WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

KIM THOMPSON, *Applicant*

vs.

COUNTY OF LOS ANGELES; PERMISSIBLY SELF-INSURED, ADMINISTRED BY SEDGWICK CMS, *Defendants*

Adjudication Number: ADJ4347908; ADJ2344089
Pomona District Office

OPINION AND ORDER GRANTING PETITION FOR RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant seeks reconsideration and in the alternative removal, of the May 23, 2023 Joint Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant, while employed as a Deputy Sheriff on April 17, 1996, sustained industrial injury to the low back, lumbar spine, and in the form of esophagitis, stress urinary incontinence, and sensory neurogenic bladder. The WCJ determined that the schedule for rating Permanent Disability for injuries prior to April 1, 1997 was not rebutted, and that applicant was not permanently and totally disabled. The WCJ further deferred a determination with respect to the nature and extent of the injury, including industrial causation of applicant's alleged thoracic outlet syndrome, as well as permanent disability, future medical treatment and apportionment of the applicant's esophageal, urinary incontinence, sensory neurogenic bladder, and orthopedic injuries.

Applicant contends that in determining that applicant did not rebut the permanent disability rating scheduled (PDRS), the WCJ failed to consider relevant case law pertaining to sheltered or workshop employment; that applicant's physicians have imposed additional work restrictions since applicant's completion of a vocational rehabilitation program; and that applicant is permanently and totally disabled "in accordance with the fact," per Labor Code sections 4660 and 4662(b). In the alternative, applicant seeks removal of the matter to the Workers' Compensation

Appeals Board (WCAB) pursuant to Labor Code section 5310, on grounds of irreparable harm. Applicant observes that the orthopedic Agreed Medical Evaluator (AME) is no longer available, and contends that development of the record will require selecting a new orthopedic Agreed or Qualified Medical Evaluator. Applicant submits that that the selection of a new AME will offer defendant additional opportunity to establish apportionment, and that there is no need for development of the record, as the record establishes a diagnosis of thoracic outlet syndrome to a reasonable medical probability.

We have received an Answer from the County of Los Angeles (defendant). The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the allegations of the Petition for Reconsideration and Petition for Removal, and the contents of the report of the WCJ with respect thereto. Insofar as applicant seeks removal, we observe that reconsideration is the appropriate remedy herein, given the WCJ's threshold determinations as to both employment and injury. Based on our review of the record, and for the reasons discussed below, we will grant reconsideration and affirm the decision of May 23, 2023, except that we will amend Finding of Fact No. 7 to reflect that issues of permanent disability are deferred pending development of the record. We will also amend Finding of Fact No. 8 to reflect that the issue of whether applicant has rebutted the scheduled rating is likewise deferred.

BACKGROUND

Applicant has filed two Applications for Adjudication. In ADJ4347908, applicant claimed injury to her the low back, lumbar spine, urinary incontinence, neurogenic bladder, esophagitis, internal system, right upper extremity, and thoracic outlet syndrome, while employed as a Deputy Sheriff by defendant Los Angeles County on April 17, 1996. Defendant admits injury to the low back, lumbar spine, and in the form of urinary incontinence, neurogenic bladder and esophagitis, but disputes injury to the internal system, right upper extremity, and in the form of thoracic outlet syndrome.

In ADJ2344089, applicant claimed injury in the form of neurogenic bladder, while employed as a Deputy Sheriff by defendant Los Angeles County from May 15, 1996 to May 15, 1997. Defendant denies liability for the claimed injury.

The parties have selected Jeffrey A. Berman, M.D., as the AME in orthopedics, Ernest H. Agatstein, M.D., as the AME in urology, and James F. Lineback, M.D. as the AME in internal medicine. The parties have also selected vocational expert witnesses, with Keith Wilkinson reporting for applicant, and Kelly Bartlett reporting for defendant.

The parties proceeded to trial on June 9, 2022, at which time the WCJ consolidated both pending cases. In Case No. ADJ4347908, the parties framed issues of parts of body, permanent disability, apportionment and need for further medical treatment. In Case No. ADJ2344089, the parties raised issues of injury arising out of and in the course of employment (AOE/COE), permanent disability, apportionment, and need for further medical treatment. Applicant testified, and the parties submitted both cases for decision as of August 16, 2022.

On May 23, 2023, the WCJ issued her Joint Findings of Fact and Award (F&A), determining in relevant part that applicant was not entitled to an Award of Permanent Total Disability based on the vocational rehabilitation reports of Keith Wilkinson (Finding of Fact No. 7), and that the schedule for rating Permanent Disability for injuries prior to April 1, 1997 was not rebutted (Finding of Fact No. 8.) The WCJ determined applicant sustained industrial injury to the low back and lumbar spine, and in the form of esophagitis, stress urinary incontinence, and sensory neurogenic bladder, but deferred the issue of injury to the right upper extremity as well as injury resulting in thoracic outlet syndrome. (Findings of Fact No. 9, 10, 11, and 12.)

Applicant's Petition for Reconsideration and Petition for Removal (Petition) avers that applicant's permanent and total disability is established by her limitation to sheltered employment, as supported by relevant case law. (Petition, at 3:26.) Applicant cites to *Spartech Plastics v. Workers' Comp. Appeals Bd. (Ochoa-Pena)* (1998) 64 Cal.Comp.Cases 124 [1998 Cal. Wrk. Comp. LEXIS 4202] (writ den.) *(Ochoa-Pena)*, and *Pacific Greyhound Lines v. Workers' Comp. Appeals Bd.* (*Dickow*) (1973) 38 Cal.Comp.Cases 359 [1973 Cal. Wrk. Comp. LEXIS 2209] (writ den.) (*Dickow*) for the proposition that a limitation to sheltered employment is consistent with a finding of total loss of market competitiveness, rendering applicant permanently and totally disabled. (Petition, at 6:28.) Applicant further contends she is permanently and totally disabled "in accordance with the fact," pursuant to section 4662(b). Alternatively, applicant contends that removal of the matter to the WCAB is warranted given the prejudice and delay that will result from the WCJ's order for development of the record. (*Id.* at 12:18) Applicant further contends that

development of the record will allow defendant to further address issues of apportionment despite a prior closure of discovery. (*Id.* at 11:28.)

Defendant's Answer avers that the WCJ's determination that applicant is not permanently and totally disabled is supported by the medical record and the reporting of the AMEs, none of whom have found applicant to be permanently and totally disabled. (Defendant's Answer to Applicant's Petition for Reconsideration and Petition for Removal (Answer), at 2:11.) Defendant further observes that applicant has previously completed a full vocational rehabilitation program, and that applicant is presently self-employed in an ongoing business concern. (*Id.* at 3:10.) Defendant concludes that because applicant has completed a vocational rehabilitation program and reentered the labor market, she is not permanently and totally disabled. (*Id.* at 3:23.)

DISCUSSION

Applicant avers that vocational evidence establishes that she is permanently and totally disabled.

In our recent decision in *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 [2023 Cal. Wrk. Comp. LEXIS 30] (Appeals Bd. en banc) (*Nunes*), we discussed the role of vocational evidence in workers' compensation proceedings:

> Section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), as applied by the Permanent Disability Rating Schedule (PDRS) in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie, supra*, at p. 1320 ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd. (Fitzpatrick)* (2018) 27 Cal. App. 5th 607, 614 [238 Cal. Rptr. 3d 224, 83 Cal. Comp. Cases 1680] (*Fitzpatrick*); *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd. (Guzman)* (2010) 187 Cal. App. 4th 808 [115 Cal. Rptr. 3d 112, 75 Cal. Comp. Cases 837] (*Guzman*).)
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> However, the scheduled rating is not absolute. (*Fitzpatrick, supra*, at pp. 619–620.) A rating obtained pursuant to the PDRS may be rebutted by showing an applicant's diminished future earning capacity is greater than that reflected in the PDRS. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262 [129 Cal. Rptr. 3d 704, 76 Cal. Comp. Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd. (Dahl)* (2015) 240 Cal. App. 4th 746 [193 Cal. Rptr. 3d 7, 80 Cal. Comp. Cases 1119] (*Dahl*).) In analyzing the issue

of whether and how the PDRS could be rebutted, the Court of Appeal has observed:

> Another way the cases have long recognized that a scheduled rating has been effectively rebutted is when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal. 3d 234 [193 Cal. Rptr. 547, 666 P.2d 989]. In *LeBoeuf*, an injured worker sought to demonstrate that, due to the residual effects of his work-related injuries, he could not be retrained for suitable meaningful employment. (Id. at pp. 237–238.) Our Supreme Court concluded that it was error to preclude *LeBoeuf* from making such a showing, and held that "the fact that an injured employee is precluded from the option of receiving rehabilitation benefits should also be taken into account in the assessment of an injured employee's permanent disability rating."
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> (*Ogilvie, supra*, at p. 1274.)
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> Thus, "an employee may challenge the presumptive scheduled percentage of permanent disability prescribed to an injury by showing a factual error in the calculation of a factor in the rating formula or application of the formula, the omission of medical complications aggravating the employee's disability in preparation of the rating schedule, or by demonstrating that due to industrial injury the employee is not amenable to rehabilitation and therefore has suffered a greater loss of future earning capacity than reflected in the scheduled rating." (*Ogilvie, supra*, at p. 1277.) The court in Ogilvie thus affirmed the continued relevance of vocational evidence with respect to the determination of permanent disability. (*Applied Materials v. Workers' Comp. Appeals. Bd. (Chadburn)* (2021) 64 Cal. App. 5th 1042 [279 Cal. Rptr. 3d 728, 86 Cal. Comp. Cases 331]; see also *County of Sonoma/Health Services Dept. v. Workers' Comp. Appeals Bd. (Helper)* (2023) 88 Cal. Comp. Cases 309 [2023 Cal. Wrk. Comp. LEXIS 4] (writ den.).)
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> (*Id.* at pp. 14-17.)

Vocational evidence may be offered to rebut the scheduled rating under the applicable Permanent Disability Rating Schedule (PDRS), in order to achieve a rating commensurate with the employee's true diminished future earning capacity. (*Ogilvie, supra*, at 1274.) However, the rebuttal of the presumptive scheduled percentage of permanent disability necessarily presupposes that the applicable percentage of disability under the PDRS has been identified.

Here, the WCJ has determined that applicant has not rebutted the applicable PDRS, and is therefore not entitled to an award of permanent and total disability. (Findings of Fact, Nos. 7, 8.) The WCJ also deferred final findings of fact as to body parts injured, including injury in the form of thoracic outlet syndrome, as well as a final determination of permanent disability and apportionment. (Findings of Fact, Nos. 9, 10, 11, 12.)

Although the WCJ is tasked with entering findings responsive to the issues submitted for decision by the parties, the WCJ's determination as to whether applicant has rebutted the PDRS is necessarily premised on the identification of the level of permanent disability under the PDRS in the first instance. That is, the scheduled rating will generally need to be established *prior to* a determination as to whether applicant has rebutted the scheduled rating. (*Ogilvie, supra*, at 1274.) Here, the WCJ has deferred her determination as to the nature and extent of the injuries sustained, including body parts, permanent disability, and apportionment. Accordingly, a determination as to whether applicant has or has not rebutted the scheduled rating is premature. We will therefore amend Findings of Fact Nos. 7 and 8, to defer issues of whether applicant has rebutted the PDRS, as further to defer issues of permanent disability.

Following our independent review of the record, we also observe that applicant has raised a colorable issue of whether she is, in fact, permanently and totally disabled as a result of her limitation to sheltered or workshop employment.

In *LeBoeuf v. Workers' Compensation Appeals Board* (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587] (*LeBoeuf*), our Supreme Court recognized that an injured worker may be found to be permanently and totally disabled when the effects of the industrial injury cause a loss of future earning capacity because the employee is not amenable to vocational rehabilitation and is unable to compete in the open competitive labor market. "[P]ermanent disability is understood as 'the irreversible residual of an injury … A permanent disability is one '… which causes impairment of earning capacity, impairment of the normal use of a member, or a competitive handicap in the open labor market … Thus, permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity."(*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1320 [72 Cal. Comp. Cases 565].)

Under the *LeBoeuf* analysis, an injured worker may be found to be totally permanently disabled even if he or she is able to perform some limited work in a sheltered and protected work

environment. In *Spartech Plastics v. Workers' Comp. Appeals Bd. (Ochoa-Pena)* (1998) 64 Cal.Comp.Cases 124 [64 Cal. Comp. Cases 124] (writ den.), applicant sustained life-threatening injuries following an electrical flash-fire, and was temporarily disabled for several years as a result of his injuries. Applicant recovered to the point where he returned to work for the same employer, working approximately 50 hours per week, albeit under specific and beneficial work conditions:

> Applicant had testified that he could take breaks from his duties at will and go rest in an air-conditioned office if he felt tired. He generally took three to four ten to fifteen minute breaks each day in addition to his lunch break. Moreover, Applicant never worked outside more than one half hour a day because the sun bothered him. The WCJ opined that when an employer allows an employee to rest in an air-conditioned office at will, the work environment is protected.

(*Id.* at pp. 125-126.)

Notwithstanding applicant's return to work, the WCJ entered findings that applicant was permanently and totally disabled. The WCJ's determination turned on applicant's inability to compete in the open labor market, and although applicant was able to return to gainful employment with the same employer, that employment was "protected" work otherwise unavailable in the open labor market. (*Id.* at p. 126.)

Similarly in *Pacific Greyhound Lines v. Workers' Comp. Appeals Bd. (Dickow)* (1973) 38 Cal.Comp.Cases 359 [1973 Cal. Wrk. Comp. LEXIS 2209] (writ den.), the WCAB held that applicant's disability caused by chronic obstructive airway disease was permanent and total, notwithstanding the fact that applicant was operating his own auto-repair shop. The WCAB observed that irrespective of applicant's sheltered self-employment, applicant's disability nevertheless precluded him from competing in the open labor market, and that this lack of market competitiveness was indicative of permanent and total disability. (*Id.* at p. 361.)

More recently, in *Garden Grove Unified School Dist. v. Workers' Comp. Appeals Bd. (Moore)* (2010) 75 Cal.Comp.Cases 521 [2010 Cal. Wrk. Comp. LEXIS 63] (writ den.), applicant sustained injury resulting in, *inter alia*, bilateral total knee replacements. Applicant's injury caused her to resign from her position with defendant, but following her convalescence, applicant returned to work for Cal. State Fullerton. Nonetheless, the WCJ determined that applicant was permanently and totally disabled based on the significant work restrictions imposed by applicant's treating physicians, coupled with expert vocational evidence that these restrictions precluded applicant's

reentry into the open and competitive labor market. (*Id.* at p. 523.) The WCJ further observed that applicant's work for Cal. State Fullerton was "sheltered" or "protected" employment:

> The WCJ also indicated in relevant part that Applicant's employment as a teacher with Cal State Fullerton was a sheltered work shop employment that did not preclude the 100-percent PD finding because applicant only worked two to three days per week for a maximum of three hours per day, she was given a special chair, and she enjoyed the assistance of an aide who carried items to Applicant's classroom. According to the WCJ, Applicant could go home whenever it was necessary. Furthermore, the WCJ indicated that Applicant's treating physicians were aware of her part-time work at Cal State Fullerton. The WCJ concluded that substantial evidence supported the WCJ's findings that Applicant had sustained 100-percent disability.
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> *(Ibid.)*

Here, applicant successfully completed a vocational rehabilitation program, followed by two separate attempts to reenter the labor market. (Minutes of Hearing and Summary of Evidence (Minutes), July 28, 2022, at 4:6.) Neither attempt resulted in applicant's successful reintegration into the competitive job market. However, applicant has been self-employed by the company she founded in 2001. (*Id.* at p. 5:1.) In her self-employment, applicant has no set schedule, and works sporadically two to eight hours per week. (*Id.* at p. 6:19.) Applicant further testified that she tries to never pass a bathroom, and that her symptoms of incontinence have been unchanged for twenty years. (*Ibid.*)

Applicant's vocational expert Mr. Wilkinson has characterized applicant's self-employment as a "protected work environment," one that can accommodate work restrictions that would not be tolerated in the open labor market. (Applicant's Ex. 1, Report of Keith Wilkinson, August 3, 2021, at pp. 2, 5.) Mr. Wilkinson observes that applicant's self-employment affords her flexibility in performing routine repetitive tasks that, allows for fluctuations of work hours and breaks and use of medications, and permits lost work time from medical appointments and unscheduled days off. (*Id.* at p. 5.)

Defendant contends the reporting of Mr. Wilkinson offers only opinion, without underlying evidence, that employers would not be willing to accommodate applicant's restrictions. In addition, defense vocational expert Kelly Bartlett avers, the concept of sheltered employment "is not a familiar one within the CA workers' compensation system," and that applicant's industrial injuries "did not impair her participation in vocational rehabilitation services and for that reason,

she did not have a future earning capacity greater than reflected in the scheduled rating." (Ex. B, Report of Kelly Bartlett, dated January 7, 2022, at p. 7.)

However, the WCJ has observed that the work restrictions which, for this date of injury may inform the ultimate permanent disability ratings, are not clear to the extent that they may overlap. The WCJ noted, "applicant has claimed additional permanent disability based on the findings of Dr. Agatstein which is alleged to be separate and apart from and not subsumed within the orthopedic work restrictions found by AME Dr. Berman. Issues remain as to whether some work restrictions issued in one specialty should be rated separate and apart or whether certain restrictions are properly subsumed within others." (F&A, Opinion on Decision, p. 5.)

Additionally, Dr. Agatstein was specific in his deposition testimony that he would need to reevaluate applicant in connection with apportionment of applicant's neurogenic bladder issues to obesity, especially in light of the claimed weight loss asserted by counsel at deposition. (Joint Ex. 5, Transcripts of the depositions of Ernest Agatstein, M.D., dated July 21, 2016 and November 12, 2019, at 80:11.)

We also observe that applicant's vocational expert Mr. Wilkinson determined that Dr. Berman's work restrictions were not easily translated to the work environment, and as a result, that Mr. Wilkinson limited his transferable skills analysis to the work restrictions offered by treating physician Dr. Dennis in 2006. (Applicant's Ex. 1, Report of Keith Wilkinson, August 3, 2021, at pp. 2, 17.)

Accordingly, and for all of the above reasons, we affirm the WCJ's determination that the record requires development. We are persuaded that additional medical-legal and vocational opinion is essential to properly assess (1) the nature and extent of applicant's injuries, (2) to what extent, if any, there is overlap between the work restrictions assigned by the AMEs in various specialties, and (3) whether applicant is medically limited to the work conditions present in her self-employment, including, but not limited to, a flexible schedule, two to eight hours per week, ability to take unscheduled days off, and proximity to a bathroom. The medical-legal evaluators must complete their reporting, and analyze the issues of causation and overlap, and their opinions should reflect the present realities of applicant's self-employment and any changes to applicant's condition (e.g., weight loss). If applicant's present employment is a reflection of *medically necessary* work restrictions, vocational expert reporting may assist the parties and the court in determining whether applicant's employment is sheltered or protected employment, and why

applicant's work restrictions might, or might not, be honored in the open and competitive labor market.

We acknowledge applicant's concerns that development of the record will further delay this case because, among other issues, the orthopedic AME has retired from practice. (Petition, at 12:17.) However, to be considered substantial evidence, a medical opinion "must be predicated on reasonable medical probability." (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 928 [71 Cal.Comp.Cases 1687]; *McAllister v. Workmen's Comp Appeals Bd.* (1968) 69 Cal. 2d 408, 413, 416-17, 419 [71 Cal. Rptr. 697, 445 P.2d 313, 33 Cal.Comp.Cases 660).) An opinion is not substantial evidence if it is based on "inadequate medical histories or examinations, on incorrect legal theories, or on surmise, speculation, conjecture, or guess." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 620-21 [2005 Cal. Wrk. Comp. LEXIS 71]; see also *West v. Industrial Acci. Com.* (1947) 79 Cal.App.2d 711 [12 Cal. Comp. Cases 86].)

Here, in order for the medical-legal opinions expressed by the AMEs to constitute substantial medical evidence, they must be based on a complete medical history, and directly address facts that are germane to the issue causation, including whether applicant's work history and job duties were causative of her claimed injuries, and must further address any overlap of resulting work restrictions. Additionally, in order to accurately reflect applicant's levels of disability, the AME reporting must reflect a complete understanding of applicant's current capabilities and work restrictions in a vocational setting.

In summary, we agree with the WCJ that the record must be developed with respect to the nature and extent of applicant's industrial injuries, including parts of body injured, and any overlap between work restrictions. Because the final determination as to permanent disability has been deferred pending development of the record, we will amend Findings of Fact Nos. 7 and 8, to defer the determination of whether applicant is permanently and totally disabled, and whether applicant has successfully rebutted her scheduled rating. We are also persuaded that notwithstanding applicant's completion of a vocational rehabilitation plan, the issue of whether applicant is medically limited to sheltered or protected work is relevant to the determination of applicant's permanent disability, and we agree with the WCJ that the issue should be addressed in supplemental reporting from the AMEs and vocational experts in this matter.

For the foregoing reasons,

IT IS ORDERED that reconsideration of the decision of May 23, 2023 is **GRANTED**.

IT IS FURTHER ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Joint Findings and Award, dated May 23, 2023, is **AFFIRMED, EXCEPT** that it is **AMENDED** as follows:

FINDINGS OF FACT

7. The issue of permanent disability is deferred pending development of the record.
8. The issue of whether applicant has rebutted the scheduled rating is deferred pending development of the record.

WORKERS' COMPENSATION APPEALS BOARD

/s/ JOSEPH V. CAPURRO, COMMISSIONER

I CONCUR,

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

ANNE SCHMITZ, DEPUTY COMMISSIONER
CONCURRING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

August 14, 2023

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

KIM THOMPSON
BAGBY, GAJDOS & ZACHARY
LAW OFFICES OF MICHAEL BARNARD

SAR/abs

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