WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

SANDRA JA'CHIM SCHEUING, ***Applicant***

vs.

LAWRENCE LIVERMORE NATIONAL LABORATORY, PERMISSIBLY SELF-INSURED, ADMINISTERED BY GALLAGHER BASSETT, ***Defendants***

Adjudication Numbers: ADJ8655364; ADJ14830172
Oakland District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION (*SIGNIFICANT PANEL DECISION*)

Pursuant to our authority, we designate this decision as a Significant Panel Decision. (Cal. Code Regs., tit. 8, § 10325(b); see Lab. Code, §§ 5300, 5301, 5302.)[1]

Applicant seeks reconsideration of the Findings & Award issued by a workers' compensation administrative law judge (WCJ), wherein the WCJ found in pertinent part that applicant's injury caused permanent disability of 28%. Applicant contends in pertinent part that she is 100% permanently and totally disabled, and that the WCJ failed to fully consider all of the medical and vocational evidence in making his determination.

We received an answer from defendant.

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[1] The Appeals Board has designated this as a significant panel decision. Significant panel decisions are not binding precedent in workers' compensation proceedings; however, they are intended to augment the body of binding appellate court and en banc decisions and, therefore, a panel decision is not deemed "significant" unless, among other things: (1) it involves an issue of general interest to the workers' compensation community, especially a new or recurring issue about which there is little or no published case law; and (2) all Appeals Board members have reviewed the decision and agree that it is significant. (See *Elliott v. Workers' Comp. Appeals Bd.* (2010) 182 Cal.App.4th 355, 361, fn. 3 [75 Cal.Comp.Cases 81]; *Larch v. Workers' Comp. Appeals Bd.* (1999) 64 Cal.Comp.Cases 1098, 1099-1100 (writ den.); *WCAB Releases Significant Panel Decisions for Publication* (News Brief, August 1997) 25 Cal. Workers' Comp. Rptr. 197.)

We received a Report and Recommendation (Report) from the WCJ, which recommends that we deny the Petition, unless we conclude that further development of the record is appropriate.

As discussed further in Section II, we accept and consider applicant's February 20, 2024 and March 1, 2024 letters to the Workers' Compensation Appeals Board (WCAB) as supplemental pleadings. (See Cal. Code Regs., tit. 8, § 10964.)

We have considered the allegations in the Petition for Reconsideration, the answer, and the supplemental pleadings, and the contents of the Report, and we have reviewed the record in this matter. Based on our review of the record and for the reasons discussed below, we will adopt and incorporate the WCJ's Report, except as to the recommendation that we deny the Petition. We will grant applicant's Petition for Reconsideration, and as our decision after reconsideration, we will rescind the December 1, 2023 Findings & Award and return the matter to the WCJ for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration of the WCJ's new decision.

I.

Labor Code section 5900[2] states that:

> (a) Any person aggrieved directly or indirectly by any final order, decision, or award made and filed by the appeals board or a workers' compensation judge under any provision contained in this division, may petition the appeals board for reconsideration in respect to any matters determined or covered by the final order, decision, or award, and specified in the petition for reconsideration. The petition shall be made *within the time* and in the manner *specified in this chapter*.
>
> (b) At any time within 60 days after the filing of an order, decision, or award by a workers' compensation judge and the accompanying report, the appeals board may, on its own motion, grant reconsideration.
>
> (Lab. Code, § 5900, italics added.)

As set forth in section 5901, a final decision may issue either after an aggrieved person has filed a timely petition for reconsideration or after action by the Appeals Board on its own motion. In either instance, a party may seek timely appellate review of that final decision under section 5950.

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[2] Unless otherwise stated, all further statutory references are to the Labor Code.

There are 25 days allowed within which to file a petition for reconsideration from a "final" decision that has been served by mail upon an address in California. (Lab. Code, §§ 5900(a), 5903; Cal. Code Regs., tit. 8, § 10507(a)(1).) This time limit is extended to the next business day if the last day for filing falls on a weekend or holiday. (Cal. Code Regs., tit. 8, § 10508.) To be timely, however, a petition for reconsideration must be filed (i.e., received) within the time allowed; proof that the petition was mailed (posted) within that period is insufficient. (Cal. Code Regs., tit. 8, §§ 10845(a), 10392(a).) As explained further below, petitions for reconsideration are required to be filed at the district office, and not directly at the Appeals Board. (Cal. Code Regs., tit. 8, § 10940(a)); see Cal. Code Regs., tit. 8, § 10205(l) [defining a "district office" as a "trial level workers' compensation court."].)

This time limit is jurisdictional and therefore, the Appeals Board has no authority to act upon or consider an *untimely* petition for reconsideration. (*Maranian v. Workers' Comp. Appeals Bd.* (2000) 81 Cal.App.4th 1068, 1076 [65 Cal.Comp.Cases 650, 656]; *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1182; *Scott v Workers' Comp. Appeals Bd.* (1981) 122 Cal.App.3d 979, 984 [46 Cal.Comp.Cases 1008, 1011]; *U.S. Pipe & Foundry Co. v. Industrial Acc. Com.* (*Hinojoza*) (1962) 201 Cal.App.2d 545, 549 [27 Cal.Comp.Cases 73, 75-76].)

In contrast, here, applicant's Petition for Reconsideration was ***timely*** filed on December 18, 2023, seventeen days after the WCJ's decision of December 1, 2023. Thus, as explained below, the Appeals Board has the authority to act upon the Petition and to consider it.

The jurisdiction conferred on the Appeals Board when a petition is timely filed under section 5900, subdivision (a), means that in order to act, the Appeals Board does not have to issue an order removing the proceedings to itself under section 5301, nor does it have to provide notice and an opportunity to be heard as required under section 5803 before issuing a new decision. Moreover, when reconsideration is granted under section 5900 or section 5811[3], it has the effect of causing "the whole subject matter [to be] reopened for further consideration and determination" (*Great Western Power Co. v. Industrial Acc. Com*. (*Savercool*) (1923) 191 Cal. 724, 729 [10 I.A.C. 322]), and of "[throwing] the entire record open for review." (*State Comp. Ins. Fund v. Industrial Acc. Com*. (*George*) (1954) 125 Cal.App.2d 201, 203 [19 Cal.Comp.Cases 98].)

[3] Section 5811 allows the Appeals Board, after a petition by an aggrieved person, or on its own motion, to grant reconsideration of its decision within 60 days. Since the time for filing a petition for writ of review is 45 days, the Appeals Board rarely exercises this power, so as to avoid duplicate proceedings.

Section 5909 provides that a petition is denied by operation of law if the Appeals Board does not act on the petition within 60 days after it is filed.[4] However, unlike the Court of Appeal, which has the right to summarily deny petitions for writ of review and mandate, the Appeals Board does not deny petitions for reconsideration by operation of law pursuant to section 5909. This is based on the Supreme Court's holdings that summary denial of reconsideration is no longer sufficient after the enactment of section 5908.5. (*Evans v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 754-755 [33 Cal.Comp.Cases 350]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627, 635 [35 Cal.Comp.Cases 16] ["We hold that if the appeals board denies a petition for reconsideration its order may incorporate and include within it the report of the referee, provided that the referee's report states the evidence relied upon and specifies in detail the reasons for the decision."]; *Moyer v. Workmen's Comp. Appeals Bd*. (1972) 24 Cal.App.3d 650, 655 [37 Cal.Comp.Cases 219]; *Hodges v. Workers' Comp. Appeals Bd*. (1978) 82 Cal.App.3d 894, 906 [43 Cal.Comp.Cases 870; *Painter v. Workers' Comp. Appeals Bd*. (1985) 166 Cal.App.3d 264, 268.)

Timely petitions for reconsideration filed and *received by* the Appeals Board are acted upon within 60 days from the date of filing pursuant to section 5909, by either granting, dismissing, or denying the petition. Thereafter, once a decision on the merits of the petition issues, the parties can then determine whether to seek review under section 5950. (See Lab. Code, § 5901.)

An exception occurs when a petition is <u>*not*</u> *received by* the Appeals Board within 60 days due to irregularities outside the petitioner's control. In *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104, 1108 [57 Cal.Comp.Cases 493], the Appeals Board denied applicant's petition for reconsideration because it had not acted on the petition within the statutory time limits of section 5909. This occurred because the Appeals Board had misplaced the file, through no fault of the parties. The Court of Appeal reversed the Appeals Board's decision holding that the time to act on applicant's petition was tolled during the period that the file was misplaced. (*Id.* at p. 1108.) Like the Court in *Shipley*, "we are not convinced that the burden of the system's inadequacies should fall on [a party]." (*Ibid.*) Pursuant to the holding in *Shipley* allowing tolling of the 60-day

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[4] We observe that section 5301 provides for "full power, authority and jurisdiction" by the Appeals Board over all proceedings, and section 5803 provides for "continuing jurisdiction" by the Appeals Board over all of its "orders, decisions, and awards." (Lab. Code, §§ 5301, 5803.) Thus, the Appeals Board's failure to act within 60 days on a timely petition is not a true issue of jurisdiction because the Appeals Board always has jurisdiction over all proceedings and all orders, decisions, and awards.

time period in section 5909, the Appeals Board acts to grant, dismiss, or deny such petitions for reconsideration within 60 days of receipt of the petition, and thereafter issues a decision on the merits.

All parties to a workers' compensation proceeding retain the fundamental right to due process and a fair hearing under both the California and United States Constitutions. (*Rucker v. Workers' Comp. Appeals Bd.* (2000) 82 Cal.App.4th 151, 157-158 [65 Cal.Comp.Cases 805].) "Due process requires notice and a meaningful opportunity to present evidence in regards to the issues." (*Rea v. Workers' Comp. Appeals Bd.* (2005) 127 Cal.App.4th 625, 635, fn. 22 [70 Cal.Comp.Cases 312]; see also *Fortich v. Workers' Comp. Appeals Bd*. (1991) 233 Cal.App.3d 1449, 1452-1454 [56 Cal.Comp.Cases 537].)

If a timely filed petition is never acted upon and considered by the Appeals Board because it is "deemed denied" due to an administrative irregularity and not through the fault of the parties, the petitioning party is deprived of their right to a decision on the merits of the petition. (Lab. Code, §5908.5; see *Evans, supra,* 68 Cal.2d at pp. 754-755; *LeVesque, supra,* 1 Cal.3d at p. 635.) Just as significantly, the parties' ability to seek meaningful appellate review is compromised, raising issues of due process. (Lab. Code, §§ 5901, 5950, 5952; see *Evans, supra,* 68 Cal.2d 753; see also *Rea, supra,* 127 Cal.App.4th at p. 643.) *Rea* and other California appellate courts[5] have consistently followed the *Shipley* court's lead when weighing the statutory mandate of 60 days against the parties' constitutional due process right to a true and complete judicial review by the Appeals Board.[6]

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[5] See e.g., *Hubbard v. Workers Comp. Appeals Bd.* (1993) 58 Cal.Comp.Cases 739 [writ of review granted to annul Appeals Board's denial of petition for reconsideration by operation of law (Lab. Code, § 5909)]; see also, *Frontline Medical Associates, Inc. v. Workers' Comp. Appeals Bd. (Lopez, Leonel; Sablan, Yolanda)* (2022) 87 Cal.Comp.Cases 314 (writ den.); *Entertainment by J & J, Inc. v. Workers' Comp. Appeals Bd. (Bernstein)* (2017) 82 Cal.Comp.Cases 384 (writ den.); *Bailey v. Workers Comp. Appeals Bd.* (1994) 59 Cal.Comp.Cases 350 (writ den.). Recent denials in all District Courts of Appeal include: First District, Div. 1 (*Scaffold Solutions v. Workers' Comp. Appeals Bd. and Angelo Paredes* (2023) (A166655)); First District, Div. 4 (*Kaiser Foundation Health Plan v. Workers' Comp. Appeals Bd. and Julie Santucci* (2021) (A163107)); Second District, Div. 3 (*Farhed Hafezi and Fred F. Hafezi, M.D., Inc. v. Workers' Comp. Appeals Bd.* (2020) (B300261)(SAU8706806)); Third District (*Reach Air Medical Services, LLC et al. v. Workers' Comp. Appeals Bd. et al. (Lomeli)* (2022) (C095051)); (*Ace American Insurance Company v. Workers' Comp. Appeals Bd. and David Valdez* (C094627) (2021)); Fourth District, Div. 2 (*Piro v. Workers' Comp. Appeals Bd. and County of San Bernardino* (2021) 86 Cal.Comp.Cases 599); Fourth District, Div. 3 (*Lazcano v. Workers' Comp. Appeals Bd*. (2022) 88 Cal.Comp.Cases 54); Fifth District (*Great Divide Insurance Company v. Workers' Comp. Appeals Bd. et al. (Melendez Banegas)* (2021) 86 Cal.Comp.Cases 1046); Sixth District (*Rebar International, Inc., et al. v. Workers' Comp. Appeals Bd. et al. (Hay*nes) (2022) 87 Cal.Comp.Cases 905).

[6] But see *Zurich American Ins. Co. v. Workers' Compensation Appeals Bd.* (2023) 97 Cal.App.5th 1213, wherein the Second District Court of Appeal, Division 7, concluded that section 5909 terminates the Appeals Board's jurisdiction to consider a petition for reconsideration after 60 days, and therefore decisions on a petition for reconsideration made

As the California Supreme Court stated in *Elkins v. Derby (1974) 12 Cal.3d 410, 420 [39 Cal.Comp.Cases 624]*:

> ***Procedural rules should engender smooth and functional adjudication.*** A procedural practice is neither sacred nor immutable. It must be able to withstand the charge that it is inequitable, burdensome or dysfunctional. We think duplicative filing succumbs to all three charges. We also believe that ***respect for our legal system -- a respect which is absolutely essential to its effective functioning -- is hardly enhanced by an incongruent procedural structure*** which causes an injured party simultaneously to allege before different tribunals propositions which are mutually inconsistent. Absent a tolling rule, this is precisely the strategy to which a party unsure of his remedy must resort in order to protect his right to recovery. (Italics and bolding added.)

(*Elkins, supra,* 12 Cal.3d at p. 420.)

"[I]t is a fundamental principle of due process that a party may not be deprived of a substantial right without notice…." (*Shipley, supra,* 7 Cal.App.4th at p. 1108.) The California Constitution mandates that the WCAB "accomplish substantial justice in all cases. . . ." (Cal. Const., art XIV, § 4; Lab. Code, § 3201.) ***In keeping with the WCAB's constitutional and statutory mandate, all litigants before the WCAB must be able to rely on precedential authority, and all litigants must have the expectation that they will be treated equitably on issues of procedure and be accorded same or similar access to the WCAB.***[7] The Appeals Board has relied on the *Shipley* precedent for over thirty years, by continuing to consider all timely filed petitions for reconsideration on the merits, consistent with due process. Treating all petitions for reconsideration in the same or similar way procedurally promotes judicial stability, consistency,

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after that date are void as in excess of the Board's jurisdiction unless specified equitable circumstances are present. The Court's opinion in *Zurich* appears to reflect a split of authority on the application of "*Shipley*" because it disagreed "with the conclusion in *Shipley* that a petitioner has a due process right to review by the Board of a petition for reconsideration even after 60 days has passed…" (*Id.* at p. 1237.)

[7] The workers' compensation system "was intended to afford a *simple and nontechnical path* to relief. (Italics added.)" (*Elkins, supra,* 12 Cal.3d at p. 419, citing 1 Hanna, Cal. Law of Employee Injuries and Workmen's Compensation (2d ed. 1973) § 4.01[1], pp. 4-2 to 4-3. Cf. Cal. Const., art. XX, § 21; § 3201.) In order to further the goal of expeditious adjudication of disputes, informal rules of pleading apply to workers' compensation proceedings. (See Cal. Code Regs., tit. 8, § 10617; *Rivera v. Workers' Comp. Appeals Bd.* (1987) 190 Cal.App.3d 1452, 1456 [52 Cal.Comp.Cases 141]; see also *Claxton v. Waters* (2004) 34 Cal.4th 367, 373 [69 Cal.Comp.Cases 895]; *Sumner v. Workers' Comp. Appeals Bd.* (1983) 33 Cal.3d 965, 972, 973 [48 Cal.Comp.Cases 369].) Moreover, as part of advancing the underlying public policy, workers may be unrepresented or represented by individuals other than attorneys. (See Lab. Code, § 5501 [providing for filing of application for adjudication by non-attorney representative or unrepresented worker].) "The system affords means by which an employee may learn about his rights informally and without an attorney." (*Elkins, supra,* 12 Cal.3d 410 at p. 419 referring to 1 Hanna, *supra*, at § 4.02[1-5], pp. 4-4 to 4-6.)

and predictability and safeguards due process for all litigants. We also observe that a decision on the merits of the petition protects every litigant's right to seek meaningful appellate review after receiving a final decision from the Appeals Board.

In this case, the WCJ issued the Findings & Award on December 1, 2023, and applicant filed a timely Petition for Reconsideration on December 18, 2023 at the Oakland district office. As required by Rule 10205.4 (Cal. Code Regs., tit. 8, § 10205.4), applicant's paper Petition was thereafter scanned into the Electronic Adjudication Management System (EAMS). (See Cal. Code Regs., tit. 8, §10206 [electronic document filing rules], § 10205.11 [manner of filing of documents].) The Division of Workers' Compensation (DWC) is headed by the Administrative Director, who administers all 24 district offices with more than 190 WCJs, is responsible for maintenance of EAMS and is the custodian of all adjudication files. (See Cal. Code Regs., tit. 8, §§10205, 10205.4, 10206, 10208.5, 10208.7; see also Lab. Code §§ 110, 111 [delineating the powers of the Administrative Director and Appeals Board].) When a petition is filed, a task is sent to the WCJ through EAMS so that the WCJ receives notice that a Report is required. (See Cal. Code Regs., tit. 8, §10206; 10962.) No such notice is provided to the Appeals Board. Thereafter, the district office electronically transmits the case to the Appeals Board through EAMS and notifies the Appeals Board that it has been transmitted.

Here, according to Events in EAMS, which functions as the "docket," the district office transmitted the case to the Appeals Board on February 21, 2024. Thus, the first notice to the Appeals Board of the Petition was on February 21, 2024. Thereafter, the WCJ issued the Report on February 27, 2024. Due to this lack of notice by the district office, the Appeals Board failed to act on the Petition within 60 days, through no fault of the parties. Therefore, considering that applicant filed a timely Petition for Reconsideration and that the Appeals Board's failure to act on that Petition was a result of administrative error, we conclude that our time to act on applicant's Petition was tolled until 60 days after February 21, 2024.

II.

WCAB Rule 10803(a)(2) defines the "record of proceedings" as:

> [T]he pleadings, minutes of hearing, summaries of evidence, certified transcripts, proofs of service, admitted evidence, exhibits identified but not admitted as evidence, notices, petitions, briefs, findings, orders, decisions and awards, opinions on decision, reports and recommendations on petitions for reconsideration and/or removal, and the arbitrator's file, if any. Each of these documents is part of the record of proceedings, whether maintained in paper or electronic form. Documents

that are in the adjudication file but have not been received or offered as evidence are not part of the record of proceedings.

(Cal. Code Regs., tit. 8, § 10803(a)(2).)

Consequently, while the Appeals Board's scope of review is broad, review on reconsideration is limited to the record of proceedings at the time of the final order, award, or decision at issue and the issues raised by that existing record. Once a case is pending at the Appeals Board, parties may not submit new evidence or raise new issues, unless the Appeals Board specifically provides notice and orders further proceedings to consider further evidence and/or issues. (See Lab. Code, §§ 5906, 5907, 5908(a).) If a new or novel legal issue arises while a matter is pending on reconsideration, the Appeals Board may decide to return the case to the trial judge for consideration in the first instance in order to preserve the parties' due process rights. (*Gangwish vs. Workers' Comp. Appeals Bd.* (2001) 89 Cal.App.4th 1284, 1295 [66 Cal.Comp.Cases 584].)

Thus, parties may only raise a legal issue by following the procedure in WCAB Rule 10964 (Cal. Code Regs., tit. 8, § 10964) for submission of a supplemental pleading.[8]

WCAB Rule 10964 provides in relevant part that:

(a) When a petition for reconsideration, removal or disqualification has been timely filed, supplemental petitions or pleadings or responses other than the answer shall be considered only when specifically requested or approved by the Appeals Board.

(b) A party seeking to file a supplemental pleading shall file a petition setting forth good cause for the Appeals Board to approve the filing of a supplemental pleading and shall attach the proposed pleading.

(c) Supplemental petitions or pleadings or responses other than the answer shall neither be accepted nor deemed filed for any purpose except as provided by this rule.

(Cal. Code Regs., tit. 8, § 10964.)

In sum, to raise a legal issue, a party must seek permission from the Appeals Board to submit a supplemental pleading and attach the supplemental pleading to the request. Supplemental pleadings are accepted and considered by the panel at the time of a decision on the merits, in the context of the entire record. Unless the parties receive notice from the Appeals Board and are

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[8] When there is a *factual* change in circumstances in a case that is currently pending at the Appeals Board, and a party wishes to notify the Appeals Board, an email inquiry copying all other parties may be sent to the Appeals Board at WCABgrantforstudy@dir.ca.gov.

provided with an opportunity to be heard, there will be no separate response by the Appeals Board to a supplemental pleading.

Here, applicant did not seek permission to file supplemental pleadings as required by WCAB Rule 10964. While WCAB Rule 10964 does not require the Appeals Board to accept supplemental pleadings, the Appeals Board may exercise its discretion to accept a supplemental pleading and consider it. We accept applicant's letters of February 22, 2024 and March 1, 2024 for filing as supplemental pleadings and consider them.

We note applicant's attorney's efforts to ensure that the Petition for Reconsideration was not deemed denied by section 5909. We believe that as a matter of due process, once a party has confirmed timely filing of a petition under WCAB Rule 10615 (Cal. Code Regs., tit. 8, § 10615), they should be able to reasonably expect that the petition will be considered by the Appeals Board.[9]

As explained above, until it is transmitted to the Appeals Board, the case remains at the district office level, and all status inquiries should be directed to the district office. When the 60-day period in section 5905 has expired and there has been no response by the Appeals Board, we recommend that the parties contact the district office to confirm that the case has been transmitted to the Appeals Board and that notice was provided to the Appeals Board. Once they have received this confirmation from the district office, they may follow up by email with the Appeals Board's Control Unit at ControlUnit@dir.ca.gov.[10]

III.

Turning to the merits of applicant's Petition, in his Report the WCJ states that:

> The Petition also appears to argue that Dr. Post should have been sent and commented on the various vocational reports, but that he did not seemingly because of defense counsel's objections, and for this reason we in essence should look more to Dr. Van de Bittner's opinions and conclusions than those of the AME. (*Id.* at p. 11-12.) Unlike defense counsel's reported position and objection to having Dr. Post review and comment on vocational evidence, I do think that is fair game, and that it would have been reasonable to obtain such an opinion, especially in hindsight, given the WCAB's more recent en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles*, 88 Cal.Comp.Cases 741, (2023). However, Applicant seemingly did not fight or contest defendant's position at the time, and at a minimum, it was not raised as an issue for trial. See MOH/SOE dated July 25, 2022

[9] All orders and decisions by the Appeals Board must be in writing and "signed by a majority of the appeals board members assigned thereto. . . ." (Lab. Code, § 5908.5.) Because the Appeals Board may only "respond" by way of a written order, the Appeals Board is unable to informally respond to substantive legal inquiries by parties.

[10] Routine status inquiries may be emailed to the Appeals Board's Control Unit at ControlUnit@dir.ca.gov.

> at pp. 3-4.) . . . I concede that in light of *Nunes II*, this is more of an issue today than it was at the time. I can therefore understand if the Board panel believes this to be a critical component of this case, that they might want to grant reconsideration and remand for further development of the record on this issue. (Report, p. 11.)

It is well established that decisions by the Appeals Board 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, supra,* 1 Cal.3d 627.) To constitute substantial evidence ". . . a medical 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 v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc).) "Medical reports and opinions are not substantial evidence if they are known to be erroneous, or if they are based on facts no longer germane, on inadequate medical histories and examinations, or on incorrect legal theories. Medical opinion also fails to support the Board's findings if it is based on surmise, speculation, conjecture or guess." (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].) The Appeals Board has the discretionary authority to develop the record when the medical record is not substantial evidence. (Lab. Code, §§ 5701, 5906; *Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal.App.4th 389 [62 Cal.Comp.Cases 924]; see *McClune v. Workers' Comp. Appeals Bd*. (1998) 62 Cal.App.4th 1117 [63 Cal.Comp.Cases 261].)

On June 23, 2023, we issued our en banc opinion in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc) (*Nunes I*) and on August 29, 2024, we issued our en banc opinion denying reconsideration of the June 23, 2023 opinion. (*Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 894 (Appeals Board en banc) (*Nunes II*).

In *Nunes I*, we held that:

1. Section 4663 required 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.

Our decision in *Nunes I* clarified that vocational evidence may still be used as a factor in determining permanent disability.

In *Nunes II*, we confirmed our findings in *Nunes I*, with some clarifications. We rejected applicant's contention that evaluating physicians are ill-equipped and unwilling to assess vocational evidence and noted that "treating and evaluating physicians regularly review, assess, and opine on vocational issues, from the gathering of vocational information relevant to the determination of causation, to the final assessment of permanent disability and work restrictions." (*Nunes II*, *supra*, at p. 9.) We further noted that vocational evidence is an important factor in preparing medical-legal reports and emphasized that valid medical apportionment discussed in vocational reporting is not pass-through apportionment as the vocational evaluator is not statutorily authorized to render an opinion on apportionment. (*Id.* at pp.10-11.)

Here, discovery closed on February 24, 2022, and the parties proceeded to trial on July 25, 2022. On October 22, 2022, the parties were ordered to obtain a supplemental report from agreed medical evaluator (AME) Michael Post, M.D., and Dr. Post issued a supplemental report on January 24, 2023. On June 7, 2023, the matter was taken under submission, before our en banc opinions in *Nunes I* and *Nunes II*. Thus, in keeping with our duty to issue a decision that is based on substantial evidence, and bearing in mind the parties' right to due process, we believe that further development of the record is appropriate. Therefore, we decline to accept the WCJ's recommendation that the Petition be denied.

Accordingly, we grant applicant's Petition for Reconsideration, and as our decision after reconsideration, we rescind the Findings & Award and return the matter to the WCJ for further proceedings consistent with this opinion. When the WCJ issues a new decision, any aggrieved person may timely seek reconsideration.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Findings & Award issued by the WCJ on December 1, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings & Award issued by the WCJ on December 1, 2023 is **RESCINDED** and that the matter is **RETURNED** to the trial level for further proceedings consistent with this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ CRAIG SNELLINGS, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

/s/ KATHERINE A. ZALEWSKI, CHAIR

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 27, 2024

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

SANDRA JA'CHIM SCHEUING
APPEL LAW
LAUGHLIN FALBO LEVY & MORESI

AS/mc

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

REPORT AND RECOMMENDATION ON
APPLICANT'S PETITION FOR RECONSIDERATION

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition) e-filed on December 18, 2023, Applicant's attorney seeks reconsideration of the Findings, Award & Order with Opinion on Decision After Resubmission (FA&O) dated and served on December 1, 2023. That FA&O in relevant part found the Applicant to have sustained injury AOE/COE on February 23, 2007, to the bilateral hands, bilateral fee, bilateral ankles, right elbow, and in the form of complex regional pain syndrome (CRPS), which resulted in permanent partial disability of 28%, based on the opinions of the AME, Michael Post, M.D., and awarded future medical treatment for the bilateral hands, feet, ankles, and in the form of CRPS, but not for the right elbow. Applicant had been seeking a finding of permanent and total disability pursuant to the *LeBoeuf* case[1] based on the evidence including the reporting of her vocational expert, Eugene Van de Bittner, Ph.D. I apologize to all for the delay in the filing of this Report and Recommendation.

Applicant's Petition specifically alleges: 1. The Findings of Fact and Order were in excess of the judge's powers; 2. The evidence does not justify the Findings of Fact; and 3. The Findings of Fact do not support the Order. (Petition at p. 1.) More specifically, it argues that the entirely of the record including AME reports of Dr. Michael Post, a functional capacity evaluation that was obtained from Rachel Feinberg, D.P.T., the Applicant's trial testimony, and the vocational reporting of Dr. Van de Bittner, warrant a finding of permanent and total disability and that it was error to find otherwise. (*Id.* at p. 14.) Applicant's attorney further argues that Dr. Post's opinion that 20% of the PD associated with her CRPS diagnosis are apportioned to non-industrial factors, is not substantial evidence, and that the defendant has failed in its burden to establish apportionment to non-industrial factors in this case. (*Id.* at p.16.)

Defense counsel e-filed a "Response to Applicant's Petition for Reconsideration" on December 28, 2023. That de facto Answer argues: 1. The Findings of Fact and Order were within the judge's powers; 2. The evidence justifies the Findings of Fact; and 3. The Findings of Fact support the Order. (Response at p. 1.) More specifically, it argues that the AME's opinions are reasonable and his related impairment ratings and apportionment opinions have

[1] See *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 48 Cal.Comp.Cases 587.

not been rebutted and should be followed, as he is the AME. (*Id.* at pp. 2-5.) It argues that the undisputed diagnosis of CRPS is not in and of itself sufficient to warrant a 100% PD finding. (*Id.* at p. 5.) It asserts that the reporting of Dr. Van de Bittner, Applicant's vocational evaluator, is not substantial evidence because his opinions that Applicant is not amenable to vocational rehabilitation and/or has zero access to the labor market, is not sufficiently explained, as required by *Escobedo*. (*Id.* at p. 6.) Finally, the Response argues that the Applicant has failed to rebut the schedule pursuant to *Dahl* with substantial evidence, and for all these reasons, the FA&O should be affirmed. (*Id.* at pp. 6-8.)

BACKGROUND

As noted in the FA&O's Opinion on Decision, this case was tried for a second time on July 25, 2022, and included testimony from the Applicant. The Opinion on Decision includes a detailed summary of the relevant evidence. (FA&O at pp. 4-10.) What follows is an abridged version of that summary. At the time of the original injury on February 23, 2007, the Applicant was employed by the Lawrence Livermore National Laboratory (LLNL) as a nurse practitioner. She sustained an accepted specific injury on February 23, 2007 to her bilateral knees, bilateral feet, bilateral ankles, right elbow, and in the form of CRPS to her lower extremities. (MOH/SOE at p. 2.) That claim was previously tried by the now retired Judge Stanley Shields, who issued a Findings, Award, and Orders with Opinion on Decision dated February 4, 2019, in which he found injury AOE/COE to the body parts above, found no injury AOE/COE to Applicant's low back, and ordered the record further developed with respect to PD and apportionment. He also had questions and concerns about Dr. Van de Bittner's vocational apportionment theory.

The Applicant testified at that first trial and again at the July 25, 2022 trial. Her testimony at each was consistent. At the time of the first trial, the reporting QME was Dr. Norman Livermore. The Applicant had left knee surgery with Dr. William Workman to remove a ganglion cyst, which reportedly was unsuccessful as the cyst and associated peroneal pain returned, and had right food surgery with Dr. Moorthy in December 2015. The Applicant was also working one day a week as a nurse practitioner at Wellworks at the time of the first trial.

After the first trial, the Applicant and the defendant agreed on physiatrist, Dr. Michael Post, to act as the AME. Dr. Post issued reports dated March 4, 2021 (Re-exam), February 25, 2021 (Supplemental which dealt with the logistics of a remote vs. in-person re-exam and does not include any substantive medical opinions), and September 16, 2021 (Initial Exam and report) (Joint 101), and he was deposed on June 9, 2021. (Joint 201.) In his initial 100-page report of September 16, 2021 (Joint 101), Dr. Post took a detailed history, reviewed and summarized voluminous medical records, conducted and summarized a physical exam, and provided medical/legal opinions. He diagnosed chronic pain syndrome involving the bilateral knees, feet, and ankles, which involved CRPS of the lower extremities, a recurrent ganglion cyst in the left knee, along with 25 separate non-industrial medical conditions. (*Id.* at pp. 56-57.) He found the Applicant to be P&S, agreed with Dr. Livermore's prior P&S dates (*Id.* at p. 92), provided work restrictions (*Id.* at pp. 92-93) and impairment ratings for the left knee and bilateral ankles, along with a Chapter 13 rating for Applicant's CRPS symptoms, and a 3 whole person impairment (WPI) pain add on for the left knee. (*Id.* at pp. 94-97.) He indicated the straight AMA rating was an accurate reflection of her impairment, that no *Almaraz/Guzman*[2] rating was necessary, (*Id.* at p. 97), and found 20% apportionment to non-industrial peripheral polyneuropathy with respect to his rating for CRPS. (*Id.* at p. 98.)

He provided permanent restrictions as follows, which he outlined in his initial report of September 16, 2019 (Joint 101), at pages 93-94, and reaffirmed in his re-exam report of March 4, 2021 (Joint 101) at p. 30, : 1. No lifting/carrying/pushing pulling > 15 lbs. on an occasional basis; 2. No running/jumping/climbing ladders; 3. No repetitive squatting/kneeling/climbing stairs; 4. No prolonged sitting/standing/walking with change of position for comfort, estimated every 20-30 minutes; and 5. Use of a single point cane (or walking stick) for long distance (community) mobility. He summarized excerpts and findings from the Functional Capacity Evaluation (FCE) which was done by Rachel Feinberg, DPT, and concluded in his last report of March 4, 2020 at page 30, that "Although the FCE is a bit more detailed, in my opinion, my overall estimate of her permanent work restrictions is reasonably consistent with those noted by Ms. Feinberg." I interpret this to mean he did not specifically adopt the "more detailed" findings regarding capacity in the

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[2] See *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School Dist.* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), and *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808, 75 Cal.Comp.Cases 837.

FCE as work restrictions, and that he only says the FCE's findings are "reasonably consistent" with the work restrictions he provides, and he does not change or supplement his opinions as to permanent work restrictions. He also considered an alternative Almaraz/Guzman method of rating, but explicitly concluded that "In my opinion, a traditional AMA Guides analysis is an accurate reflection of the orthopedic permanent disability/impairment." (Joint 101, Report of 9/16/19 at p. 97.) That opinion was unchanged in his re-exam report dated March 4, 2020 at p. 31, as were all his other opinions.

Dr. Post was deposed by defense counsel on June 9, 2021. (Joint 102.) At that deposition, he testified with respect to his apportionment opinion that 20% of Applicant's polyneuropathy symptoms were attributable to her non-industrial diabetes, as noted in his initial report at p. 97. (*Id.* at p. 11.) Applicant's condition and presentation upon physical exam was essentially unchanged between the time of the initial exam and report in September 2019 and the re-exam in March of 2021. (*Id.* at p. 12.) Although the Applicant had multiple non-industrial medical conditions and co-morbidities, which were referenced in the 25 diagnoses in his initial report, after careful review he testified that only the polyneuropathy associated with her diabetes contributes to her current PD. (*Id.* at p. 12-13.) He did not find any contribution towards current PD from Applicant's employment with subsequent employers, or find any new cumulative industrial injury, noting that in her most recent job she was working only one day a week at Wellworks, and that the clinic was "slow" with not that many patients and that she was able to sit and stand at will. (*Id.* at pp. 14-17.) He clearly testified that he did not adopt or endorse the Applicant's physical capacities as found in the FCE report of Rachel Feinberg, DPT, dated January 28, 2021 (as summarized in Joint 101, Dr. Post report of 3/4/22 at pp. 23-24), as de facto work restrictions of his own. (*Id.* at pp. 18-19.) He was also questioned about his diagnosis of CRPS, and noted that the distinction between CRPS and neuropathic pain in terms of diagnosis does not really matter as a practical matter, since the treatment for both conditions is the same. (*Id.* at pp. 28-29.)

The Applicant testified at the second trial in relevant part as follows. (MOH/SOE at pp. 6-11.) She last worked in June 2018, and has not worked since. (*Id.* at p. 6.) The reason she has not worked since is that she has chronic pain, 24 hours a day, 7 days a week. The pain comes and goes, and can range from "5-20." (*Id.*) She has bilateral feet and lower extremity pain which feel like she is walking on hot embers, which are also numb and tingling, which is worse at night. (*Id.* at pp. 6-7.) She has difficulty sleeping at night due to pain, getting only about 2 hours of sleep a

night. (*Id.* at p. 6.) She cannot work as a nurse practitioner (NP) in her current condition. (*Id*. at p. 7.) She is 70 years old and had planned to work until she was 72, before her physical condition made it impossible, and she has no intention of returning to work. *(Id.*) She can only do limited cooking, cannot do much more than review bills or mail, and generally cannot go up or down stairs, with the result that 99% of the time she sleeps downstairs on a chaise lounge. (*Id*.) She is afraid of falling, has difficulty showering, and her husband has to stand by her when she showers with the result that she takes sponge baths most of the time. (*Id.*)

Her left knee has a ganglion cyst which causes pain, weakness, swelling, and drop foot on the left side, which makes it difficult to get into and out of the bathtub and is why she no longer takes baths. (*Id.* at pp. 7-8.) Her CRPS has progressed worsened over time, and often flares up, which results in chronic pain and fatigue, and prevents her from working in any job in the medical field. (*Id.* at p. 8.) She worked as a PA at Chevron for a few months through a temporary agency YOH in San Ramon, and she worked at Muir Diablo Occupational in 2015, when she quit at the end of the year because it was bought by U.S. Healthworks, who she did not want to work for. *(Id.* at p. 9) She was employed by San Ramon Wellworks from 2016 through [June] 2018, generally only for one day a week, but sometimes more, depending on her schedule and whether she was needed. (*Id.*) Over time, her work hours there were reduced when they saw she needed to use a cane due to the progression of her CRPS. (*Id.* at pp. 9-10.)

Following the second trial, I issued a Joint Findings & Orders with NOI to Admit and Opinion on Decision (Joint F&O) dated October 22, 2022, which found that in this case, the record needed to be developed and clarified with respect to the AME Dr. Post's impairment ratings, which I could not understand. That Joint F&O also found there was no cumulative injury AOE/COE involving a subsequent employer, San Ramon Medical Center/Wellworks Occupational Medical, based on the record and especially the opinions of the AME. That cumulative injury claim had been filed and alleged by the defendant in the first claim, AIG, and was not alleged by the Applicant. That second finding was not the subject of a Petition for Reconsideration and is therefore final, and is not part of the current appeal, which only involves ADJ8655364. After additional discovery was conducted with Dr. Post regarding the first claim, the matter was eventually resubmitted with a supplemented record on September 14, 2023, which resulted in the FA&O that is the subject of the current Petition.

In the FA&O, before considering the *LeBoeuf* claim, I rated Dr. Post's opinions, as reflected in his reports and deposition testimony, as follows, at pp. 14-15.

Chronic Pain LE RSD 13.11.02.03 9 [5] 11 311F 11 13 (.8) 10 (.8) 10

L knee DBE Menisectomy w/ 3 pain add on 17.05.10.04 4 [2] 5 311F 5 6

L Ankle ROM 17.07.04.00 4 [2] 5 311F 5 6

Combine LLE 6 C 6 = 12

R Ankle ROM 17.07.04.00 6 [2] 7 311F 7 9

Combine 12 C 10 = 21 21 C 9 = 28

Finally, in the FA&O, with respect to my Notice of Intent to Admit the second report of defendant's vocational expert, Emily Tincher, at part of the original Joint F&O dated October 22, 2022, and having considered Applicant's objection to that NOI, I found that Ms. Tincher's report of May 20, 2021, was not timely served and/or offered into evidence and I therefore ordered that it was to not be admitted into evidence, leaving only her initial report of August 18, 2018, in evidence. (Defendant's B.)

APPLICANT'S CLAIMS OF ERROR

A large portion of Applicant's Petition is a summary of the various evidence. (*Id.* at p. 3-14.) Defendant's first claim of error and argument appears to be that Dr. Van de Bittner's opinion that Applicant is not amenable to vocational rehabilitation is unrebutted since Ms. Tincher's second report was not admitted into evidence, that it was substantial evidence, and that I erred by not following it and making a finding of permanent and total disability due to *LeBoeuf*. (*Id.* at pp. 10-11.) Part of the difficulty in this case is the large gap between Applicant's claim of PTD and the AME's impairment ratings, including his finding of 20% apportionment of the rating of her CRPS to diabetes, which as noted above, I calculate to 28%, and his permanent work restrictions, which in my view leave room for potential jobs in the labor market that Applicant could nominally do. Although the Petition emphasizes the limited physical capacities as found by Dr. Rachel Feinberg, Dr. Post in his reports and in his deposition testimony, explicitly did not adopt those as work restrictions and the FCE, which he reviewed and considered, but did not change his opinions with respect to the applicable permanent work restrictions. To that end, I do not think it is proper for Dr. Van de Bittner to treat the FCE capacity findings as de facto work restrictions in his analysis of potential available jobs in the labor market when assessing her

vocational prospects, which he appears to do. (Applicant's 1, Dr. Van de Bittner report of 4/19/21 at pp. 47-54.) The Petition seems to assert that he can do so, arguing that his own findings as to overall capacity to work, the need for breaks from work, pace of work, and fatigue due to lack of sleep are "vocational considerations," and do not need to be based on medical opinion. Petition at p. 10. I disagree, and the Petition does not provide any authority in support of that contention. The vocational expert's opinion on potentially available jobs must be based and rooted on the relevant medical opinion regarding work restrictions, especially in cases like this one where there is a reporting AME.

The Petition at the bottom of page 12, seems to argue that the FCE capacities/restrictions should be considered because the AME did not "disagree" with them and found them "reasonably consistent with his own." However, as noted above, the AME despite being pushed to do so, never adopted the admittedly much more restrictive capacities/restrictions of the FCE as his own, and specifically indicated they were not his opinions and declined to change his opinions on work restrictions, which have been consistent throughout his reporting.

Dr. Van de Bittner also discusses the apportionment opinion of Dr. Post in his report of April 19, 2021, at pages 54-57. (Applicant's 1.) Although he concedes that Dr. Post apportions 20% of the PD associated with his CRPS rating, Dr. Van de Bittner concludes that "Ms. Ja'Chim's CRPS is so debilitating that even if 20% of her permanent disability were set aside, apportionment of employability, earning capacity, and amenability to rehabilitation would continue to be 100% due to her work injury of 2/23/07." (*Id.* at bottom of p. 54.) He also on the next page states "In summary when considering the opinions of Dr. Post, apportionment of employability, earning capacity, and amenability to rehabilitation is 100% due to Ms. Ja'Chim's work injury of 2/23/07." (*Id.* at p. 55.) Despite the long and wordy discussion of this issue generally in this section of his report, I do not find this critical opinion on either page to be sufficiently explained under *Escobdeo* and I therefore do not find it to be substantial medical evidence. The same is true for what in my view is his conclusory statement that the Applicant cannot benefit from vocational services and is therefore not amendable to vocational rehabilitation. (*Id.* at pp. 53-54.) That is why I did not find Dr. Van de Bittner's opinions to be persuasive even though there is no specific report in evidence from Emily Tincher rebutting those conclusions in that report, and why I did not find the Applicant to be 100% disabled, especially in light of the AME's apportionment opinion, which I found to be substantial medical evidence.

The Petition also seems to imply indirectly that the reporting of Dr. Post is stale and that since Dr. Van de Bittner reviewed more recent medical reports in his supplemental report of April 19, 2021, his opinion that the Applicant is not vocationally feasible should be followed. This raises the question of why the parties and/or Applicant's counsel in particular did not seek a re-exam with Dr. Post before filing a DOR which ultimately resulted in the 2022 trial, if he felt the Applicant's condition had significantly worsened. It would have been easy to accomplish, and certainly an alleged change in condition and/or subjective pain complaints could have prompted Dr. Post to change his opinions as to ratings and/or work restrictions.

The Petition also appears to argue that Dr. Post should have been sent and commented on the various vocational reports, but that he did not seemingly because of defense counsel's objections, and for this reason we in essence should look more to Dr. Van de Bittner's opinions and conclusions than those of the AME. (*Id.* at p. 11-12.) Unlike defense counsel's reported position and objection to having Dr. Post review and comment on vocational evidence, I do think that is fair game, and that it would have been reasonable to obtain such an opinion, especially in hindsight, given the WCAB's more recent en banc decision in *Nunes v. State of California, Dept. of Motor Vehicles*, 88 Cal.Comp.Cases 741, (2023). However, Applicant seemingly did not fight or contest defendant's position at the time, and at a minimum, it was not raised as an issue for trial. See MOH/SOE dated July 25, 2022 at pp. 3-4.) If Applicant felt strongly about that issue it should have been raised and listed as an issue for determination at trial. To the extent it was not, I think Applicant can be deemed to have waived it. However, I concede that in light of *Nunes II*, this is more of an issue today than it was at the time. I can therefore understand if the Board panel believes this to be a critical component of this case, that they might want to grant reconsideration and remand for further development of the record on this issue.

Finally, the Petition at p. 16, argues that Dr. Post's apportionment opinion is not substantial medical evidence, and that defendant has failed in its burden to prove apportionment. This also appears to be a new argument, since the legal validity of the AME's apportionment opinion was not listed as an issue for trial, as reflected in the MOH/SOE dated July 25, 2022 at pp. 3-4. In my initial Joint F&O dated October 22, 2022 at page 16, and again in the FA&O dated December 1, 2023 at p. 13, I found that Dr. Post's apportionment opinion constituted substantial medical evidence and would therefore be applied when considering PD. My opinions have not changed since. It also pays to keep in mind that as the AME, Dr. Post's opinions have special significance

and will ordinarily be followed by the judge, absent good reason to find them unpersuasive, which in my view is not the case here. (*Power v. Workers' Comp. Appeals Bd.* (1986) 179 Cal.App.3d 775 [51 Cal.Comp.Cases 114]; *Siqueros v. Workers' Comp. Appeals Bd.* (1985) 60 Cal.Comp.Cases 150 (writ den.).) To the extent that the Petition seems to argue at p. 16, seemingly for the first time at any point in these proceedings, that because Dr. Post did not review or comment on the vocational evidence, his apportionment opinion cannot be substantial medical evidence, I disagree. Had Applicant felt this way previously, she very easily have raised this as an issue for trial and litigated it at trial.

RECOMMENDATION

In sum, for the reasons explained above, I recommend that Applicant's Petition for Reconsideration be denied.

Dated: February 26, 2024

Thomas J. Russell, Jr.
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE