WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LUISA MATIAS, *Applicant*

vs.

NATURIPE BERRY GROWERS;
ZENITH INSURANCE COMPANY, *Defendants*

Adjudication Number: ADJ10607794
Oakland District Office

OPINION AND DECISION AFTER RECONSIDERATION

The Appeals Board granted reconsideration to study the factual and legal issues. This is our Decision After Reconsideration.[1]

In the Findings, Award and Orders of March 12, 2021, the workers' compensation judge ("WCJ") found that applicant, while employed as a harvester on June 16, 2016, sustained industrial injury to her neck, low back, left shoulder, left hip, left knee, left leg and left elbow, causing permanent disability of 28% after apportionment. The WCJ also made rulings concerning the admissibility of certain evidence. The WCJ found no good cause to disturb the prior orders regarding discovery of January 3, 2019 and March 21, 2019. In addition, the WCJ admitted into evidence exhibits 18, 19, and 20, as well as exhibits Q and R, but the WCJ disallowed admission of exhibit 21 and exhibit O.

Applicant filed a timely Petition for Reconsideration of the WCJ's decision. Applicant contends that the WCJ erred in not vacating the prior WCJ's orders of January 3, 2019 closing medical discovery, and that the WCJ erred in not continuing the trial of December 2, 2020 to allow further discovery.

Defendant filed an answer, which has been considered.

The WCJ submitted a Report and Recommendation ("Report").

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[1] Commissioner Deidra E. Lowe signed the Opinion and Order Granting Petition for Reconsideration dated June 1, 2021. As Commissioner Lowe is no longer a member of the Appeals Board, a new panel member has been substituted in her place.

At the outset, we observe that if a decision includes resolution of a "threshold" issue, then it is a "final" decision, whether or not all issues are resolved or there is an ultimate decision on the right to benefits. (*Aldi v. Carr, McClellan, Ingersoll, Thompson & Horn* (2006) 71 Cal.Comp.Cases 783, 784, fn. 2 (Appeals Board en banc).) Threshold issues include but are not limited to, injury arising out of and in the course of employment, jurisdiction, the existence of an employment relationship and statute of limitations issues. (See *Capital Builders Hardware, Inc. v. Workers' Comp. Appeals Bd.* (*Gaona*) (2016) 5 Cal.App.5th 658, 662 [81 Cal.Comp.Cases 1122].) Failure to timely petition for reconsideration of a final decision bars later challenge to the propriety of the decision before the WCAB or Court of Appeal. (See Lab. Code, § 5904.) Alternatively, non-final decisions may later be challenged by petition for reconsideration once a final decision issues.

A decision issued by the Appeals Board may address a hybrid of both threshold and interlocutory issues. If a party challenges a hybrid decision, the petition seeking relief is treated as a petition for reconsideration because the decision resolves a threshold issue. However, if the petition challenging a hybrid decision disputes a determination made on an interlocutory question, then the Appeals Board will evaluate the issues raised by the petition under the removal standard applicable to non-final decisions, i.e., significant prejudice or irreparable harm. (Cal. Code Regs., tit. 8, § 10955.)

In this case, the Findings, Award and Orders of March 12, 2021 included orders on the admissibility of certain evidence, which make the orders interlocutory in nature and subject to challenge by petition for removal. However, we treat applicant's challenge to the Findings, Award and Orders of March 12, 2021 as a petition for reconsideration, because the decision also includes the WCJ's finding that applicant sustained permanent disability of 28% after apportionment. That finding constitutes final resolution of a threshold issue. Therefore, the WCJ's decision is properly challenged by petition for reconsideration, and we address applicant's petition as such.

Turning to the merits, we have considered the allegations of applicant's Petition for Reconsideration and the contents of the WCJ's Report with respect thereto. Based on our review of the record, and for the reasons stated in the WCJ's Report, which we adopt and incorporate except the WCJ's discussion of apportionment of applicant's left shoulder and lumbar disability, we will affirm the WCJ's evidentiary rulings and his determination that the scheduled permanent disability was not rebutted by vocational evidence. In affirming the WCJ on those issues, we have

given the WCJ's credibility determination pertaining to applicant great weight because the WCJ had the opportunity to observe the demeanor of the witness. (*Garza v. Workmen's Comp. Appeals Bd*. (1970) 3 Cal.3d 312, 318-319 [35 Cal.Comp.Cases 500].)

However, we disagree with the WCJ that the medical opinion of Dr. Domeniconi, the Panel Qualified Medical Evaluator ("PQME"), is substantial evidence of apportionment of applicant's left shoulder and lumbar disability.[2] Therefore, we will amend the WCJ's Findings and Award to reflect that applicant's industrial injury resulted in permanent disability of 41%, without apportionment.

It is well-settled that the burden of proving apportionment is with the defense. (*Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1114 [71 Cal.Comp.Cases 1229].) Stated another way, the rule also stands for the proposition that applicant does not have the burden of *disproving* apportionment. In this case, although applicant failed to disclose injuries she suffered before and after the industrial injury of June 16, 2016, this fact does not mean that the complete record necessarily dictates a finding of apportionment.

Dr. Domeniconi served as the PQME in this matter. In his first comprehensive report dated March 21, 2018, Dr. Domenico evaluated applicant's spinal impairment (including cervical and lumbar impairment) at 10% Whole Person Impairment ("WPI") and her left shoulder impairment at 9% WPI. The doctor also added 3% WPI for pain, with a combined overall assessment of impairment at 22% WPI. Dr. Domeniconi found no basis for apportionment of permanent disability in his March 21, 2018 report. (Exhibit F, pp. 19-21.)

In a supplemental report dated July 16, 2018, Dr. Domeniconi reviewed additional medical records and stated that "there were obvious prior conditions Ms. Matias had/has that did not come out" when the doctor took her history for his initial report. Although Dr. Domeniconi gave the same permanent impairment ratings described in his March 21, 2018 report, he changed his opinion on apportionment as follows:

> (3) Regarding applicant's left shoulder, it is apparent that she has had more than [one] incidence in injuring that shoulder. The shoulder has been dislocated and research has shown that a dislocated [shoulder] usually is more susceptible to future complications. It is my opinion that 50% apportionment should be applied to her permanent disability of injury date 06/16/16, from prior shoulder injuries.

[2] Applicant raised the issue of apportionment on page eleven of her petition for reconsideration.

> (4) Applicant has had [many] prior falls, where documented complaints of neck and low back pain have resulted. And, shortly after her work injury in question (DOI: 06/16/16), she fell once more on 10/08/2016, with documented low back pain as a result. [Given] the past injuries to her neck and low back, it is my opinion that 50% of her permanent disability [given] by me to these areas from injury date 06/16/2016, should be apportioned due to her prior injuries.
>
> (Exhibit I, pp. 19-22.)

In reference to the permanent disability resulting from injury to applicant's neck, we agree with the WCJ that the above opinion of Dr. Domenico does not support apportionment to non-industrial factors under Labor Code section 4663. The WCJ correctly points out in his Report that Dr. Domenico's apportionment of applicant's cervical spine disability "is not borne out by the medical records, as the cervical spine was not involved in her 2009 injury or the October 2016 injury, and the involvement of the cervical spine in the 2014 fall is not clear."

We further note the WCJ correctly recognized that in order to constitute substantial evidence of apportionment, the medical opinion must "describe in detail the exact nature of the apportionable disability," among other required elements. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 [Appeals Board en banc].) However, we do not share the WCJ's view that Dr. Domenico's 50% apportionment of applicant's left shoulder and lumbar disabilities is substantial evidence.

Dr. Domenico tried to support apportionment of applicant's left shoulder disability by stating that applicant's "shoulder has been dislocated and research has shown that a dislocated [shoulder] usually is more susceptible to future complications." This is not substantial evidence of apportionment because the doctor did not describe in detail the exact nature of the apportionable disability resulting from the prior dislocation of applicant's left shoulder, and the doctor did not explain how and why the dislocation was causing permanent disability at the time of the doctor's evaluation in 2018. Further, the fact that the prior shoulder dislocation may have made applicant more susceptible to left shoulder injury to begin with, as implied by Dr. Domenico, does not necessarily support a finding of apportionment. This is because the existence of a contributing factor in an industrial injury does not necessarily equate to a finding that the contributing factor likewise is causing permanent disability; the analysis of these two issues may be different. (See *Reyes v. Hart Plastering* (2005) 70 Cal.Comp.Cases 223 [Significant Panel Decision], citing

Employers Mutual Liability Ins. Co. of Wisconsin v. Industrial Acc. Com. (*Gideon*) (1953) 41 Cal.2d 676 (18 Cal.Comp.Cases 286) [employee's head injury resulting from fall caused by non-industrial seizure found compensable].)

We reach the same conclusion regarding Dr. Domenico's attempt to apportion applicant's lumbar spine disability. The basis for the doctor's apportionment of one-half of the lumbar spine disability was his observation that applicant had several falls before and after the industrial injury, with the falls resulting in documented low back pain. Here again, Dr. Domenico failed to describe in detail the exact nature of the apportionable lumbar disability resulting from applicant's falls; the fact that the falls resulted in "documented back pain" is a generalized description of the lumbar disability and as such does not constitute substantial evidence of apportionment. Dr. Domenico also failed to explain how and why the back pain resulting from the falls was causing permanent disability at the time of the doctor's evaluation in 2018. Further, the doctor's formulation of percentages of non-industrial disability, without any explanation as to how they were calculated, is not substantial evidence of apportionment.

Finally, we note that there has been no objection to the WCJ's finding of the permanent disability indemnity rate at $160.00 per week, or to rating formula applied by the WCJ in his Opinion on Decision:

Lumbar spine: .50 (15.03.01.00 – 7% [1.4] - 10% - 491H – 13 – 14%) 7%

Cervical spine: 15.01.01.00 – 7% [1.4] – 10% -491H – 13 – 14%

Left shoulder: .50 (16.02.02.00 – 12% [1.4] – 17% - 491G – 19 – 20%) 10%

Combined Value Chart ("CVC") = 28%

Absent apportionment, the rating of applicant's permanent disability is set forth below, and we will amend the WCJ's decision accordingly:

Lumbar spine: 15.03.01.00 – 7% [1.4] - 10% - 491H – 13 – 14%

Cervical spine: 15.01.01.00 – 7% [1.4] – 10% -491H – 13 – 14%

Left shoulder: 16.02.02.00 – 12% [1.4] – 17% - 491G – 19 – 20%

CVC = 41%

For the foregoing reasons,

IT IS ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, that the Findings, Award and Orders of March 12, 2021 is **AFFIRMED**, except that Finding 6 and paragraph A of the Award are **AMENDED** to reflect as follows:

FINDINGS OF FACT

6. Applicant's injury caused permanent disability of 41%.

AWARD

(A) Permanent disability of 41%, payable at the rate of $160.00 per week beginning March 6, 2018 for 208 weeks, less credit for benefits previously paid, and less an attorney's fee in the amount of 15% of permanent disability indemnity awarded hereunder.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSEPH V. CAPURRO, COMMISSIONER

CRAIG SNELLINGS, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

February 15, 2024

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

LUISA MATIAS
KNOPP PISTIOLAS
CHERNOW & LIEB

JTL/*ara*

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 PETITION FOR RECONSIDERATION

INTRODUCTION

By a timely and verified Petition for Reconsideration (Petition), [applicant] seeks reconsideration of my March 12, 2021 Findings, Award and Orders, wherein I found, among other things, that there is no basis to disturb the prior orders of January 3, 2019 and March 21, 2019, at which time discovery was closed. I further found that applicant's injuries caused permanent disability of 28% after apportionment, and that applicant's July 21, 2109 proposed letter to the QME, Dr. Domeniconi, is not admitted into evidence.

Applicant contends that medical discovery should remain open for a supplemental report and evaluation from Dr. Domeniconi because applicant's condition has worsened since she was seen by Dr. Domeniconi in 2018. Defendant filed an Answer, disputing applicant's contention. I have reviewed the entire record in this matter, applicant's Petition, and defendant's Answer.

FACTUAL BACKGROUND

The relevant portion of the background and my prior opinion is set forth at pages 1-14 of the Opinion on Decision as follows:

BACKGROUND

1. Proceedings Prior to December 2, 2020 Trial

This case has a long history of litigation, including but certainly not limited to the February 11, 2020 Opinion and Order Granting [Defendant's] Petition for Removal and Decision after Removal, wherein the Appeals Board affirmed that discovery was closed at the January 3, 2019 mandatory settlement conference, and that the matter should proceed to trial on the issued identified in the January 3, 2019 Pre-Trial Conference Statement. Specific additional discovery was allowed in the March 21, 2019 Order, which pertained to vocational evidence sought by applicant.

There was a previous full day trial in this matter in front of a different trial judge on November 21, 2017, after which applicant was awarded temporary disability benefits as a seasonal worker.

2. Testimony at December 2, 2020 Trial

Applicant testified on direct examination that for her neck symptoms, she is still experiencing weakness, tightness & stabbing pain. It is increased by mopping, putting on socks, washing clothes. She needs to lie down when it increases, about 4 times per day. She gets tired from activities, which causes her to lay down.

For her low back symptoms, she is still experiencing burning pain. The pain is always there. For her left shoulder, she still experiences a stabbing pain. The pain is always there.

For her left elbow, she still experiences pain, which radiates down her left arm. She experiences this pain every 5 minutes. For the left leg, she experiences pain in the back of her leg, her left hip and left knee. The hip feels as if it is "open" and that it is "falling down." She experiences this all of the time. Her left knee feels numb, which comes and goes, and she feels this when she sits and walks, stands or sits a lot. She will experience this every day. She experiences pain in the left rib area, and can't sleep on her left side without pain. She is right-handed.

Her pain limits her – she cannot lift heavy items. She can only lift a gallon of milk with her left arm. She was previously able to lift a large basket of clothes. She can now lift a chair with both arms. Before the injury, she could lift a heavy load of laundry. Heaviest item she had to lift in her job was boxes full of blackberries. She can't lift overhead with her left arm, and can't comb her hair – her daughter did this for her today. She feels that she has no strength.

She is mostly not limited in her walking, but she experiences left leg numbness. When she is limited in walking, she cannot walk more than half a mile. She can only stand in one place for 15-20 minutes. She cannot fasten her bra, as she can't twist her arm backwards. She can't stretch enough to put her socks on. She uses her right hand only in the shower. Has trouble lifting pans and chopping vegetables. She has trouble mopping and only picks up dishes with right hand. She was able to clean her house before the injury.

She's not still under the care of a doctor for the injury. She can't recall when she last saw her treating physician, Dr. Meza. This treatment ended because the carrier was not paying for the treatment. She believes that she can benefit from further medical treatment. She takes Tylenol once per day. This decreases her pain a little bit for 3 hours.

She has not worked since shortly after the injury, and she has not looked for work since then because she believes she cannot work because of the pain in her left arm. She depends on her husband and her daughter to support her. She wants to work. She recalls the interview and testing with Mr. Malmuth and his staff in San Francisco. She was truthful with him.

On cross-examination, applicant stated that she is at home, testifying over LifeSize Cloud. No one else has been in the room with her while testifying.

She has seen other doctors besides Dr. Meza for her injury. She has also seen other physicians for conditions other than this injury. She has always told these doctors the truth. She recalls being seen by defendant's vocational expert, Scott Simon, and she told him the truth.

She recalls being seen at Salinas Valley Memorial Hospital regarding her seizures. She was seen there in September of 2000, when she fell and hit a metal object per these records, but she did not recall this. The report was read to her (she cannot read English) from exhibit DD, but this does not refresh her recollection. She has no reason to doubt what is in this report. She does, however, recall having seizures before the 2016 injury. She does not recall a May 7, 2010 left shoulder injury. She was then shown the May 7, 2010 report from Salinas Valley Memorial Hospital (Exh. DD), which shows a prior left shoulder dislocation, but this does not refresh her recollection. She has no reason to doubt what is in this report.

She does not recall being seen at Natividad Medical Center. There is a May 3, 2010 report in these records (Exh. FF) documenting a seizure, but she does not recall treatment there. She was shown this report, but this does not refresh her recollection. She has no reason to doubt what is in this report. There is a July 11, 2014 report from Natividad, where she fell down some stairs and felt pain in her neck, low back, left shoulder and head. She was shown this report, but this does not refresh her recollection. She has no reason to doubt what is in this report.

Regarding a June 3, 2015 report from Natividad where she had 3 seizures in the past week, she does not recall this. She was shown this report, but this does not refresh her recollection. She has no reason to doubt what is in this report, which shows that her husband related that these were her first seizures since 2009. There is an April 26, 2015 report regarding headaches, abdominal pain and low back pain for 3-4 days at Natividad, but she does not recall this. She was shown this report, but this does not refresh her recollection. She has no reason to doubt what is in this report.

She does not recall being seen by physicians at Laurel Family Practice Health Clinic. There is documentation of her July 11, 2014 fall down stairs documented there. It shows that she hit her head several times. She was shown this report, but this does not refresh her recollection. She has no reason to doubt what is in this report. She doesn't recall being seen there for her seizures.

She was then asked about an August 23, 2008 injury to her neck, back, shoulder, abdomen and legs that settled. She does not recall this injury.

She does not recall being seen at Salinas Valley Memorial Hospital for abdominal pain.

For an entry of June 5, 2003 re: stomach pain at Salinas Valley Memorial Hospital, she does not recall this. Regarding her prior deposition on August 1, 2017 (Exh. R), page 38:3-41:15, she was asked about medication for her seizures. This did not refresh her recollection.

She denied in her deposition any prior back injuries at p. 60 of her deposition, and this is contrary to records showed to her in earlier questioning of the back treatment and injury in 2015 at Natividad (exhibit FF). She didn't recall this appointment, or

being asked about it in the morning session today. She denies memory loss issues from injury to her head.

When asked about line 64:5-15 of her deposition regarding pain in neck going down left arm to her left finger from the injury, she denied pain prior to this in the deposition. She was shown records of this earlier, and she said that the medical records are correct. She agrees with this inconsistency.

Regarding her left shoulder, she was asked about pages 42-43:4 of her deposition testimony, where she denied prior injury to her left shoulder. It was then pointed out that this is inconsistent with medical records shown to her in the morning session.

Applicant said that the medical records are correct. She agrees that this is inconsistent.

Regarding her seizures at page 36:22 – 37, and her history of seizures, where she said that she didn't have any seizures since the age of 9 until her deposition in 2017. This did not refresh her recollection. Applicant said that the medical records are correct, and her deposition testimony was not. She agrees that this is inconsistent.

When asked for clarification of her neck pain from her direct testimony, she stated that it comes and goes. She stated that she started having to lie down for neck pain since she stopped seeing a doctor. The last known report of Dr. Meza is from June of 2019. She does not recall telling Mr. Malmuth or Mr. Simon of the need to lie down.

She doesn't recall that she told Mr. Simon that she can walk up to an hour. She can sit for 15 minutes. She does not recall telling Mr. Simon that she could sit for up to an hour.

Regarding page 74 of her deposition transcript, she was then asked if she could clean the bathroom, and she appeared to say that she could (although this is not entirely clear). She testified on direct examination that she cannot do this, and that any inference that she could do this after the injury is incorrect.

She doesn't recall who told her that the insurance company would not pay for her treatment with Dr. Meza anymore.

On re-direct examination, regarding her lack of recall of treatment for numerous conditions on cross-examination, she was referred to page 60 of her deposition, where she denied any prior back injury. She was not trying to intentionally deceive the questioner, but she had simply "did not remember." The same is true regarding her prior stomach problems at pages 38-41, her prior left shoulder injury at pages 42-43, and regarding her prior neck pain at pages 64-65.

She earlier testified about being told by Dr. Navani that she was not authorized for further treatment. She was referring to treatment with Dr. Navini.

On re-cross examination, applicant stated that, regarding the difference between not understanding between not remembering something or not knowing something, she was asked a hypothetical regarding robbing a bank. She understands this distinction. (*Minutes of Hearing and Summary of Evidence [MOH/SOE],* December 2, 2020 at pp. 7-11.)

* * * *

3. Medical-Legal Reports

Applicant was evaluated by Dr. Henri Domeniconi as the Qualified Medical Examiner (QME). Dr. Domeniconi produced two reports. His first report of March 21, 2018 (Exh. 101) found applicant's condition to be permanent and stationary for her orthopedic complaints. He found 7% Whole Person Impairment (WPI) for her cervical spine, 7% WPI for her lumbar spine, and 12% WPI (including the 3% add-on for pain) for her left shoulder. He did not apportion any of applicant's permanent disability to non-industrial factors or prior injuries. He provided her with lifting restrictions of 15 pounds, with "no repetitive push/pull/lift/bend/reaching overhead."

In his supplemental report of July 16, 2019 (Exh. 102), Dr. Domeniconi was provided medical records for review, and noted at page 19 of his report that "there were obvious prior conditions Ms. Matias has/had that did not come out in my history taking of her." He noted her prior history of left shoulder injuries, and apportioned 50% of the permanent disability to the June 16, 2016 injury, and the remaining 50% to her history of prior left shoulder injuries, including a history of shoulder dislocation. He also apportioned 50% of her cervical and lumbar spine permanent impairment to prior conditions, based upon her history of many prior falls. He remained of the opinion that she is in need of further medical care for her left shoulder, neck and low back.

4. Vocational Reports

Applicant was evaluated by Jeff Malmuth on her own behalf. Mr. Malmuth provided three reports. In his first report of January 28, 2019 (Exh. 18), Mr. Malmuth found at page 9 of his report that applicant has an eroded or impaired degree of vocational amenability to direct placement in the labor market. He also notes that she has been provided with a training voucher, but has not used it. He concluded at page 27 of his report that she has a 54% alteration in the capacity to meet post-injury occupational demands, and 79% diminished ability to compete in the open labor market. Despite the significant medical apportionment, Mr. Malmuth did not find any applicable apportionment from a vocational perspective.

In his next report of March 7, 2019 (Exh. 19), when asked to provide a "detailed individualized employability assessment," Mr. Malmuth changed his opinion to now conclude that she is not vocationally feasible or amendable to rehabilitation, that she is not employable, and has sustained a total loss of earnings capacity.

Applicant was then evaluated by Scott Simon as the vocational expert on behalf of defendant. In his February 13, 2020 report (Exh. Z), Mr. Simon found that applicant is amenable to rehabilitation, and that she has not sustained any loss of future earnings capacity.

In his final report of July 10, 2020 (Exh. 20), Mr. Malmuth spends much of his time on other cases and other vocational counselors not affiliated with or germane to this case. He later notes that he disagrees with Mr. Simon's assessment. He concludes that, utilizing the data obtained by Mr. Simon, applicant has a 63% loss of labor market access, a.k.a., diminished future ability to compete in an open labor market, which Mr. Malmuth characterized at page 48 of his report as "another data point the Trier of Fact may want to consider regarding Ms. Matias' level of permanent disability."

DISCUSSION

Procedural Issues

At the January 3, 2019 MSC, discovery was closed. At the March 21, 2019 trial setting, the trial judge allowed limited additional discovery regarding vocational experts. The Appeals Board has ruled on the contentions of the parties regarding closure of discovery in its February 11, 2020 Opinion, and the Appeals Board's determination on this issue is final. Discovery remains closed based upon the current record. I also observe that applicant has provided no evidence of any worsening in applicant's condition from when she was last seen by Dr. Domeniconi.

Admissibility of Evidence

I find good cause to allow the reports of Mr. Malmuth (Exh's 18 – 20) into evidence based upon the March 21, 2019 Order, but I do not find any reason to allow exhibit 21, the letter from applicant's counsel to Dr. Domeniconi, based upon the January 3, 2019 Order closing discovery.

* * *

Permanent Disability, Apportionment and Need for Further Medical Treatment

[…]

Apportionment of permanent disability is now "based on causation" and the "employer shall only be liable for the percentage of permanent disability directly caused by the injury arising out of and occurring in the course of employment." (Labor Code sections 4663 (a) and 4664(a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 611 (en banc).) Examining physicians therefore must "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (Labor Code section 4663(c).) For a medical opinion on apportionment 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.
>
> 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." (Esc*obedo, supra,* at 70 Cal.Comp.Cases at 621-622.)

[…]

[…] The apportionment to her cervical spine [by Dr. Domeniconi]…is not borne out by the medical records, as the cervical spine was not involved in her 2009 injury or the October, 2016 injury, and the involvement of the cervical spine in the 2014 fall is not clear. […]

The opinion of Dr. Domeniconi supports applicant's need for further medical treatment to her low back, neck and left shoulder.

* * *

Reports of Vocational Experts

Although the statutory scheme of rating permanent disability pursuant to the 2005 Permanent Disability Rating Schedule (PDRS) is presumptively correct, it can be rebutted, as determined in *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal. App. 4th 1262 [76 Cal.Comp.Cases 624], which states:

> [A]n 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 (emphasis added). (*Ogilvie, supra* 197 Cal. App. 4th at p. 1277.)

The *Ogilvie* court derived the method of rebutting the PDRS by demonstrating that due to industrial injury the employee is not amenable to rehabilitation from the California Supreme Courts's opinion in *LeBoeuf v. Workers' Compensation Appeals Board* (1983) 34 Cal.3d 234. This has been referred to as the "*LeBoeuf* method." The *Ogilvie* case clarified that the *LeBoeuf* method is only applicable in cases "where the employee's diminished future earnings are directly attributable to the employee's work- related injury, and not due to nonindustrial factors such as general economic conditions, illiteracy, proficiency in speaking English, or an employee's lack of education." (*Ogilvie, supra,* 197 Cal.App.4th at p. 1275.) "This application of *LeBoeuf* hews most closely to an employer's responsibility . . . to 'compensate only for such disability or need for treatment as is occupationally related.'" (Id. at p. 1275.)

Ogilvy was further discussed in the *Dahl* decision:

> *Ogilvie* confirmed the Legislature meant what it said, and that claimants may not rebut their disability rating merely by offering an alternative calculation of their diminished future earning capacity. While Ogilvie found the 2004 amendments did not overthrow certain long-held approaches to calculating earning capacity, it clearly did not intend those approaches to be construed so broadly as to return us to the ad-hoc decision making that prevailed prior to 2004. Following the WCAB's approach in this case would do just that. Claimants could rebut their presumptively correct disability rating merely by presenting an analysis that shows a greater diminished future earning capacity than that determined by applying the Schedule. As *Ogilvie* makes clear, this approach is no longer permissible. (*Dahl, supra*, 240 Cal. App. 4th at 761.)

Turning to the instant case, I cannot rely on applicant's vocational expert, Jeff Malmuth, to support an increase in applicant's permanent disability rating.

As discussed above, applicant's credibility is in question regarding the history that she provided to the QME, which raises the question of the reliability of the information that she provided to the vocational evaluators as well. Specifically, applicant admitted on cross-examination at trial that her deposition testimony was inconsistent with medical records shown to her at trial regarding her prior history of injury and pain to her lower back (Exh. R, p. 60), neck (Exh. R, pp. 64—65), and left shoulder (Exh. R, pp. 42-43). Furthermore, even after being shown records of prior treatment at trial, applicant could not recall her prior left shoulder injury of May 7, 2010, the slip and fall in July of 2014 resulting in pain to her neck, low back and left shoulder, and a complaint of lower back pain on April 26, 2015. Therefore, I cannot take the history that she provided to the vocational evaluators at face value, since applicant has been proven to be an inaccurate and unreliable historian.

Mr. Malmuth initially found that applicant has some vocational amenability, and that she has a 54% alteration in the capacity to meet post-injury occupational demands, and 79% diminished ability to compete in the open labor market. He did not deviate from these numbers in his later reports, but he did state that she is not employable at all due to her work restrictions, as well as her age at the time of injury (44), her lack of transferable or marketable skills, her below average academic ability, and that she had been absent from the labor market for three years. What this leap from at most 79% diminished capacity to compete in the open labor market to complete unemployability ignores is that these non-industrial factors (with the exception of her being three years post-injury at the time of the vocational evaluations) were already in existence prior to her injury in 2016. They did not, however, prevent her from finding employment at that time, despite the fact that this severely limited the jobs which were available to her pre-injury. Moreover, Mr. Malmuth also places reliance on his determination that her work limitations per the QME has a "synergistic effect," despite no such medical determination to support this.

Even assuming that applicant's history and information provided to the vocational evaluators could be credibly relied upon, the *Dahl* court was skeptical that an employee may invoke the second *Ogilvie* rebuttal method where the inability to rehabilitate results in less than a 100% permanent disability, and I share the same skepticism in the present case, because Mr. Malmuth has not provided a plausible opinion that applicant has a complete loss of earnings capacity. Therefore, because applicant has not rebutted the rebutted diminished future earning capacity (DFEC) factor in 2005 PDRS, there is no legal basis to increase to award of permanent disability above the level established by the medical evidence.

DISCUSSION REGARDING APPLICANT'S PETITION FOR RECONSIDERATION

I have reviewed applicant's petition and it did not persuade me to change my Findings, Award, Orders or opinion.

With respect to the closure of discovery, defendant correctly points out in its Answer that discovery was clearly closed at the time of the January 3, 2019 MSC, and it was only re-opened for vocational evidence, as confirmed by the Appeals Board. Perhaps if there had been even the slightest support of a worsening of applicant's condition since 2018 or some procedural flaw pointed out the opinion of Dr. Domeniconi, there would have been a basis to consider re-opening medical discovery.

I did not find applicant to be a credible witness, and I note that she confirmed at trial on cross-examination that her prior deposition testimony was inconsistent with her prior medical records on numerous occasions. Even if applicant were a credible witness, she did not testify that her condition had worsened since the time of the 2018 examination with the QME, Dr. Domeniconi. Furthermore, there are no medical records which support a worsening of her condition since 2018. Therefore, I find no support for applicant's contention that the medical record is in need of further discovery based upon any worsening of her condition since the 2018 evaluation with Dr. Domeniconi.

Lastly, with respect to exhibit 21, applicant's proposed July 8, 2019 letter to the QME, I remain of the opinion that there is no basis to admit this into evidence, since it was produced after non-vocational discovery was closed.

[…]

Dated: April 23, 2021

JAMES GRIFFIN
WORKERS' COMPENSATION
ADMINISTRATIVE LAW JUDGE