfying the requirements of Labor Code section 5313." (*City of San Diego v. Workers' Comp. Appeals Bd.* (*Rutherford*) (1989) 54 Cal.Comp.Cases 57 (writ den.); *Smales v. Workers' Comp. Appeals Bd.* (1980) 45 Cal.Comp.Cases 1026 (writ den.).) To the extent that the undersigned failed to elaborate on her conclusions, they will be discussed below.

Two medical reports by QME Dr. Fernando Luque and PTP Dr. Phillip Wagner were submitted to support a permanent disability award. The Applicant's PD for her left wrist was rated at 19%, based on Dr. Luque's opinion. (APPL'S EX. A-5: Report, Fernando Luque, D.C., 11/19/18; DEFT'S EX. D-8: Report, Phillip Wagner, M.D., 3/15/17.) Applicant submitted vocational evidence by Jeff Malmuth to argue that she suffered a greater loss of earning capacity than her scheduled PD. (APPL'S EX. A-6: Report, Jeff Malmuth & Company, 8/28/20; APPL'S EX. A-7: Report, Jeff Malmuth & Company, 3/12/19.)

In the 3/8/21 Findings of Fact, the undersigned stated in the Opinion on Decision that Applicant had failed to rebut the scheduled rating. The burden of proof is on the party asserting an alternative rating. "The rebuttable presumption established by section 4660, subdivision (c) is a presumption affecting the burden of proof, and the burden of rebutting a scheduled rating rests with the party disputing the rating. (*Almaraz v. Environmental Recovery Services* (2009) 74 Cal.Comp.Cases 1084, 1097–1098 [WCAB en banc], citing Evid. Code, §§ 601, 605.) Since Worker disputed the scheduled ratings of 68 and 70 percent, she had the burden of presenting substantial evidence that rebutted those ratings." (*Applied Materials v. Workers' Comp. Appeals*

Bd. & D.C. (May 7, 2021, Nos. H047148, H047154) __Cal.App.5th__ [2021 Cal. App. LEXIS 461, at *95], ordered published on 6/1/21.)

Per *Ogilvie III*, there are essentially three ways to challenge a scheduled rating. The Court of Appeal in *Ogilvie III* held "that an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1277; 76 Cal. Comp. Cases 624 (rev. den.).)

The first two methods are not implicated in this case. The third, "amenability to rehabilitation," is the remaining method that Mr. Malmuth attempted to address.

This WCJ did not find Mr. Malmuth's opinions to be substantial evidence. In formulating its decisions, the WCAB may only rely upon expert opinions that constitute substantial evidence. Opinions that are based on incorrect legal theories, "surmise, speculation, conjecture, or guess," are not substantial evidence." (*Hegglin v. W.C.A.B.* (1971) 4 Cal.3d 162, 165.) Conclusory opinions do not constitute substantial evidence. (See *Ins. Co. of No. America v. W.C.A.B.* (1981) 46 Cal. Comp. Cases 913, 917.)

Mr. Malmuth relies on impermissible factors, such as pre-injury skills and age, to conclude that Applicant is not amenable to rehabilitation. The following statements are examples:

- "From my perspective Ms. Ramirez must be viewed vocationally as a severely injured worker with multiple disabling functional limitations, chronic pain, *a limited pre-injury occupational base and 49 years old at DOI. Taken together these factors will preclude the use of any transferable or marketable skills to post injury work irrespective of any "impermissible" or "Montana factors.""* (APPL'S EX. A-7: Report, Jeff Malmuth & Company, 3/12/19, p. 5. (Italics added).)
- "Upon performing an individualized analysis of amenability to vocational rehabilitation as required by the *Dahl* court that includes medically imposed functional limitations combined with the negative effects of age and other pertinent individualized factor

described above it is clear from my perspective that this individual is, for all practical purposes, totally disabled." (Id., pp. 5-6.)

- "Accounting for restrictions determined by Dr. Luque relative to her pre-injury labor market: In compliance with the AMA Guides 5th Edition Ms. Ramirez will experience an estimated 60% alteration in her capacity to meet post injury occupational demands when compared to her pre-injury capacity." (Id., p. 6.)
- Secondary to her post injury occupation erosion Ms. Ramirez will experience an estimated 82% diminished ability to compete in the open labor market when compared to her pre-injury labor market access. (*LeBoeuf* and *Brodie*.) (Ibid.)
- Ms. Ramirez has been out of the labor market for 3 years as a direct and sole consequence of her 7/5/2016 industrial injuries and the attendant disabling limitations. Regarding transferability of skills, skills become obsolete, requirements in the labor market change with time, as do tools, materials, and work aides necessary to perform the essential tasks of the job. Ms. Ramirez however does not possess any marketable skills from the unskilled work she performed prior to the date of her career ending injuries.
- "When accounting for her age at injury and MMI combined with her limited occupational history, functional limitations and pain described by Dr. Luque I do not believe vocational retraining or any other form of vocational rehabilitation will succeed in returning her to competitive employment." (Id., p. 12.)
- "Nevertheless, regarding the likelihood of a severely injured unskilled worker with below average academic scores who was 49 years of age at DOI returning to a competitive labor force after 3 years, absent extraordinary vocational adjustment and accommodations, and a multidisciplinary effort is, in my opinion, nil." (Id., p. 15.)

As noted by the *Ogilvie* Court,

> "While some of the briefing provided to the court may be read to suggest that under *LeBoeuf* a disability award may be affected when an employee is not amenable to vocational rehabilitation for any reason, *the most widely accepted view of its holding, and that which appears to be most frequently applied by the WCAB, is to limit its application to cases where the employee's diminished future earnings are 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.*

> This application of *LeBoeuf* hews most closely to an employer's responsibility under sections 3208 and 3600 to "compensate only for such disability or need for treatment as is occupationally related." (*Livitsanos v. Superior Court, supra*, 2 Cal.4th at p. 753.) "Employers must compensate injured workers only for that portion of their permanent disability attributable to a current industrial injury, not for that portion attributable to previous injuries or to nonindustrial factors." (*Brodie v. Workers' Comp. Appeals Bd., supra*, 40 Cal.4th at p. 1321 [discussing apportionment].) An employee effectively rebuts the scheduled rating when the employee will have a greater loss of future earnings than reflected in a rating because, *due to the industrial injury*, the employee is not amenable to rehabilitation." (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274-1275; 76 Cal. Comp. Cases 624 (italics added).)

Mr. Malmuth utilizes incorrect legal theories. The following are examples:

- "A Diminished Occupational Capacity evaluation is not a rebuttal of the 2005 PDRS but rather an alternate rating based on the AMA Guides 5th Edition incorporating chapters 1 and 2. Therefore, if one were to follow this approach the issue of Amenability to Vocational Rehabilitation would not apply since nonamenability to vocational rehabilitation is not a threshold requirement for an AMA/AG evaluation. Rather, this evaluation is within the four corners of the Guides and is based in particular on chapters one and two. Nevertheless, as an alternative theory I will provide my opinion regarding Vocational Amenability in the body of this report."
- "'Amenability to Vocational Rehabilitation': Vocational rehabilitation means rehabilitating an injured worker vocationally. This concept assumes that successful vocational rehabilitation services should return an injured worker to competitive work. I have determined that the number of vocationally reasonable methods of returning Ms. Ramirez to competitive work is limited in scope. Based on the functional limitations determined by Dr. Luque I conclude that Ms. Ramirez's post injury occupational base results in "impaired amenability" as distinguished by the *Ogilvie* Court and the *Dahl* Court:

  The *Ogilvie* Court wrote: 'Another way the cases have long recognized that a scheduled rating has been effectively rebutted is 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. *Ogilvie v WCAB* (2011) 76 Cal. Comp. Cases 633, emphasis added.'" (Id., pp. 6-7.)

Furthermore, the *Dahl* Court distinguished between 'impaired' and 'eliminated' amenability to vocational rehabilitation:

In any event, even if an employee's ability to rehabilitate need only be impaired (and not eliminated) in order to rebut the schedule, *Dahl* failed to make such a showing here." (Id., p. 7.)

As the *Fitzpatrick* Court made clear, the requirements of Labor Code section 4660 also apply to cases of permanent total disability. There is no "alternative path" under Labor Code section 4662(b). "We further see no basis for concluding section 4662, subdivision (b), provides a second independent path to permanent total disability findings separate from section 4660. Section 4660 is *mandatory*. There is nothing ambiguous or unclear in section 4660's directive that "[i]n determining *the percentages of permanent disability*, account shall be taken of the nature of the physical injury or disfigurement, the occupation of the injured employee, and his or her age at the time of the injury, consideration being given to an employee's diminished future earning capacity" and the 2005 Schedule "*shall* be prima facie evidence of the *percentage of permanent disability* to be attributed to each injury covered by the schedule." (§ 4660, subds. (a), (c), italics added; see § 15 ["'[s]hall' is mandatory and 'may' is permissive"].) (*Dept. of Corrections & Rehabilitation v. W.C.A.B.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 622; 83 Cal. Comp. Cases 1680.)

IV
RECOMMENDATION

It is recommended that Applicant's Petition for Reconsideration be denied.

ROISILIN RILEY
Workers' Compensation
Administrative Law Judge