**WORKERS' COMPENSATION APPEALS BOARD**

**STATE OF CALIFORNIA**

**ROBERTA HERNANDEZ, *Applicant***

**vs.**

**VENTURA POST ACUTE; STARSTONE NATIONAL INSURANCE COMPANY, Administered By CANNON COCHRAN MANAGEMENT SERVICES, INC., *Defendants***

**Adjudication Number: ADJ13064691**
**Oxnard District Office**

# OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION

Defendant seeks reconsideration of our Decision After Reconsideration of May 12, 2023, wherein we found that while employed on August 21, 2019 as a medical records director, applicant sustained industrial injury to her back causing permanent total (100%) disability. In so finding, we amended a workers' compensation administrative law judge's (WCJ) Findings, Award and Order of February 21, 2023, wherein it was found that applicant's injury caused permanent partial disability of 45%. At trial applicant introduced vocational expert evidence standing for the proposition that applicant was unable to work, and had thus rebutted the scheduled permanent disability, and should be found permanently totally (100% disabled). This evidence was rejected by the WCJ, but was the basis for our May 12, 2023 Opinion and Decision After Reconsideration.

Defendant contends that we erred in finding that applicant successfully rebutted the scheduled disability by showing that she was unable to work or be vocationally rehabilitated, and thus finding permanent total disability. Defendant argues that applicant's vocational evidence did not constitute substantial evidence, and that we should have applied apportionment as found by qualified medical evaluator orthopedist Brian S. Grossman, M.D. We have received an Answer from the applicant.

Preliminarily, we note that the Appeals Board has 60 days from the filing of a petition for reconsideration to act on that petition. (Lab. Code, § 5909.) Defendant's Petition was timely filed on June 5, 2023. However, the Petition did not come to the attention of the Appeals Board until after the expiration of the statutory time period. Consistent with fundamental principles of due

process, therefore, we are persuaded, under these circumstances, that the running of the 60-day statutory period for reviewing and acting upon a petition for reconsideration begins no earlier than the Appeals Board's actual notice of the petition for reconsideration. (See *Shipley v. Workers' Comp. Appeals Bd.* (1992) 7 Cal.App.4th 1104 [57 Cal.Comp.Cases 493]; *State Farm Fire and Casualty v. Workers' Comp. Appeals Bd. (Felts)* (1981) 119 Cal.App.3d 193 [46 Cal.Comp.Cases 622].) In this case, the Appeals Board received actual notice of the Petition for Reconsideration on August 16, 2023, making this decision timely.

Turning to the merits, we will deny the defendant's Petition for the reasons stated in our Opinion of May 12, 2023, which we adopt, incorporate, and quote below. With regard to the issue of apportionment, as noted in our prior opinion, the WCJ rejected Dr. Grossman's apportionment, and defendant did not seek reconsideration of that decision. In any case, Dr. Grossman's entire discussion of apportionment in the November 4, 2021 report is, "20% Whole Person Impairment was present prior to the 8/29/19 injury based on previous lumbar fusion surgery. The 8/29/19 industrial injury has resulted in an additional 10% Whole Person Impairment. Stated as a percentage, 33% of the impairment is due to the 8/29/18 injury and 67% is pre-existing."

While it is now well established that one may properly apportion to pathology and asymptomatic prior conditions (see, e.g. *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 617 [Appeals Bd. en banc]), an apportionment opinion must still constitute substantial medical evidence. As we explained in *Escobedo*:

> [A] medical report is not substantial evidence unless it sets forth the reasoning behind the physician's opinion, not merely his or her conclusions. [Citations.]
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> Moreover, in the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles. [Citations.]
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> For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability. And, if a physician opines that 50% of an

> employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability.

(*Escobedo*, 70 Cal.Comp.Cases at p. 621.)

Dr. Grossman did not explain in detail how applicant already had 20% WPI or how non-industrial factors were contributing to applicant's permanent impairment. Accordingly, defendant did not meet its burden of showing that non-industrial factors caused any of applicant's permanent impairment or disability.

We otherwise incorporate our Opinion of May 12, 2023:

**OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION**

> Applicant seeks reconsideration of a workers' compensation administrative law judge's (WCJ) Findings, Award and Order of February 21, 2023, wherein it was found that while employed on August 21, 2019 as a medical records director, applicant sustained industrial injury to her back causing permanent disability of 45% and the need for further medical treatment. At trial applicant introduced vocational expert evidence standing for the proposition that applicant was unable to work, and had thus rebutted the scheduled permanent disability, and should be found permanently totally (100% disabled). However, this evidence was rejected by the WCJ.
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> Applicant contends that the WCJ erred in finding only 45% permanent partial disability, arguing that it successfully rebutted the scheduled disability by showing that applicant was unable to work or be vocationally rehabilitated. Applicant argues that based on this vocational evidence, we should find applicant permanently totally (100%) disabled. We have received an Answer from defendant and the WCJ has filed a Report and Recommendation on Petition for Reconsideration.
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> As explained below, we find applicant's vocational evidence persuasive and thus grant reconsideration and amend the WCJ's decision to reflect that applicant's injury caused permanent total disability. We have deferred the issues of the exact calculation of applicant's permanent total disability indemnity award and attorneys' fees, and a final award of permanent total disability indemnity should be issued at the trial level after resolution of these issues.
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> Applicant sustained injury to her back after falling on the floor. She was evaluated by qualified medical evaluator orthopedist Brian S. Grossman, M.D. who ultimately opined that the scheduled AMA Guides rating was 30% whole person impairment based on the range of motion method of evaluating

impairment. (November 4, 2021 report at p. 8.) However, regarding work restrictions, Dr. Grossman wrote, "She has disability resulting in limitation to sedentary work no greater than 4 hours per 8 hour day which contemplates that she can do work predominantly in a sitting position with minimal demands for physical effort and with some degree of walking and standing being permitted." (November 4, 2021 report at p. 8.) At the conclusion of his report, Dr. Grossman included a short "Functional Capacity Assessment" which read, "Ms. Hernandez is precluded from lifting greater than 5 pounds and standing greater than 15 minutes or sitting greater than 30 minutes at one time without a 5 minute break to alter her position. She is precluded from any bending, stooping, or twisting. She can work for up to 4 hours per 8 hour day." (November 4, 2021 report at p. 9.) Dr. Grossman noted that applicant, "has constant moderate low back pain that increases to occasional severe low back pain." (November 4, 2021 report at p. 8.)

Applicant was then evaluated by her vocational expert P. Steve Ramirez, M.S. C.R.C. In a report of February 22, 2022, Mr. Ramirez wrote:

> The work restrictions issued for Ms. Hernandez, include maximum lifting capacity of 5 pounds, in conjunction with her need to alternate sitting and standing with standing, limited to no longer than 15 minutes and sitting limited to no longer than 30 minutes without a 5-minute break and a moveable workstation to eliminate any postural when standing,
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> However, while sedentary work is not defined in the Dictionary of Occupational Titles as requiring bending/stooping, in a real-world scenario there are going to be occasions, even in rare instances such as picking up something dropped or retrieving a file from a lower cabinet, when bending/stooping occur. Based on her preclusion from any posturals, this serves to render her incapable of performing any work as generally performed in the open labor market.

(February 24, 2022 report at p. 7.)

Although Mr. Ramirez opined that applicant's work restrictions in and of themselves precluded applicant from employment, he also noted that her constant pain was another factor that could impact her work performance and make her less employable, especially given her already very restrictive work preclusions. (February 24, 2022 report at pp. 7-8.)

In a supplemental report of September 6, 2022, Mr. Ramirez wrote:

> In preparing for the transferable skills analysis, Ms. Hernandez' vocational profile was developed, based on the above work restrictions:

- Part-time sedentary work with a sit-stand option with no bending, stooping, twisting, or lifting more than 5 pounds.

- Her profile would include jobs in which she was allowed to alternate sitting and standing with standing limited to no longer than 15 minutes and sitting limited to no longer than 30 minutes continuously without a 5-minute break.

- A moveable workstation would be required to allow for no posturals when standing. She already has available a "reacher," which she uses to avoid bending/stooping, to pick up items on the floor and overhead reaching.

Now, let's take a closer look at the work restrictions:

- No bending, stooping or twisting

- Part-time work, maximum of 4 hours a day

- Lifting, maximum of 5 pounds which reduces her access to the sedentary open labor market for all jobs requiring lifting from 6 to 10 pounds

- Standing no greater than 15 minutes at a time

- Sitting no greater than 30 minutes at a time, without a 5-minute break to alter her position

- To accommodate these restrictions to avoid bending/stooping when standing, she will need to have access to a movable work station which can be raised and lowered, which requires her to adjust the levels by stooping and bending.

(September 6, 2022 report at p. 4.)

Mr. Ramirez concluded, "When giving consideration to Ms. Hernandez' work restrictions precluding her from working more than 4 hours per day with no bending or stooping … in a real-world scenario ,this would eliminate all jobs. Further with her limitation of lifting no more than 5 pounds, with sedentary work defined as lifting up to 10 pounds, this would significantly erode her occupational base prior to the restrictions on posturals." (September 6, 2022 report at p. 4.)

Defendant does not argue that rebuttal of applicant's permanent disability rating based on vocational evidence is not available to applicant in this case. Rather,

defendant argues that we should follow the opinion of its vocational expert Debbie Abitz, M.Ed., who opined that applicant's work injury alone did not render applicant unemployable.

As explained by the Court of Appeal in *Ogilvie v. Workers' Comp. Appeals Bd*. (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624], one "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 [48 Cal.Comp.Cases 587]. 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."

Based on the vocational evidence submitted by the applicant, we agree that applicant has shown that she is not reasonably employable or amenable to vocational rehabilitation. Defendant's expert Ms. Aziz does not directly contradict Mr. Ramirez's opinion that applicant is not employable, but rather states, "The applicant's work restrictions are based on an injury that was deemed 67% non-industrial. Accordingly, only 33% is industrially based. Absent the non-industrial component, the applicant would clearly be capable of working in sedentary/full-time positions that are consistent with her skill set/work history." (June 8, 2022 report at p. 32.) However, while Dr. Grossman did opine applicant's AMA Guides work impairment was subject to apportionment to preexisting pathology, the WCJ ultimately rejected apportionment. In any case, if the permanent disability award is based on applicant's lack of employability based on work restrictions, apportionment would be to the cause of the work restrictions. However, Dr. Grossman never stated that work restrictions were caused by anything other than the industrial injury. To the contrary, Dr. Grossman wrote, "Ms. Hernandez was working without restrictions up until the date of her 8/21/19 industrial injury. I have received no medical records that indicate that she was symptomatic or required medical care for her low back in the years preceding the 8/21/19 industrial injury. It remains my opinion that, although the degenerative abnormalities are pre-existing, they were not causing symptoms and did not require treatment until Ms. Hernandez was injured at work." (November 4, 2021 report at p. 7.)

The WCJ rejected Mr. Ramirez' analysis because of Mr. Ramirez's analysis of the effect of applicant's chronic pain on her employability. Although Mr. Ramirez's pain analysis buttresses the rest of his conclusions, Mr. Ramirez opined that applicant was not employable or subject to vocational rehabilitation based on the work preclusions provided by Dr. Grossman. Based on this analysis, we will grant reconsideration and amend the WCJ's decision to reflect that applicant's injury caused permanent total (100%) disability. However, we defer the award of permanent disability and attorneys' fees so that a calculation

of applicant's permanent total disability indemnity and the attorney's fees award may be determined at the trial level.

For the foregoing reasons,

**IT IS ORDERED** that Defendant's Petition for Reconsideration of our Decision After Reconsideration of May 12, 2023 is **DENIED**.

**WORKERS' COMPENSATION APPEALS BOARD**

**/s/ NATALIE PALUGYAI, COMMISSIONER**

**I CONCUR,**

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

**I DISSENT,**

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**October 16, 2023**

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

**ROBERTA HERNANDEZ**
**DONALD COCQUYT**
**RK LAW WC**

**DW/oo**

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

## DISSENTING OPINION OF COMISSIONER JOSÉ H. RAZO

I respectfully dissented from the majority's Opinion of May 12, 2023, and I therefore continue to respectfully dissent today. I would have granted defendant's Petition and reinstated the WCJ's original decision for the reasons stated in my Dissenting Opinion of May 12, 2023, which I adopt, incorporate, and quote below:

> As noted by the WCJ in his Report, any finding by vocational expert Steve Ramirez that applicant is unemployable because of chronic pain is inapposite. Ultimately, qualified medical evaluator Brian S. Grossman, M.D. did not opine that applicant was in any unusual pain given her condition and did not even include a pain add-on allowed by the AMA Guides. While it is not difficult to accept that chronic pain may affect job performance, this is already considered by the ratings of the Guides and the allowance of a pain add-on. Mr. Ramirez cited to a generalized article with no discussion of applicant's specific condition. It is not unusual for an injured worker to have chronic pain after an injury, and indeed a *permanent* disability foresees that a condition will not completely improve. Mr. Ramirez's discussion can be taken to mean that any worker with chronic pain is unemployable because the pain may affect their work performance. This clearly cannot be the law, which bases disability on the AMA Guides unless rebutted by evidence of an individual worker's circumstances. (Lab. Code, § 4660.1, subd. (b)(1).)
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> With regard to applicant's work restrictions, Mr. Ramirez takes an unreasonably restrictive view of Dr. Grossman's preclusion from "any bending, stooping, or twisting." Dr. Grossman was clearly stating that these activities should not be a required activity of the job, not that in a very rare instance, if not otherwise accommodated, applicant may sometimes have to partially bend or twist. Elsewhere in the report, Dr. Grossman wrote "She has disability resulting in limitation to sedentary work no greater than 4 hours per 8 hour day which contemplates that she can do work predominantly in a sitting position with **minimal demands** for physical effort and with some degree of walking and standing being permitted." (November 4, 2021 report at p. 8 [emphasis added].) Dr. Grossman's report did not contain any pain add-on or make any mention at all of applicant's use of opiates, other than vaguely stating in the future medical care section that, "All further treatment should be consistent with the California Medical Treatment Utilization Schedule or other Evidenced-Based Medicine Guidelines, and should include prescription anti-inflammatory or analgesic medications…." (November 4, 2021 report at p. 9.) Dr. Grossman does not specify whether these analgesics should be Tylenol or opiates. Ultimately, Dr. Grossman does not paint a picture of someone who's disability is not adequately reflected by the AMA Guides, and certainly not someone who is permanently totally disabled.

For these reasons, applicant has not rebutted the scheduled disability with substantial evidence, and I would have denied the applicant's Petition. I therefore respectfully dissent.

**/s/ JOSÉ H. RAZO, COMMISSIONER**

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

**October 16, 2023**

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