WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

GRACE NUNES, *Applicant*

vs.

STATE OF CALIFORNIA, DEPT. OF MOTOR VEHICLES, Legally Uninsured; STATE COMPENSATION INSURANCE FUND, Adjusting Agency, *Defendants*

Adjudication Number: ADJ8210063; ADJ8621818
Fresno District Office

OPINION AND DECISION AFTER RECONSIDERATION (En Banc)

We previously 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 Opinion and Decision After Reconsideration (En Banc).

To secure uniformity of decision in the future, the Chair of the Appeals Board, upon a unanimous vote of its members, assigned this case to the Appeals Board as a whole for an en banc decision.[1] (Lab. Code, § 115.)

Defendant seeks reconsideration of the February 21, 2023 Findings of Fact and Award (F&A), wherein the workers' compensation administrative law judge (WCJ) found that in Case No. ADJ8210063, applicant, while employed as a Motor Vehicle Field Representative on September 13, 2011, sustained industrial injury to her neck, upper extremities, and left shoulder. The WCJ further found that in Case No. ADJ8621818, applicant, while employed as a Motor Vehicle Field Representative from September 13, 2010 to September 13, 2011, sustained injury to

[1] En banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and workers' compensation administrative judges. (Cal. Code Regs., tit. 8, § 10325; *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].) This en banc decision is also adopted as a precedent decision pursuant to Government Code section 11425.60(b).

her bilateral upper extremities. The WCJ found that applicant is entitled to an unapportioned award of 100 percent industrial disability.[2]

Defendant contends that the WCJ's decision does not comply with the requirements of Labor Code section 5313;[3] that applicant did not rebut the scheduled rating under section 4660; that substantial medical evidence supports apportionment to nonindustrial factors; and that applicant's preexisting disability is presumed to be present at the time of the specific injury of September 13, 2011.

We received an Answer from applicant. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be granted to clarify that applicant's permanent and total disability arose solely out of her specific injury of September 13, 2011.

We have considered the Petition for Reconsideration, the Answer, and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we conclude that:

1. **Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."**

2. **Vocational evidence may be used to address issues relevant to the determination of permanent disability.**

3. **Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.**

Applying these principles to the present matter, we conclude that the current medical and vocational record is analytically incomplete. Accordingly, we will rescind the F&A and return this matter to the trial level for further proceedings consistent with this opinion.

---

[2] The WCJ apparently intended to issue a joint award in ADJ8210063 and ADJ8621818. However, it is not clear whether the cases were consolidated at trial. Further, the F&A identifies "Stipulated Facts," "Findings of Fact," and "Issues." It is not necessary to differentiate between a finding of fact based on a stipulation under Labor Code section 5702 and a finding of fact based on the evidence submitted in the record at trial. This is because once the WCJ approves a stipulation under Labor Code section 5702, the stipulation becomes a finding of fact, and there is no difference in the legal effect between findings based on a stipulation and findings based on the evidence at trial. Finally, the issues to be decided need not be identified in the findings and award.

[3] Further references are to the Labor Code unless otherwise stated.

FACTUAL BACKGROUND

In the cases before us, applicant sustained two admitted industrial injuries while employed by defendant. In Case No. ADJ8210063, applicant sustained injury to her neck, upper extremities, and left shoulder, on September 13, 2011. In Case No. ADJ8621818, applicant sustained injury to her bilateral upper extremities from September 13, 2010 to September 13, 2011.[4]

The parties selected Melinda Brown, M.D., to act as the qualified medical evaluator (QME) in orthopedic medicine. Dr. Brown first evaluated applicant on August 20, 2012. (Ex. A, Report of Melinda Brown, M.D., August 20, 2012, at p. 11.) Applicant underwent cervical spine surgery on March 20, 2014, including a fusion at the C5-6 level. (Ex. D, Report of Melinda Brown, M.D., May 17, 2016, at p. 9.) Dr. Brown declared applicant permanent and stationary as of her May 17, 2016 evaluation, and assigned impairment to the cervical spine, left upper extremity, and carpal tunnel syndrome. (*Id*. at p. 22.) Dr. Brown further opined to 100 percent industrial causation of the left shoulder impairment, and to 60 percent industrial causation of the cervical spine impairment, with 40 percent apportioned to preexisting degenerative factors. (*Id*. at p. 25.) Dr. Brown ascribed applicant's carpal tunnel symptoms to cumulative injury, with 40 percent apportioned to industrial factors, and 60 percent apportioned to nonindustrial diabetes. (*Id*. at p. 26.) Dr. Brown noted that absent shoulder surgery, applicant was not likely to return to her usual and customary duties with the Department of Motor Vehicles, and restricted applicant from forceful gripping, grasping, reaching above chest level with the left upper limb, repetitive forward reaching, lifting and carrying in excess of 15 pounds with the bilateral hands or three pounds with the left hand, and any static neck positioning. (*Ibid.*)

On March 16, 2021, Dr. Brown issued a supplemental report following a reevaluation of applicant and a review of records. Dr. Brown opined that "[f]unctionally, I do not believe [applicant] would be employable in the open-labor market based on evaluation today … I do believe her inability to work is based on a pain basis and function." (Ex. G, Report of Melinda Brown, M.D., March 16, 2021, at p. 32.)

On June 18, 2021, applicant's vocational expert Gene Gonzales evaluated applicant and issued a report addressing applicant's feasibility for vocational retraining. (Ex. X, Report of Gene

[4] While we do not address the issue of the liability period, the parties are reminded that the liability period identified pursuant to section 5500.5 is not a date of injury. Instead, for cumulative injuries, the date of injury is determined pursuant to section 5412. (See Lab. Code, § 3208.1.)

Gonzales, June 18, 2021, at p. 34.) In the report, Mr. Gonzales reviewed the medical record, including relevant work restrictions, and presented the results of applicant's vocational testing and transferable skills analysis. Mr. Gonzales concluded that the "transferable skills analysis tool revealed that applicant sustained a 100 percent loss of access to her open labor market." (*Id.* at p. 27.) Mr. Gonzales concluded that applicant "has sustained an industrial injury that has resulted in significant functional limitations, that within all reasonable vocational probability, preclude her from accessing and/or applying previously acquired transferable skills." (*Id.* at p. 34.) Applicant was deemed "not amenable" to vocational rehabilitation, accordingly. (*Id.* at p. 35.)

Mr. Gonzales also addressed apportionment by acknowledging Dr. Brown's determination that applicant's left shoulder injury was 100 percent industrial, while 40 percent of the cervical spine injury was attributed to nonindustrial factors. Mr. Gonzales opined:

> Vocational apportionment is not the same as medical apportionment. For most if not all individuals, medical impairment naturally develops as we age (i.e. degenerative disc disease, hypertension, etc.). Other individuals have long-standing impairments that are with them throughout much of their life. However, medical impairment does not always result in work disability. Often individuals with medical impairment are able to cope with any symptoms they may have and function in a workplace without impediment; in such a case, there is medical impairment, but no work disability.
>
> (*Id.* at p. 37.)

Following his review of the medical reporting, as well as applicant's vocational history and testing results, Mr. Gonzales concluded:

> From a vocational standpoint, Ms. Nunes' preexisting/non-industrial degenerative condition had zero impact to her earning capacity given applicant's work history. Based upon the well-reasoned opinion of Agreed Panel QME Dr. Brown, the limitations that have rendered Ms. Nunes 100 percent permanently and totally disabled are a direct result of the left shoulder and cervical spine injury on September 13, 2011. It should be noted that standing alone, absent the right elbow/shoulder condition, carpal tunnel syndrome, and diabetic condition, Ms. Nunes' functional limitations and chronic pain clearly render her 100 percent permanently and totally disabled. Without question, vocational apportionment in Ms. Nunes' case is 100 percent industrial and attributable to the specific injury of September 13, 2011.
>
> (*Id.* at p. 38.)

He concluded that because applicant "was capable of performing her usual and customary work with zero impediment until the specific injury of September 13, 2011 … 100 percent of Ms. Nunes' loss of future earning capacity and non-amenability to vocational rehabilitation is industrial in nature." (*Id.* at pp. 38-39.)

On August 17, 2021, QME Dr. Brown reviewed additional treatment and vocational records, and opined, "…based on review of [the] vocational assessment there are not job options available in the open labor market that are meeting her limitations. I would agree based on this assessment that she is 100% disabled." (Ex. H, Report of Melinda Brown, M.D., August 17, 2021, at p. 11.)

On January 31, 2022, defense vocational expert Steven D. Koobatian, Ph.D., evaluated applicant on behalf of defendant. The reporting of Dr. Koobatian detailed the results of vocational testing, and reviewed applicant's vocational and medical history. Based on his review, Dr. Koobatian concluded that "it is likely that Ms. Nunes is not employable in the competitive labor market resulting in a substantial loss of future earning capacity." (Ex. Y, Report of Steven Koobatian, Ph.D., January 31, 2022, at p. 33.) However, the report also detailed nonindustrial factors of apportionment to the cervical spine, right upper limb, and left carpal tunnel, as identified by Dr. Brown. Following a review of these nonindustrial factors, Dr. Koobatian concluded that "while the majority of Ms. Nunes' present medical barriers are industrial in origin, the undersigned opines at least 10% *vocational apportionment* from non-industrial medical factors is attributable to Ms. Nunes' inability to compete in the open labor market and participate in vocational rehabilitation services." (Italics added.) (*Id.* at p. 37.)

On March 24, 2022, Dr. Koobatian issued a supplemental vocational rehabilitation evaluation report, further explaining that his assessment of 10 percent "vocational apportionment" was based on the fact that "applicant's non-industrial conditions would likely be further aggravated causing additional barriers/problems in [applicant] carrying out alternative work, including participating in more strenuous job activities in the job market." (*Id.* at p. 3.)

On December 5, 2022, the parties proceeded to trial. The parties placed in issue permanent disability, apportionment, attorney's fees, and whether "applicant rebutted the AMA Guides for permanent total disability."[5] Applicant testified, and the parties submitted the matter for decision.

[5] The "AMA Guides" referred to by the parties is the American Medical Association's Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides). As we discuss herein, an employee may challenge a scheduled

On February 21, 2023, the WCJ issued his F&A, determining in relevant part that "[a]pplicant is entitled to an un-apportioned award of 100% industrial disability." The entirety of the WCJ's analysis of the facts and evidence as set forth in the Opinion on Decision is as follows:

> Applicant claims 100% industrial disability based upon the vocational report of Gene Gonzalez (*sic*), exhibit X. She has been evaluated by Dr. Brown who submitted 8 reports. Dr. Brown agrees with the reporting of Mr. Gonzalez. Applicant has rebutted the AMA Guides.
>
> She's found to be 100% disabled as there is no evidence of previous loss of earnings capacity.
>
> (F&A, Opinion on Decision, at p. 1.)

On March 17, 2023, defendant sought reconsideration, contending that the WCJ's decision fails to comply with section 5313, which requires the WCJ to state the "reasons or grounds upon which the determination was made." (Petition for Reconsideration (Petition), at p. 3:24.) Defendant further contends that the decision failed to discuss whether applicant's specific injury, cumulative injury, or a combination of both, resulted in the award of permanent disability. (*Id.* at p. 5:3.) The Petition asserts that the WCJ impermissibly disregarded the QME's apportionment of 40 percent of applicant's cervical spine disability to preexisting nonindustrial factors,[6] thus precluding any assertion that the 2011 industrial injury is the sole cause of applicant's permanent and total disability. (Petition, at pp. 5:3; 8:10.) Finally, defendant avers applicant has not rebutted the AMA Guides, and requests that a new award issue, "in accordance with the strict application of the AMA Guides pursuant to Dr. Brown's reporting." (Petition, at p. 10:8.)

Applicant's Answer responds that "[s]ince permanent total disability is distinctly defined by a complete loss of earning capacity, and not based on medical impairment, it is inappropriate to subtract medical impairment (or permanent partial disability) from loss of earning capacity." (Answer, at p. 8:5.) Citing to the panel decision in *Target Corp. v. Workers' Comp. Appeals Bd.* (*Estrada*) (2016) 81 Cal.Comp.Cases 1192 [2016 Cal. Wrk. Comp. LEXIS 131] (writ den.),

---

rating by establishing that they are not amenable to rehabilitation and therefore have suffered a greater loss of future earning capacity than reflected in the scheduled rating. As such, the employee is seeking to rebut the permanent disability rating schedule, not the AMA Guides.

[6] Defendant also contends that section 4664 requires the presumption of ongoing disability arising out of applicant's 1996 injury. However, defendant failed to submit evidence of the award in the 1996 injury, and thus did not meet its burden on that issue. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229].) Consequently, we do not consider the issue of apportionment of the prior award under section 4664(b).

applicant avers that because the underlying nonindustrial impairment did not cause any loss of earning capacity, disability was appropriately awarded without apportionment. Applicant also asserts that the 10 percent vocational apportionment figure described by defendant's vocational expert is speculative and based on an incorrect legal theory. (Answer, at p. 9:21.)

DISCUSSION

I. Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."

The California worker's compensation system requires that, "[e]mployers 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. 'Apportionment is the process employed by the Board to segregate the residuals of an industrial injury from those attributable to other industrial injuries, or to nonindustrial factors, in order to fairly allocate the legal responsibility.'" (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565], quoting *Ashley v. Workers' Comp. Appeals Bd.* (1995) 37 Cal.App.4th 320, 326 [60 Cal.Comp.Cases 683].)

Section 4663(c) provides, in relevant part:

> (c) In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries.
>
> (Lab. Code, § 4663(c).)

In *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*), we explained:

> Section 4663(c) not only prescribes what determinations a reporting physician must make with respect to apportionment, it also prescribes what standards the WCAB must use in deciding apportionment; that is, both a reporting physician and the WCAB must make determinations of what percentage of

> the permanent disability was directly caused by the industrial injury and what percentage was caused by other factors.
>
> (*Id.* at p. 607.)

Accordingly, section 4663(c) authorizes and requires the reporting physician to make an apportionment determination, and further prescribes the standards the physician must use. (Lab. Code, § 4663(c); *Escobedo*, *supra*, at pp. 607, 611-612.) Apportionment must account for "other factors both before and subsequent to the industrial injury," and may include disability that formerly could not have been apportioned, including apportionment to pathology, asymptomatic prior conditions, and retroactive prophylactic work restrictions. (*Ibid*.) In addition, when a physician considers all appropriate factors of apportionment but nevertheless determines that it is not possible to approximate the percentages of each factor contributing to the employee's overall permanent disability to a reasonable medical probability, the physician has made the apportionment determination required under section 4663(c). (*Benson v. Workers' Comp. Appeals Bd.* (2009) 170 Cal.App.4th 1535 [74 Cal.Comp.Cases 113, 133]; see also *James v. Pacific Bell Tel. Co.* (May 10, 2010, ADJ1357786) [2010 Cal. Wrk. Comp. P.D. LEXIS 188].)

Section 4663(c) does not provide, however, for collateral sources of expert opinion as to apportionment, and further does not authorize the application of any other standard of apportionment. Accordingly, "vocational apportionment" offered by a non-physician is not a statutorily authorized form of apportionment. In addition, apportionment determinations that deviate from the mandatory standards described in section 4663(c) are not a valid basis upon which to determine permanent disability. (Lab. Code, § 4663(c); *Escobedo, supra*, at p. 604; *Place v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525] [not all expert medical opinion constitutes substantial evidence upon which the Appeals Board may rest its decision].)

II. Vocational evidence may be used to address issues relevant to the determination of permanent disability.

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), as applied by the Permanent Disability Rating Schedule (PDRS) in light of the medical record and the effect of the injury on the worker's future earning

capacity. (*Brodie, supra,* at p. 1320 ["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] (*Fitzpatrick*); *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] *(Guzman)*.)

However, the scheduled rating is not absolute. (*Fitzpatrick, supra,* at pp. 619-620.) A rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning capacity is greater than that reflected in 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 1119] (*Dahl*).) In analyzing the issue of whether and how the PDRS could be rebutted, the Court of Appeal has observed:

> 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. 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].[7] In *LeBoeuf,* an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (*Id.* at pp. 237-238.) Our Supreme Court concluded that it was error to preclude LeBoeuf from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating."
>
> (*Ogilvie, supra*, at p. 1274.)

Thus, "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

[7] 48 Cal.Comp.Cases 587.

loss of future earning capacity than reflected in the scheduled rating."[8] (*Ogilvie, supra,* at p. 1277.) The court in *Ogilvie* thus affirmed the continued relevance of vocational evidence with respect to the determination of permanent disability. (*Applied Materials v. Workers' Comp. Appeals. Bd.* (*Chadburn*) (2021) 64 Cal.App.5th 1042 [86 Cal.Comp.Cases 331]; see also *County of Sonoma/Health Services Dept. v. Workers' Comp. Appeals Bd.* (*Helper*) (2023) 88 Cal.Comp.Cases 309 [2023 Cal. Wrk. Comp. LEXIS 4] (writ den.).)

In addition to the applications for vocational evidence contemplated in *Ogilvie, supra,* vocational reporting may also be admitted as evidence and considered by the WCJ under other circumstances. (Lab. Code, §§ 5703(j), 5307.7; Cal. Code Regs., tit. 8, § 10685.)

Pursuant to section 4663(c), evaluating physicians play an integral role in the determination of permanent disability. It is therefore appropriate and often necessary that evaluating physicians consider the vocational evidence as part of their determination of permanent disability, including factors such as whether applicant is feasible for vocational rehabilitation, and whether the reasons underlying applicant's non-feasibility for vocational retraining arise solely out of the present industrial injury or are multifactorial. As is noted in *Guzman, supra,* it is the *physician* that must exercise their "skill, knowledge and experience as well as other considerations" in formulating an opinion on permanent disability.[9] (*Guzman, supra,* at p. 828.) Thus, vocational evidence is often relevant and appropriately considered by the reporting physician in their evaluation of issues pertaining to permanent disability. (See, e.g., *Qualcomm, Inc. v. Workers' Comp. Appeals Bd.* (*Brown*) (2019) 84 Cal.Comp.Cases 531 [2019 Cal. Wrk. Comp. LEXIS 35] (writ den.) [WCJ appropriately relied on agreed medical evaluator opinion that injured employee was precluded from gainful employment and vocational rehabilitation].)

---

[8] We further observe that notwithstanding the statutory changes to the calculation of diminished future earning capacity (DFEC) made by section 4660.1, the holding in *Ogilvie*, which provides that vocational evidence may be offered to rebut the permanent disability rating schedule, continues to apply to all dates of injury, including those occurring on or after January 1, 2013. (See *County of Alameda v. Workers' Comp. Appeals Bd.* (*Williams*) (2020) 85 Cal.Comp.Cases 792 [2020 Cal. Wrk. Comp. LEXIS 64] (writ den.); *The Conco Companies v. Workers' Comp. Appeals Bd.* (*Sandoval*) (2019) 84 Cal.Comp.Cases 1067 [2019 Cal. Wrk. Comp. LEXIS 112] (writ den.); *Hennessey v. Compass Group* (2019) 84 Cal.Comp.Cases 756 [2019 Cal. Wrk. Comp. P.D. LEXIS 121].)

[9] The AMA Guides further provide that "[p]hysicians with the appropriate skills, training and knowledge may address some of the implications of the medical impairment toward work disability and future employment … more complicated are the cases in which the physician is requested to make a broad judgment regarding an individual's ability to return to any job in his or her field. A decision of this scope usually requires input from medical and nonmedical experts, such as vocational specialists …." (AMA Guides, 5th Ed., § 1.9, at pp. 13-14.)

The same considerations used to evaluate whether a medical expert's opinion constitutes substantial evidence are *equally applicable* to vocational reporting. In order to constitute substantial evidence, a vocational expert's opinion must detail the history and evidence in support of its conclusions, as well as "how and why" any specific condition or factor is causing permanent disability. (*Escobedo, supra*, at p. 611; see also *E.L. Yeager v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922 [71 Cal.Comp.Cases 1687].)

Vocational evidence may assist the parties and the court in evaluating the various factors precluding successful vocational rehabilitation. In *Thomas v. Peter Kiewit Sons', Inc.* (March 23, 2021, ADJ9229556) [2021 Cal. Wrk. Comp. P.D. LEXIS 90], writ den. sub nom. *Kiewit Infrastructure West Co. v. Workers' Comp. Appeals Bd.* (2021) 86 Cal.Comp.Cases 711), the vocational expert identified the factors of apportionment that were purely industrial in nature, and based on the QME's assessment of the synergistic effect of the combined impairments, determined that applicant had sustained a total loss of future earning capacity. In *Bagobri v. AC Transit* (October 8, 2019, ADJ2559682) [2019 Cal. Wrk. Comp. P.D. LEXIS 384], functional capacity evaluations and vocational expert reporting established that applicant was not feasible for vocational retraining due to his work restrictions, and expert evidence further established that those physical restrictions arose solely out of medical treatment for applicant's industrial injury. Because the work restrictions placed on applicant following his industrial injury precluded him from gainful employment, applicant effectively lost all future earning capacity due solely to his industrial injury. (*Id.* at p. 35.)

Vocational evidence may also be used to parse permanent disability caused by multiple body parts or systems. In *Lehman v. Walgreens* (February 3, 2017, ADJ8811286) [2017 Cal. Wrk. Comp. P.D. LEXIS 66], vocational evidence was used to distinguish between multiple injured body parts to determine that applicant was permanently and totally disabled on a psychiatric basis alone, when applicant's psychiatric disability was not subject to apportionment. Additionally, vocational evidence demonstrated that the combination of applicant's unapportioned psychiatric disability, combined with his post-apportionment orthopedic disability, yielded disability that was permanent and total, without apportionment. (*Id.* at pp. 25-26.) Conversely, vocational evidence may also assist the parties in evaluating the effect of multiple disabilities spread across multiple body parts and systems. In *Cemex, Inv. v. Workers' Comp. Appeals Bd.* (*Burdine*) (2013) 78 Cal.Comp.Cases 780 [2013 Cal. Wrk. Comp. LEXIS 117] (writ den.), the WCJ relied on the

vocational expert's evaluation of applicant's disability arising out of injury to the neck, back, upper extremities, left thumb, and psyche to gauge the impact of applicant's industrial injuries on his employability in the open labor market, ultimately finding that the opinions of the Agreed Medical Evaluator (AME) and the vocational expert supported a finding of permanent and total disability.

As the above examples illustrate, vocational evidence remains appropriate to assist the parties and the court in evaluating factors relevant to a determination of permanent disability, even where valid medical apportionment has been identified by the reporting physicians.

We note that the foregoing is not an exhaustive list of the applications of vocational evidence to workers' compensation proceedings, and that ultimately it is the WCJ who is authorized and required to weigh the totality of the evidence adduced, and to enter a corresponding findings, order, or award. (Lab. Code, § 5313.) We emphasize that the WCJ is vested with the full power, jurisdiction, and authority, to hear and determine all issues of fact and law presented, and it is within the sound discretion of the WCJ to accept or reject the testimony of an expert witness, so long as the WCJ does not act arbitrarily. (*Bonner v. Workers' Comp. Appeals Bd.* (1990) 225 Cal.App.3d 1023 [55 Cal.Comp.Cases 470]; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 890 [92 Cal.Rptr. 162].) It is also well-established that the WCJ enjoys wide latitude to admit evidence necessary to determine the substantive rights of the parties, but in doing so, must consider whether the vocational evidence is substantial, whether it rests upon relevant facts, applies a correct legal theory, and refrains from surmise, speculation, conjecture, or guess. (Lab. Code, § 5708; *Place, supra,* 3 Cal.3d 372*; Owings v. Industrial Acc. Com.* (1948) 31 Cal.2d 689, 692 [13 Cal.Comp.Cases 80].)

In sum, vocational evidence continues to be relevant to the issue of permanent disability, and may be offered to rebut a scheduled rating by establishing that an injured worker is not feasible for vocational retraining. Vocational evidence may also be considered by evaluating physicians as relevant to their determination of permanent disability, and may assist the parties and the WCJ in assessing those factors of permanent disability. Finally, the WCJ retains the duty and the authority to review and weigh the medical and vocational evidence, and to enter corresponding orders, findings, decisions, and awards that are supported by substantial evidence in light of the entire record, including orders for development of the record where necessary. (*Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; see also *Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 404 [65 Cal.Comp.Cases 264] ["the

WCJ or the Board may not leave undeveloped matters which its acquired specialized knowledge should identify as requiring further evidence"].)

III. Vocational evidence must address apportionment and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

While vocational evidence may be utilized to assess factors of permanent disability, including whether an injured employee is feasible for vocational retraining, in order to constitute substantial evidence, vocational reporting must consider valid medical apportionment. (*Acme Steel v. Workers' Comp. Appeals Bd.* (*Borman*) (2013) 218 Cal.App.4th 1137, 1142-1143 [78 Cal.Comp.Cases 751] (*Borman*); *City of Petaluma v. Workers' Comp. Appeals. Bd.* (*Lindh*) (2018) 29 Cal.App.5th 1175 [83 Cal.Comp.Cases 1869] (*Lindh*).)

In *Borman*, applicant claimed a cumulative injury ending in 2003 resulting in bilateral hearing loss. Applicant sustained a prior hearing loss injury in 1993, resulting in an award of 22 percent permanent disability. The AME in 2004 determined that applicant's total hearing loss was 60 percent attributable to "noise-induced hearing loss," which included applicant's prior injury in 1993, and 40 percent to "other factors." (*Id.* at p. 1140.) The WCJ determined that applicant had sustained permanent and total disability based on vocational expert testimony that there were no jobs available to applicant in the labor market, and that applicant had not sustained a loss of earnings following the 1993 injury. Following the Appeals Board's denial of reconsideration, the Court of Appeal reversed, observing that while "we do not take issue with the WCALJ's conclusion that Borman could rebut the rating schedule's DFEC by offering vocational expert testimony showing 100 percent loss of earning capacity … [t]he WCALJ erred … by failing to address the issue of apportionment." (*Id*. at p. 1142.) Noting the "clear intent" of the Legislature in enacting Senate Bill No. 899 "to charge employers only with that percentage of permanent disability directly caused by the current industrial injury," the *Borman* court determined that the evidence presented clear and unambiguous evidence of prior disability, and "[f]aced with this unrebutted substantial medical evidence from the AME, the WCAB should have parceled out the 'causative sources—nonindustrial, prior industrial, current industrial—and decide[d] the amount directly caused by the current industrial source.'" (*Id*. at p. 1143.)

Consequently, factors of apportionment must be carefully considered, even in cases where an injured worker is permanently and totally disabled as a result of an inability to participate in

vocational retraining. In addressing apportionment, the vocational expert must disclose familiarity with the concepts of apportionment and set forth in detail the basis for the opinion, and may not rely on facts that are not germane, on inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162 [36 Cal.Comp.Cases 93]; *Place*, *supra,* 3 Cal.3d 372; *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794 [33 Cal.Comp.Cases 358].)

The apportionment analysis required under 4663(a) and *Escobedo, supra,* does not permit reliance on facts offered in support of a competing theory of apportionment. (*Lindh, supra*, at p. 1193 [suggestion that apportionment is required only where there is medical evidence the asymptomatic preexisting condition would invariably have become symptomatic, even without the workplace injury, reflects prior law]; *Dahl, supra,* at p. 758 ["The *Ogilvie* court did not sanction rebuttal of the statutory Schedule by a competing empirical methodology—no matter how superior the applicant and her expert claim it may be."].)

Accordingly, a vocational report is not substantial evidence if it relies upon facts that are not germane, marshalled in the service of an incorrect legal theory. Examples of reliance on facts that are not germane often fall under the rubric of "vocational apportionment," and include assertions that applicant's disability is solely attributable to the current industrial injury because applicant had no prior work restrictions (*Zmek v. State of California, Department of Corrections and Rehabilitation* (December 13, 2019, ADJ8493350) [2019 Cal. Wrk. Comp. P.D. LEXIS 552]), or was able to adequately perform their job (*Lindh, supra,* at p. 1194), or suffered no wage loss prior to the current industrial injury (*Borman, supra,* at p. 1141).

The analysis described by *Escobedo, Borman,* and *Lindh* requires an evaluation of *all* factors of apportionment, so long as they are otherwise supported by substantial medical evidence, and irrespective of whether they were the result of pathology, asymptomatic prior conditions, or whether those factors manifested in diminished earnings, work restrictions, or an inability to perform job duties.

Therefore, an analysis of whether there are valid sources of apportionment is still required even when applicant is deemed not feasible for vocational retraining and is permanently and totally disabled as a result. In such cases, the WCJ must determine whether the cause of the permanent and total disability includes nonindustrial or prior industrial factors, or whether the permanent

disability reflected in applicant's inability to meaningfully participate in vocational retraining arises solely out of the current industrial injury.[10]

IV. Application to the Current Matter

Applying the above principles to the matter before us, we initially observe that both of the vocational experts and the QME agree that applicant is not feasible for vocational retraining. Writing on behalf of applicant, Mr. Gonzales states, "it is my opinion that the global effect of Ms. Nunes' disability creates significant, and likely insurmountable, barriers to employment … [a]s such, this Applicant cannot benefit from services such as vocational rehabilitation…." (Ex. X, Report of Gene Gonzales, June 18, 2021, at p. 35.) Writing on behalf of defendant, Dr. Koobatian states, "it is highly unlikely that Grace Nunes will be able to compete in the open labor market … she is not amenable/feasible in participating in vocational rehabilitation services." (Ex. Z, Report of Steven Koobatian, Ph.D., March 24, 2022, at p. 2.) After her review of the vocational evidence, Dr. Brown concurred that applicant is not amenable to vocational rehabilitation and is 100 percent permanently and totally disabled. (Ex. H, Report of Melinda Brown, M.D., August 17, 2021, at p. 11.) Accordingly, and pursuant to both *LeBoeuf* and *Ogilvie*, applicant's inability to participate in vocational retraining renders her permanently and totally disabled. (*LeBoeuf*, *supra*, at pp. 237-238; *Ogilvie*, *supra*, at p. 1277.)

Addressing the issue of apportionment, Mr. Gonzales acknowledges that the QME has apportioned 40 percent of applicant's cervical spine disability to nonindustrial degenerative changes and 60 percent of applicant's carpal tunnel syndrome disability to preexisting nonindustrial factors.

Mr. Gonzales disclaims factoring in any of the disability for the right upper extremity and carpal tunnel syndromes, instead focusing his analysis solely on the effects of applicant's cervical spine-related disability. The parsing of the various body parts/systems in this context, and the individualized analysis of their effect on applicant's ability to benefit from vocational retraining, constitutes a valid and appropriate use for vocational evidence.

---

[10] As we noted in *Escobedo, supra,* "[t]he issue of the causation of permanent disability, for purposes of apportionment, is distinct from the issue of the causation of an injury. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 (Significant Panel Decision).) Thus, the percentage to which an applicant's injury is causally related to his or her employment is not necessarily the same as the percentage to which an applicant's permanent disability is causally related to his or her injury. The analyses of these issues are different and the medical evidence for any percentage conclusions might be different." (*Escobedo, supra,* at p. 611.)

However, having limited his consideration to only one body part, Mr. Gonzales then asserts that applicant's prior award of disability and degenerative changes need not be considered, because they did not manifest in an inability to perform pre-injury job functions or reduced earning capacity. By discounting prior impairment because it did not manifest in the form of diminished pre-injury earnings, the analysis fails to account for "disability that formerly could not have been apportioned (e.g., pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions) …." (*Escobedo*, *supra*, at p. 607.) That is, the analysis fails to determine whether there is "substantial medical evidence that establishes that the asymptomatic condition or pathology was a contributing cause of the disability." (*Lindh*, *supra*, at p. 1882.) Thus, we conclude that the vocational reporting from Mr. Gonzales does not adequately consider the issue of apportionment.

We further observe that defendant's vocational reporting engages in speculation rendering it unreliable. Dr. Koobatian's reporting does not explain how he arrived at the 10 percent figure, other than to note the factors of nonindustrial medical and legal apportionment will likely interfere with applicant's reentry into the labor market. Accordingly, we are persuaded that Dr. Koobatian's report also does not constitute substantial evidence on the issue of apportionment.

In sum, factors of apportionment must be carefully considered, even in cases where an injured worker is permanently and totally disabled as a result of an inability to participate in vocational retraining. Expert vocational testimony may be utilized to identify and distinguish industrial and nonindustrial vocational factors, but may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. Finally, we observe that an unapportioned award may be appropriate where it can be established through competent medical and/or vocational evidence that the current industrial injury is the sole causative factor for the employee's residual permanent disability.

The statutory and regulatory duties of a WCJ include the issuance of a decision that complies with section 5313. "For the opinion on decision to be meaningful, the WCJ must refer with specificity to an adequate and completely developed record." (*Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc) (*Hamilton*).) In addition, section 3208.2 requires that "[w]hen disability, need for medical treatment, or death results from the combined effects of two or more injuries, either

specific, cumulative, or both, all questions of fact and law shall be separately determined with respect to each such injury ….” (Lab. Code, § 3208.2.)

Here, the F&A fails to adequately address the issues submitted for decision by the parties, including permanent disability and apportionment for *each injury* claimed by applicant. Moreover, the Opinion on Decision fails to explain in detail the WCJ’s analysis as to each claimed injury and the associated issues submitted for decision, and further fails to provide appropriate citation to the evidentiary record or to legal authority. As we noted in *Hamilton, supra,* an opinion on decision that states the evidence relied upon and specifies *in detail* the reasons for the decision will serve to “assist the reviewing court to ascertain the principles relied upon by the lower tribunal, to help that tribunal avoid careless or arbitrary action, and to make the right of appeal or of seeking review more meaningful.” (*Evans v. Workmen’s Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].)

The current record does not afford an adequate basis for review of the evidentiary or legal conclusions reached by the F&A. Consequently, we will rescind the F&A and return this matter to the trial level for further proceedings and decision by the WCJ addressing each claimed injury. Upon return of this matter to the trial level, the parties may wish to obtain supplemental reporting from their respective medical and vocational experts to address apportionment in accord with the principles explained above.

Accordingly, we rescind the F&A and return the matter to the trial level for further proceedings and a new decision consistent with this opinion. Any person aggrieved by the WCJ’s decision may thereafter seek reconsideration.

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board (En Banc) that the Findings of Fact and Award, issued on February 21, 2023 is **RESCINDED** and that this matter is **RETURNED** to the trial level for such further proceedings and decisions by the WCJ as may be required, consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD (En Banc)

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ CRAIG SNELLINGS, COMMISSIONER

/s/ JOSEPH V. CAPURRO, COMMISSIONER

/s/ NATALIE PALUGYAI, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

June 22, 2023

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

GRACE NUNES
BRET GROVE LAW
STATE COMPENSATION INSURANCE FUND

SAR/abs

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