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

**MARGARITA CHAVOLLA, *Applicant***

**vs.**

**GRIMMWAY ENTERPRISES, INC. (PSI);**
**Adjusted by TRISTAR, *Defendants***

**Adjudication Number: ADJ7640424**
**Bakersfield District Office**

# OPINION AND DECISION AFTER RECONSIDERATION

We previously granted applicant's Petition for Reconsideration of the Rulings on Evidence, Finding of Fact, Awards and Orders (F&A) issued on October 13, 2021, by the workers' compensation administrative law judge (WCJ), in order to further study the factual and legal issues.[1] This is our Opinion and Decision After Reconsideration.

In the F&A, the WCJ found, in pertinent part, that applicant sustained a permanent partial disability of 74%. The WCJ found applicant's average weekly wage at the time of injury to be $346.50.

Applicant contends that the WCJ erred because the reporting of her vocational expert established that she is not capable of working on the open labor market and not capable of rehabilitation and thus, applicant is permanently totally disabled. In the alternative, applicant argues that the WCJ should have developed the record further on the issue of permanent disability. Applicant further argues that her permanent disability rate should have included consideration for increases in state minimum wage post-injury.

We have received an answer from defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we deny reconsideration.

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[1] Commissioner Sweeney was on the panel when we granted reconsideration but is no longer a member of the Workers' Compensation Appeals Board (WCAB). A new panel member has been appointed in her place.

We have considered the allegations of the Petition for Reconsideration, the answer, and the contents of the WCJ's Report. Based on our review of the record and for the reasons discussed below, as our Decision After Reconsideration we will rescind the October 13, 2021 F&A and return the matter to the trial level for further development of the record.

## FACTS

Applicant sustained an admitted industrial injury on July 23, 2009, to her cervical spine, lumbar spine, left shoulder, left first rib, psyche, sleep, dysphagia/acid reflux, and irritable bowel syndrome. (Minutes of Hearing and Summary of Evidence (MOH/SOE), August 6, 2021, p. 2, lines 21-29.) Applicant claimed additional injury in the form of neurological damage and headaches. (*Ibid*.) Applicant's mechanism of injury was described as follows: "[W]hile at work, she was changing a roll of bags for the machine. The roll slipped out and as she tried to catch it she felt immediate pain in her neck and left shoulder." (Joint Exhibit 7, Report of Graham Woolf, M.D., January 22, 2021, p. 3.)

**1. Applicant's claim of an increase in wages.**

Applicant stipulated at trial that her average weekly wage at the time of injury was $346.50 per week. (MOH/SOE, *supra* at p. 2, lines 34-37.) However, applicant disputed her permanent disability rate. (*Ibid*.) The WCJ issued no findings of fact addressing this argument and issued no finding as to applicant's permanent disability rate. (See generally, F&A, October 13, 2021.) The WCJ issued an award of permanent disability which referenced the average weekly wage stipulation without calculation of applicant's permanent disability rate. (*Id*. at p. 2.)

Applicant testified that she earned approximately $9.25 per hour at the time of injury. (*Id*. at p. 4, lines 44-47.) Applicant worked 40 hours per week with infrequent overtime. (*Ibid*.)

Applicant argues that her permanent disability rate should be adjusted to account for increases in state minimum wage.

**2. Applicant's claim of permanent total disability.**

Applicant had a multitude of surgeries for her injury including thoracic outlet surgery in 2012, decompression surgery in 2015, lumbar surgery in 2015, and cervical fusion in 2016. (Joint Exhibit 5, Report of Christina Averill, Ph.D., July 25, 2019, pp. 14-16.) Applicant was provided the following work restrictions on an orthopedic basis: limited forward bending for 1 to 2 hours per day, limited twisting for 1 to 2 hours per day, and "[m]ay not lift/carry at a height of 4 feet

more than 5 lbs. for more than 4 hours per day.". (Joint Exhibit 4, Report of Peter Newton, M.D., October 22, 2018, p. 21.) Applicant was not restricted from standing, walking, sitting, climbing, kneeling, crawling, keyboarding, grasping, pushing, or pulling. (*Ibid*.)

Applicant's psychological work restrictions were discussed as follows:

> Despite the presence of psychiatric symptoms which impacted upon her energy, motivation and drive, Ms. Chavolla remained at work following the injury, attempting to self-modify her tasks to accommodate both her increasing depression until she was laid off in April 2010. Subsequent to her layoff, in my opinion, it is within reasonable psychological probability that Ms. Chavolla would have been able to resume work with modifications provided her orthopedic restrictions had been honored. These modifications would have included work restrictions to accommodate her depression and mounting anxiety including a part-time work schedule, less complex tasks so that she could work at a slower pace, as well as more frequent breaks. In addition, the claimant would have required increased support and structure from management given her intensifying clinical depression.

(Joint Exhibit 5, *supra* at p. 75.)

Applicant was evaluated by a neurologist for her headaches and sleep disorder, who opined on work restrictions as follows:

> She does not require any specific work restrictions for her sleep disorder or headaches. However, if she has severe headaches that are not relieved with the medication provided, she may have to sit down or lay down to rest. Therefore, she may have to call in sick or leave work early thereby causing occasional absenteeism 3-4 times a year that should be accommodated by the patient's employer.
>
> For the patient's left shoulder injury, she should avoid repeated use of the left arm at or above shoulder level.

(Applicant's Exhibit 1, QME Report of Shen Wang, M.D., August 23, 2019, p. 48.)

Applicant was evaluated by a gastroenterologist for various GI issues, who did not ascribe work restrictions. (See generally, Joint Exhibit 6, QME Report of Graham Woolf, January 22, 2021.)

Applicant was seen by a vocational expert who issued one report in evidence. (Applicant's Exhibit 2, Report of Gene Gonzales, November 11, 2020.) Defendant did not obtain a vocational expert report.

Mr. Gonzales performed vocational testing. Applicant scored in the 10th percentile for reading comprehension, the 62nd percentile for math computation, the 96th percentile for mathematic concepts and applications, and the 12th percentile for language. (*Id*. at p. 20.)

Mr. Gonzales noted a history of applicant working occasionally as a part-time babysitter for family members since her injury. Mr. Gonzales took a history of this work but did not include it in his analysis when determining applicant's transferable skills and employability. (*Id*. at p. 23.)

Mr. Gonzales generally concluded that applicant was not capable of vocational retraining and was not employable on the open labor market. (*Id*. at p. 36.) In reaching this conclusion, Mr. Gonzales, in part, relied upon his own personal observations of applicant's abilities.

> In addition, Ms. Chavolla has sustained a Pain Disorder due to both psychological factors and a general medical condition. According to Panel QME Dr. Averill, the applicant's state of chronic depression and anxiety impacts her energy and motivations on a daily basis, as does her pain complaints and functional basis. Furthermore, Dr. Averill noted that test findings include somatic preoccupation, anxiety, and rumination about her overall physical condition, which likely has caused a notable feed back of increasing psychological distress and hopelessness.
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> The applicant's presentation during the vocational evaluation process was consistent with the findings made by Dr. Averill, particularly the preoccupation with her physical condition. As noted in my behavioral observations during vocational testing, Ms. Chavolla experienced fatigue and anxiety. She also demonstrated pain behaviors which include a need to lean against the wall and alternate between sitting and standing positions due to pain and discomfort. To a degree of reasonable vocational probability, Ms. Chavolla's preoccupation with her physical condition resulted in an impaired ability to concentrate and focus, which in turn resulted in low test scores.

(*Id*. at p. 35.)

## DISCUSSION

The WCJ and the Appeals Board have a duty to further develop the record where there is insufficient evidence on an issue. (*McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261].) The Appeals Board has a constitutional mandate to "ensure substantial justice in all cases." (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403 [65 Cal.Comp.Cases 264].) Substantial justice is "[j]ustice fairly administered according to the rules of substantive law, regardless of any procedural errors not

affecting the litigant's substantive rights; a fair trial on the merits." (Black's Law Dictionary (7th ed. 1999).) The Board may not leave matters undeveloped where it is clear that additional discovery is needed. (*Id.* at p. 404.)

**1. Applicant's permanent disability rate.**

Labor Code section 5313 requires a WCJ to state the "reasons or grounds upon which the determination was made." The WCJ's opinion on decision "enables the parties, and the Board if reconsideration is sought, to ascertain the basis for the decision, and makes the right of seeking reconsideration more meaningful." (*Hamilton v. Lockheed Corporation* (*Hamilton*) (2001) 66 Cal.Comp.Cases 473, 476 (Appeals Board en banc), citing *Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350, 351].) A decision "must be based on admitted evidence in the record" (*Hamilton*, *supra*, at p. 478), and must be supported by substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) As required by section 5313 and explained in *Hamilton*, "the WCJ is charged with the responsibility of referring to the evidence in the opinion on decision, and of clearly designating the evidence that forms the basis of the decision." (*Hamilton*, *supra*, at p. 475.)

No actual findings of fact was made as to applicant's permanent disability rate. The WCJ simply restated the stipulated earnings on the date of injury and did not address applicant's allegation of an increase due to state minimum wage. Without such a finding, this matter is not ripe for reconsideration, and we are compelled to return this issue to the trial level to complete the record and issue an appropriate findings of fact per *Hamilton*.[2]

Upon return, the parties may wish to review our Supreme Court's holding in *Montana* when addressing applicant's claim of increased earnings:

> In making a permanent award, long-term earning history is a reliable guide in predicting earning capacity, although in a variety of fact situations earning history alone may be misleading. With regard to both awards all facts relevant and helpful to making the estimate must be considered. (Citation.) The applicant's ability to work, his age and health, his willingness and opportunities

[2] Although not raised as an issue for reconsideration, we would also note there is no Findings of Fact establishing whether applicant is entitled to the 15% increase in her permanent disability rate per section 4658(d). The WCJ included a 15% increase when issuing the award of permanent disability, but again failed to list a permanent disability rate or when the 15% increase began. There also appears to be significant mathematical errors in the WCJ's award of $121,409.19 in permanent disability benefits, which again appears to require correction.

> to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated are all relevant. (Citation.) In weighing such facts, the commission may make use of its general knowledge as a basis of reasonable forecast. (Citations.) In weighing the evidence relevant to earning capacity the commission has the same range of discretion that it has in apportioning injuries between industrial and nonindustrial causes. (Citation.) It must, however, have evidence that will at least demonstrate the reasonableness of the determination made. (Citation.)

(*Argonaut Ins. Co. v. Industrial Acci. Com*. (*Montana*), 57 Cal.2d 589, 595, 27 Cal. Comp. Cases 130, 133 (Cal. May 8, 1962).)

While testimony from applicant is helpful, it does not appear that the testimony comports with the parties' stipulation. Applicant testified to working on average 40 hours per week with occasional overtime and earning approximately $9.25 per hour. This would calculate to a wage rate slightly exceeding $370.00 on the date of injury. The parties stipulated to a rate of $346.50, which creates a discrepancy between applicant's testimony and the stipulation. Further explanation and documentation of the factors described in *Montana* is necessary.

**2. Whether applicant is permanently and totally disabled.**

In *Nunes v. State of California, Dept. of Motor Vehicles* (June 22, 2023) 2023 Cal. Wrk. Comp. LEXIS 30 [88 Cal.Comp.Cases 741] ("*Nunes* I"), the Board held in relevant part that vocational evidence must address apportionment and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment under Labor Code section 4663. (Affirmed in *Nunes v. State of California, Dept. of Motor Vehicles* (August 29, 2023) 23 Cal. Wrk. Comp. LEXIS 46 [88 Cal.Comp.Cases 894] ("*Nunes* II").

As noted in *Nunes I*:

> 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.

(*Nunes I*, *supra* at 750.)

In *Nunes*, the Appeals Board made it clear that a vocational expert is not a medical expert. It is the physician's job to determine the factors establishing whether applicant is feasible for vocational rehabilitation. In reviewing Mr. Gonzales' report, he bases his opinion, in part, upon

his own personal observations and beliefs as to applicant's physical ability. This is not permissible. For example, when discussing whether applicant is amenable to retraining, the vocation expert concluded as follows:

> In all reasonable vocational probability, Ms. Chavolla's somatic preoccupation with her physical condition will impede her ability to learn new tasks or processes. As demonstrated during vocational testing, the applicant's preoccupation with her physical condition contributed to low test scores.

(Applicant's Exhibit 2, *supra* at p. 28.)

This is a medical opinion, not a vocational opinion. We could find no support in the medical record establishing that applicant is not capable of learning new tasks or processes due to her somatic complaints. This fact must be established by a medical professional. Accordingly, Mr. Gonzales' report is not substantial evidence. The current record does not support a finding that applicant is permanently totally disabled.

While we agree with the WCJ that an award of permanent total disability is not supported on the current record, based upon the recent decision in *Nunes* and the clarification as to the manner of proof required in total disability cases, and to ensure substantial justice, and because the WCJ's F&A contains no actual finding of fact as to applicant's permanent disability rate and the award that issued contained no rate of payment, as our Decision After Reconsideration we will rescind the F&A and return the matter to the parties for further development of the record.

For the foregoing reasons,

**IT IS ORDERED**, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Rulings on Evidence, Finding of Fact, Awards and Orders (F&A) issued on October 13, 2021, is **RESCINDED** and that this matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ JOSEPH V. CAPURRO, COMMISSIONER**

**I CONCUR,**

**/s/ CRAIG SNELLINGS, COMMISSIONER**

**/s/ KATHERINE A. ZALEWSKI, CHAIR**

**DATED AND FILED AT SAN FRANCISCO, CALIFORNIA**

**March 25, 2024**

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

**EMPLOYMENT DEVELOPMENT DEPARTMENT**
**GHITTERMAN GHITTERMAN FELD**
**HANNA BROPHY**
**MARGARITA CHAVOLLA**
**KEITH GILMETTI**

**EDL/oo**

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