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 Numbers: ADJ8210063; ADJ8621818
Fresno District Office

OPINION AND ORDER DENYING PETITION FOR RECONSIDERATION (En Banc)

Applicant seeks reconsideration of the Opinion and Decision After Reconsideration (En Banc) issued by the Workers' Compensation Appeals Board on June 22, 2023 (hereinafter, "Opinion"). In the Opinion, the Appeals Board en banc rescinded the Findings of Fact and Award (F&A) issued by the workers' compensation administrative law judge (WCJ) on February 21, 2023, and returned the matter to the trial level for development of the record and for further proceedings. The en banc decision held that (1) Labor Code[1] section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment, and that the Labor Code makes no statutory provision for "vocational apportionment;" (2) that vocational evidence may be used to address issues relevant to the determination of permanent disability; and (3) that vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

Applicant contends that the apportionment analysis described by the QME is speculative and not substantial, and that applicant is entitled to an unapportioned award. Applicant further contends that vocational evidence may be used to characterize and quantify permanent disability, and that the vocational opinions expressed by vocational experts may differ from the medical

[1] All further statutory references are to the Labor Code unless otherwise stated.

evidence. Applicant asserts that the prohibition against using vocational apportionment in place of otherwise valid medical apportionment will result in "pass-through" apportionment that is not substantial evidence; that defendant failed to meet its burden of proof under section 4664; and that our June 22, 2023 Opinion may result in protracted discovery and litigation.

We have received an Answer from defendant.

We have considered the allegations of applicant's Petition for Reconsideration and defendant's Answer. Based on our review of the record, and for the reasons stated in the Opinion, which we incorporate herein, we will deny reconsideration.[2]

DISCUSSION

Initially, we conclude that our June 22, 2023 en banc decision constitutes a "final" order. A petition for reconsideration is properly taken only from a "final" order, decision, or award. (Lab. Code, §§ 5900(a), 5902, 5903.) Generally, a "final" order is one "which determines any substantive right or liability of those involved in the case." (*Capital Builders Hardware v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122] (*Gaona*); *Rymer v. Hagler* (1989) 211 Cal.App.3d 1171, 1180 [260 Cal. Rptr. 76] (*Rymer*); *Safeway Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Pointer*) (1980) 104 Cal.App.3d 528, 534-535 [45 Cal.Comp.Cases 410, 413] (*Pointer*).) Accordingly, where the Appeals Board grants reconsideration, rescinds the decision of the WCJ, and returns the matter to the WCJ for further proceedings and a new decision, the Appeals Board's action generally is not deemed a "final" order. (Cf. *Travelers Ins. Co. v. Workers' Comp. Appeals Bd.* (*Taylor*) (1983) 147 Cal.App.3d 1033, 1036, fn. 3 [48 Cal.Comp.Cases 774, 775, fn. 3] (*Taylor*) ("a petition seeking review of a [WCAB] order which remands a matter to the trial judge for further proceedings is ordinarily premature").)

However, en banc decisions of the Appeals Board are binding precedent on all Appeals Board panels and WCJs. (Cal. Code Regs., tit. 8, § 10341; *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). Therefore, we will treat our June 22, 2023 decision as a "final" order. (Cf. *Aldi v.*

[2] This decision is being issued in response to applicant's challenge to our en banc decision in this matter and is designated as an en banc decision. (Lab. Code, § 115.)

Carr, McClellan, Ingersoll, Thompson & Horn (2006) 71 Cal.Comp.Cases 783, 784 [2006 Cal. Wrk. Comp. LEXIS 189] (Appeals Board en banc).)

Our Opinion determined that the February 21, 2023 F&A failed to satisfy the requirements set forth in section 5313 and *Hamilton v. Lockheed Corporation* (2001) 66 Cal.Comp.Cases 473, 476 [2001 Cal. Wrk. Comp. LEXIS 4947] (Appeals Board en banc) (*Hamilton*). (Opinion, at pp. 16-17.) We observed that while the parties submitted both specific and cumulative injury claims for decision during trial proceedings, the WCJ's February 21, 2023 Findings of Fact and Award (F&A) failed to adequately address permanent disability and apportionment for each injury claimed by applicant. We further determined that the Opinion on Decision failed to explain in detail the WCJ's analysis as to each claimed injury and the associated issues submitted for decision and further, failed to provide appropriate citation to the evidentiary record or to legal authority. (*Ibid.*)

Other than speculating that an inadequate apportionment analysis by the Qualified Medical Evaluator (QME) may have been the reason the WCJ ignored the evaluating physician's apportionment analysis, applicant's Petition offers no substantive discussion of section 5313 or the adequacy of the record under *Hamilton*. (Petition, at 4:24; *Hamilton, supra*, at p. 476.) Therefore, applicant has not established that our decision to return the matter to the trial level for development of the record and to comply with section 5313 was made in error, which, standing alone, may constitute grounds for denial of the Petition.

Turning to applicant's stated contentions, we begin with our holding that vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment. (Opinion, at p. 13.) Applicant contends our use of the term "valid" to describe the apportionment that must be considered by the vocational expert presupposes a prior legal determination as to the validity of the medical apportionment. (Petition, at p. 3:21.) However, in order to constitute substantial evidence the opinions of both the evaluating physician as well as the vocational expert must detail the history and evidence in support of their respective conclusions, including "how and why" a condition or factor is causing permanent disability. (Opinion, at p. 11; *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 [2005 Cal. Wrk. Comp. LEXIS 71] (Appeals Board en banc) (*Escobedo*); see also *E.L. Yeager v. Workers' Comp. Appeals Bd. (Gatten)* (2006) 145 Cal.App.4th

922 [71 Cal.Comp.Cases 1687].) In *Escobedo, supra*, we summarized the standard that an apportionment analysis must meet in order to constitute substantial evidence as follows:

> [T]o be substantial evidence on the issue of the approximate percentages of permanent disability due to the direct results of the injury and the approximate percentage of permanent disability due to other factors, 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, supra,* at pp. 43-44.)

The validity of an apportionment analysis described by an evaluating physician is therefore *not assumed*, and must be carefully weighed and determined by the WCJ. (See Opinion, at p. 12; Lab. Code, § 5952(d); *Garza v. Workmen's Comp. App. Bd.* (1970) 3 Cal.3d 312, 317 [35 Cal.Comp.Cases 500].) Our reference to "otherwise valid" medical apportionment is an acknowledgment that the proper application of apportionment to a determination of permanent disability must be based on an apportionment analysis that constitutes substantial evidence, that is based on a review of the entire record, and that does not rely on an incorrect legal theory. (*Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Place v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 372, 378-379 [35 Cal.Comp.Cases 525].) It is axiomatic that in those instances where the WCJ determines that no evaluating physician has identified valid legal apportionment, applicant is entitled to an unapportioned award.

A corollary of this principle is that if no evaluating physician has identified medical apportionment, a vocational expert is not authorized to interpose an independent apportionment analysis. This is because section 4663 does not authorize an expert witness to offer a superseding "vocational apportionment" scheme independent of that identified by evaluating physicians. Similarly, if an evaluating physician identifies apportionment, but the WCJ determines that the apportionment analysis does not constitute substantial evidence and that development of the record is not otherwise warranted, applicant is entitled to an unapportioned award. (See, e.g., *Escobedo, supra,* 70 Cal.Comp.Cases 604, at p. 611; *Boone v. State of California - Dept. of Transp.* (July 23, 2018, ADJ7974582) [2018 Cal. Wrk. Comp. P.D. LEXIS 348]; *Maverick v. Marriott Int'l* (January 30, 2015, ADJ2034254) [2015 Cal. Wrk. Comp. P.D. LEXIS 50].)

It is also well-established that a physician has made the apportionment determination required under section 4663(c) where the evaluating physician has carefully considered factors of

apportionment, but has nonetheless determined 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. Under those circumstances, assuming that the WCJ or the WCAB determines that development of the record is not warranted, applicant would then be entitled to an unapportioned award. (Opinion, at p. 8; *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].)

Applicant's Petition cites to *Target Corp. v. Workers' Comp. Appeals Bd. (Estrada)* (2016) 81 Cal.Comp.Cases 1192 [2016 Cal. Wrk. Comp. LEXIS 131] (writ den.),[3] for the proposition that a "vocational expert's analysis necessarily includes a different approach to causation [of disability]…." (Petition, at p. 10:19.) However, to the extent this argument assumes that the vocational expert may offer a competing or alternate apportionment analysis, we reject the assertion as inconsistent with section 4663. As we explained in our Opinion, section 4663 authorizes and requires that apportionment determinations be made by *evaluating physicians*. (Opinion, at p. 8.) Alternate apportionment schemes espoused by vocational or other expert witnesses are not statutorily authorized and may not be used to circumvent the apportionment mandated by the legislature in the exercise of their plenary power to create and enforce a complete system of workers' compensation. (Cal. Const., art. XIV, § 4; *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal.App.4th 746, 758 [80 Cal.Comp.Cases 1119] (*Dahl*).) Moreover, in *Estrada,* we affirmed the WCJ's determination that applicant was entitled to an unapportioned award because the WCJ found no evidence supporting nonindustrial apportionment.[4] (*Estrada, supra*, at p. 1195.)

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[3] Panel decisions are not binding precedent (as are en banc decisions) on all Appeals Board panels and workers' compensation judges. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425 fn. 6 [67 Cal.Comp.Cases 236].) A California Compensation Cases digest of a "writ denied" case is also not binding precedent. (*MacDonald v. Western Asbestos Co*. (1982) 47 Cal.Comp.Cases 365, 366 [Appeals Bd. en banc].) While not binding, the WCAB may consider panel decisions to the extent that it finds their reasoning persuasive. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, fn. 7 (Appeals Bd. en banc).)

[4] We also note that in *Estrada*, the WCJ's finding that applicant had sustained permanent and total disability was made "in accordance with the fact," pursuant to section 4662(b). The Court of Appeal has subsequently held in *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd.* (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 610 [83 Cal.Comp.Cases 1680) that section 4662(b) does not provide a separate path to a finding of permanent and total disability. Rather, *Fitzpatrick* clarified that it is section 4660 which governs how a finding and award of permanent total disability may be made "in accordance with the fact." (*Ibid.*)

Applicant's Petition refers us to the writ-denied decision in *Pacific Compensation Insurance Co. v. Workers' Comp. Appeals Bd. (Nilsen)* (2013) 78 Cal.Comp.Cases 722 [2013 Cal. Wrk. Comp. LEXIS 90] (*Nilsen*),[5] for the proposition that industrial injuries can result in a total loss of earning capacity, notwithstanding factors of apportionment including a prior award and preexisting psychiatric treatment. (Petition, at p. 7:9.) In *Nilsen*, applicant's industrial injuries resulted in the development of a new and distinct medical condition in the form of a chronic pain syndrome. (*Nilsen, supra*, at p. 723.)[6] Multiple evaluating physicians opined that the chronic pain syndrome *standing alone* resulted in permanent and total disability without apportionment. (*Nilsen, supra*, at pp. 723-724.) While the record reflected other valid factors of apportionment, the WCJ concluded that the medical and vocational evidence supported a finding of permanent and total disability based on the opinions of the evaluating physicians who determined that applicant's inability to compete for wages was caused solely by his chronic pain syndrome, a condition for which there was no valid apportionment. (*Ibid.*) In sum, nothing in the analysis in our Opinion is inconsistent with the outcome in *Nilsen*.

On the other hand, when an evaluating physician identifies a valid basis for apportionment, such apportionment must be considered as part of any determination of permanent disability, including a vocational expert's evaluation of an injured worker's feasibility for vocational retraining. (Opinion, at p. 13.) As was the case in *Nilsen*, *supra,* a finding of permanent and total disability notwithstanding the presence of valid nonindustrial apportionment is permissible, so long as the medical and vocational evidence establishes that the permanent and total disability arises solely out of industrial conditions or factors, that is, exclusive of nonindustrial or prior industrial conditions or factors. (*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*).) It is not permissible, however, to circumvent valid medical apportionment by attempting to introduce a competing theory of apportionment such as "vocational apportionment." (Opinion, at p. 13.)

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[5] See footnote 3, ante, page 5.

[6] Subsequent case law has clarified that when injury to a new or different body part is caused by industrially provided medical treatment, the resulting disability is not apportionable. (*Hikida v. Workers' Comp. Appeals Bd.* (2017) 12 Cal.App.5th 1249 [82 Cal.Comp.Cases 679]; cf. *County of Santa Clara v. Workers' Comp. Appeals Bd.* (*Justice*) (2020) 49 Cal.App.5th 605 [85 Cal.Comp.Cases 467].)

In the present matter, both vocational experts have attempted to describe an apportionment analysis that is inconsistent with the apportionment described by the evaluating physician. Our Opinion returns the matter to the trial level for further development and explication of the record, and accordingly, we have expressed no opinion as to the validity of the apportionment analysis of QME Dr. Brown. However, to the extent that *both* applicant's and defendant's vocational experts seek to interpose vocational apportionment in place of medical apportionment, the vocational reporting does not constitute substantial evidence of apportionment consistent with section 4663.

Applicant asserts that the underlying apportionment analysis of the QME is not substantial medical evidence. Applicant contends that the "medical apportionment found by Dr. Brown relating to diabetes is similarly speculative, in that it does not explain the 'how and why' of how the permanent disability found is impacted by an underlying diabetic condition." (Petition, at p. 4:24.) However, the QME's apportionment to applicant's diabetic condition was described in the context of the carpal tunnel syndrome diagnosis. (Ex. E, Report of Melinda A. Brown, M.D., August 1, 2017, at p. 33.) Applicant's vocational expert, on the other hand, focused his analysis of applicant's feasibility for vocational retraining on the sequelae of applicant's cervical spine and left shoulder injuries, and specifically excluded the "right elbow/shoulder condition, carpal tunnel syndrome, and diabetic condition." (Ex. X, Report of Gene Gonzales, June 18, 2021, at p. 38.) As a result, applicant's contentions regarding apportionment of the wrist/carpal tunnel syndrome disability are not relevant to the discussion of whether the vocational experts have appropriately accounted for the apportionment of applicant's cervical spine disability. In that regard, we note that the QME has thus far described apportionment related to each of the various injured body parts or conditions, but has not been asked to address apportionment in relation to the factors identified by the vocational experts. (Ex. D, Report of Melinda Brown, M.D., May 17, 2016, at pp. 25-26.)

All parties to this matter are required to meet their respective burdens of proof as to all issues by a preponderance of the evidence. (Lab. Code, § 3202.5; see *Peter Kiewit Sons v. Industrial Acc. Com.* (*McLaughlin*) (1965) 234 Cal.App.2d 831, 838 [30 Cal.Comp.Cases 188].) Moreover, "[t]he burden of proof rests upon the party … holding the affirmative of the issue." (Lab. Code, § 5705; *Escobedo, supra*, at p. 612.) In order to address their respective burdens of proof, the parties may wish to seek an additional opinion from the QME as to whether the factors giving rise to applicant's non-feasibility for vocational retraining as identified by the vocational

experts are themselves subject to medical apportionment, or whether applicant's inability to participate in vocational retraining is attributable solely to current industrial conditions or factors. (*Borman, supra*, at pp. 1142-1143; *Lindh, supra*, at p. 1175.)

Applicant's Petition further contends that physicians are ill-equipped and frequently unwilling to address vocational evidence, declining to address the topic as "beyond the scope of [their] expertise." (Petition, at p. 11:1.) We reject this assertion as speculative, overbroad, and unsupported in the record. It is uncontroverted that many evaluating physicians routinely describe and consider a significant array of vocational evidence in the preparation of their reporting.

In fact, the Labor Code repeatedly provides that evaluating physicians must address all relevant issues as comprehensively as possible. (See Lab. Code, §§ 139.2, 4061, 4062.3(j), 4064(a), 4628(c), 4663(b); see also Cal. Code Regs., tit. 8, § 10683.) WCAB Rule 10682 requires that physicians include in their reporting a history of the alleged industrial injury, the patient's complaints, and an opinion "as to the nature, extent and duration of disability and work limitations, if any." (Cal. Code Regs., tit. 8, § 10682(b)(8).) A physician's report must further gather information and express an opinion as to the causation of the work injury, and whether or not permanent disability has resulted from the work injury. (Cal. Code Regs., tit. 8, § 10682(b)(13).)

Section 4061.5 states in relevant part that "[t]he treating physician . . . shall . . . render opinions on all medical issues necessary to determine eligibility for compensation. . . ." A primary treating physician is tasked with notifying the claims administrator of changes in applicant's condition, including a change to the employee's return to work status, or when the employee's condition requires them to leave work, or requires changes in work restrictions or modifications. (Cal. Code Regs., tit. 8, § 9785(f)(3) & (4).) The primary treating physician is further tasked with determining whether the employee's permanent disability precludes, or is likely to preclude, the employee from engaging in the employee's usual occupation or the occupation the employee was engaged in at the time of the injury. (Cal. Code Regs., tit. 8, § 9785(f)(7).) If the injury results in permanent partial disability, the primary treating physician must complete a Physician's Return-to-Work and Voucher Report form.[7] (Cal. Code Regs., tit. 8, § 9785(i).) This form requires that the treating physician opine as to "work restrictions in terms of how many hours a particular activity is restricted during an 8-hour work day," and further provides for "[o]ther restrictions

[7] https://www.dir.ca.gov/dwc/forms/SJDB/10133.36.pdf.

[which] can include psychiatric restrictions, chemical exposure, use of equipment, or any other restrictions." (Cal. Code Regs., tit. 8, § 10133.36.)

In addition to the required consideration of vocational evidence in the preparation of a report, an evaluating physician may also utilize vocational evidence in the assessment of both impairment and permanent disability. The AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides) observes 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." (AMA Guides, 5th Ed., § 1.9, at pp. 13-14.) With respect to the broader question of whether a seriously injured worker is able to reenter the labor market, the AMA Guides observe, "[a] decision of this scope usually requires input from medical and nonmedical experts, such as vocational specialists, and the evaluation of both stable and changing factors, such as the person's education, skills, and motivation, the state of the job market, and local economic consideration." (*Id.* at p. 14.) Additionally, where an evaluating physician is tasked with describing impairment pursuant to the AMA Guides, vocational evidence may assist the physician in determining which of the chapters, tables, or methods from within the four corners of the AMA Guides will provide the most accurate assessment of the injured worker's impairment. (*Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc), as affirmed by *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

We further observe that despite applicant's predictions to the contrary, the QME in the present matter was both willing to, and able to, review and comment on the vocational reporting as relevant to her assessment of applicant's overall permanent disability. (Ex. G, Report of Melinda Brown, M.D., March 16, 2021, at p. 32.)

In short, as is demonstrated above, 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. We therefore find no merit in applicant's contention that evaluating physicians are ill-equipped and unwilling to assess vocational evidence. To the contrary, we believe that vocational evidence is an important, and often integral, consideration in the preparation of medical-legal reporting, and that is fully within the purview of the evaluating physician to offer an opinion

responsive to the vocational evidence either at the request of the parties, or of the physician's own accord.

Applicant also contends our holding that the reporting of vocational experts must address valid medical apportionment will result in "pass-through" apportionment. That is, "if the vocational expert simply adopts medical apportionment as the vocational expert's own opinion, sometimes referred to a 'pass through apportionment,' it may result in situations where the vocational expert does not properly provide opinions based on the vocational factors and evidence as they relate to causation." (Petition, at 13:20.) However, we find applicant's argument in this respect unpersuasive because the argument assumes vocational experts are legally entitled to make an apportionment determination, a contention we have previously rejected. (Opinion, at p. 7.) Moreover, applicant concedes that "'[p]ass-through' apportionment *from one medical specialty to another* is typically considered invalid and can cause a report to lack substantial evidence." (Petition, at p. 13:20, italics added.) While we agree generally that it is impermissible for an evaluating physician to merely reiterate another physician's apportionment analysis without an accompanying explanation of "how and why" the conditions or factors of apportionment result in permanent disability, these concerns would necessarily be limited to *physicians* who are statutorily authorized to render an apportionment opinion under section 4663. (See, e.g. *Mayorga v. Dexter Axle Chassis Group* (June 25, 2015, ADJ364166; ADJ3925942) [2015 Cal. Wrk. Comp. P.D. LEXIS 359].) There can be no "pass-through" apportionment from a physician to a vocational expert when that expert is not authorized to render an apportionment determination in the first instance.

Finally, we wish to address the rhetoric used by applicant in the Petition. Applicant contends that the consequences of our decision proscribing "vocational apportionment" will be "disastrous" and will lead to an "implosion of the [workers' compensation] system." (Petition, at p. 16:20.) Applicant characterizes our decision as "directionless" and potentially requiring the application of "invalid" medical apportionment, the result of which would be "devastating to the worker's [*sic*] compensation environment." (*Id.* at pp. 17:26, 16:1.) Applicant further contends that "lawyers on both sides may use this case as a sword to distract, delay and obfuscate …." (*Id.* at p. 16:13.) We find these arguments to be unpersuasive and inflammatory. Our Opinion holds that only an evaluating physician may render an apportionment opinion, and that the opinion must be based on substantial medical evidence. (Opinion, at p. 7.) Our Opinion further holds that

pursuant to section 4663, a vocational expert may not substitute other theories of apportionment in an effort to supplant otherwise valid legal apportionment. (Opinion, at p. 13.) Our Opinion does not require the application of invalid apportionment by the parties or by the WCJ, and in those instances where there is a significant question as to the validity of a physician's medical apportionment opinion, the vocational expert is free to offer their analysis in the alternative.

Our Opinion applies the legislative mandate that valid legal apportionment be considered in the assessment of an employer's liability for industrial injuries, including those determinations where the assessment of disability derives from applicant's non-feasibility for vocational retraining. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624].) We therefore decline to engage in the conjecture and surmise urged by applicant's rhetoric. We further remind applicant's counsel that the use of intemperate language is proscribed by our Rules, and we encourage all parties to employ language that is both reasoned and civil in their pleadings before this court. (Lab. Code, § 5813; Cal. Code Regs., tit. 8, § 10421(b)(9).)

In summary, reconsideration is inapposite because applicant's petition offers no challenge to our determination that the current record does not comply with section 5313. We reject applicant's contention that a vocational expert may substitute a competing theory of apportionment in place of otherwise valid legal apportionment, as inconsistent with statutory and case law authority. We further reject applicant's contention that evaluating physicians are unwilling or unqualified to evaluate vocational evidence. Rather, we are of the opinion that evaluating physicians are uniquely situated to consider and opine on vocational evidence, and that the consideration of vocational evidence is appropriate and often necessary to the assessment of issues related to industrial injury and permanent disability. Finally, we decline to characterize the consideration of valid medical apportionment in vocational reporting as "pass-through" apportionment, because the vocational evaluator is not statutorily authorized to render an apportionment opinion. We will deny applicant's Petition for Reconsideration, accordingly.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the Opinion and Decision After Reconsideration (En Banc) issued by the Workers' Compensation Appeals Board on June 22, 2023 is **DENIED**.

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

August 29, 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
LAW FIRM OF ROWEN, GURVEY & WIN
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*