WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

JOHN FLOYD, *Applicant*

vs.

FLOYD SKEREN & KELLY, LLP; CYPRESS INSURANCE COMPANY, administered by Berkshire Hathaway Homestate Companies, *Defendants*

Adjudication Number: ADJ9116799
Santa Barbara District Office

OPINION AND DECISION AFTER RECONSIDERATION

We previously granted reconsideration to allow us time to further study the factual and legal issues in this case. This is our Opinion and Decision After Reconsideration.[1]

Applicant and defendant each seek reconsideration of the Findings of Fact and Award (F&A) issued on May 19, 2022, by the workers' compensation administrative law judge (WCJ). The WCJ found, in pertinent part that, while employed as an attorney, applicant sustained injury arising out of and in the course of his employment during the period March 27, 2001 to May 15, 2013, to his brain, heart, circulatory system, internal organs, intestinal system, digestive system, and excretory system (including irritable bowel syndrome (IBS)); that applicant's injury caused 100% permanent disability; and that the weekly rate of payment is $1,066.72, commencing on January 25, 2014.

Applicant contends that the WCJ erred in failing to apply Labor Code section 4659(c)[2] to account for the "state average weekly wage" increase to the permanent total disability indemnity rate based on stipulated average weekly earnings of $5,000.00 per week.

Defendant contends that the WCJ's decision is not based on substantial evidence because he should have relied on the opinions of panel qualified medical evaluators (PQMEs) Jeffrey Caren, M.D., Stanley Majcher, M.D., and Jay Jurkowitz, M.D., and vocational expert Scott Simon,

---

[1] Commissioner Sweeney was on the panel that issued the order granting reconsideration. Commissioner Sweeney no longer serves on the Appeals Board. A new panel member has been appointed in her place.

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

M.S., and that applicant failed to rebut the Permanent Disability Rating Schedule (PDRS); and that it met its burden to show apportionment in accordance with section 4663 based on substantial medical evidence and section 4664 based on applicant's prior Joint Award of 45% permanent disability under case numbers ADJ3416484 (MON 0319157) and ADJ3761342 (MON 0319158) for injuries to the vascular system and in the form of high blood pressure. Finally, defendant requests correction of the F&A to reflect the date of injury as March 27, 2001 to April 15, 2013.

We have received Answers from applicant and defendant. The WCJ filed a Report and Recommendation on Petition for Reconsideration (Report) recommending that we grant reconsideration to amend the permanent disability indemnity rate to account for a section 4659(c) increase.

We have considered the allegations in both Petitions for Reconsideration, their respective Answers, and the contents of the WCJ's Report with respect thereto. Based upon our review of the record, and for the reasons discussed below, we will rescind the F&A and substitute a new F&A that reflects the proper period of injurious exposure, corrects clerical errors with respect to the defendants, removes the finding that applicant's weekly rate is $1,066.72, and defers the issues of permanent disability, apportionment, and attorney fees. We make no other substantive changes to the F&A.

BACKGROUND

Applicant, while employed during the period March 27, 2001 to April 15, 2013, as an attorney, sustained an industrial injury to his brain, heart, circulatory system, internal organs, intestinal system, digestive system, and excretory system (including IBS).

On April 30, 2007, applicant and State Compensation Insurance Fund executed Joint Stipulations with Request for Award (Stipulations) wherein he sustained, during the period up through March 2001 and on March 27, 2001, industrial injuries to his vascular system and in the form of high blood pressure resulting in 45% permanent disability with the need for further medical treatment. (ADJ3416484 and ADJ 3761342.) The Joint Stipulations relied on the qualified medical evaluation (QME) report of Robert Weissman, M.D., dated January 24, 2003 (Joint Ex. E) based on preclusion from undue emotional distress and very heavy work, contemplating a 25% loss of applicant's preinjury capacity for bending, lifting, stooping, pushing, pulling and climbing or other comparable physical activities. (*Id.* at p. 8.)

On January 19, 2022, the parties proceeded to trial. Among the issues they submitted for adjudication were permanent disability and apportionment.

Applicant submitted treating physician reports of Nachman Brautbar, M.D. (App. Exs. 11-12) and Dr. Weissman (App. Exs. 16-19) as well as the vocational reports of John C. Meyers, M.A. (App. Exs. 9-10). Defendant submitted PQME reports of Dr. Caren (Def. Exs. I-L) and Dr. Jurkowitz (Def. Exs. S-V) as well as the vocational expert reports of Mr. Simon (Def. Ex. N-R).

Dr. Weissman, in his report dated February 15, 2016 (Joint Ex. H), evaluated applicant and recorded a history of a 2001 transient ischemic attack attributed to excessive workload. Per the report, Tarzana Medical Center diagnosed the applicant with carotid artery disease requiring multiple surgeries, resulting in verbal apraxia and memory loss. (*Id.* at pp. 3-4.) Dr. Weissman also diagnosed applicant with coronary heart disease and renal failure. (*Id.* at p. 12.) With respect to work restrictions, Dr. Weissman stated as follows:

> It may be appreciated that, given the extent of his impairment relating to his renal disease and his coronary heart disease and with added considerations as to his cerebrovascular problems that remain to be clarified and with further consideration given to his impairment related to psychological problems with anxiety and depression for which he requires treatment, it would appear that a strong case could be made for this individual being totally and permanently disabled for return to work in the open labor market. However, because of the nature of his employment with his own firm, he was able to continue working on less than a full time basis. In effect, that appears to be working in what might be viewed as a sheltered environment since he could not otherwise go out and work full time as a practicing attorney, given the problems that he now has.

(*Id.* at pp. 17-18.)

PTP Dr. Weissman, in his deposition dated October 7, 2016 (Joint Ex. G), testified that applicant's work restrictions have increased since his April 30, 2007 Award, now recommending that applicant not work at all. (*Id.* at p. 186:2-13.)

In his November 14, 2017 report (App. Ex. 1), Dr. Weissman opined that applicant has 35% whole person impairment (WPI) of the gastrointestinal system, corresponding to Class 3 under Table 6-4 at page 128 of the AMA Guides to the Evaluation of Permanent Impairment (AMA Guides). Dr. Weissman based this rating on applicant's activity restrictions, the need for a special diet during attacks, and his associated weight loss resulting from dietary modification necessitated by the condition. (*Id.* at p. 11.) Dr. Weissman further opined on applicant's permanent disability as follows:

> Given the severity of the irritable bowel syndrome, significant renal insufficiency, problems with cognitive function and further limitations related to hypertensive cardiovascular disease with therapy as well as underlying coronary disease post bypass, it would appear that his impairment, taken as a whole, is far more impaired than when one looks at each system individually or tries to reduce them in a combined formula. It is my impression that taken as a whole, given these conditions, all of which have evolved subsequent to his earlier industrial injury in 2001, he should now be seen as permanently and totally disabled for return to work in the open labor market. It would not appear that there would be any type of sheltered environment other than his own law firm where he might even be able to work a few hours a week and it is not clear that he is really working at all but simply making an appearance when he is there.

(*Ibid.*)

Dr. Weissman, in his report dated January 11, 2019 (App. Ex. 5), opined that, with respect to applicant's carotid artery disease, he has 35% WPI, consistent with Class 3 under Table 3-6a on page 36 of the AMA Guides. A fixed focal obstruction of at least 50% of a coronary artery supports this opinion. (*Id.* at p. 5.) With respect to his hypertensive cardiovascular disease, applicant has 30% WPI, consistent with Class 3 under Table 4-2 on page 66 of the AMA Guides based on an echocardiogram evidencing left ventricular hypertrophy. (*Id.* at p. 5.) With respect to the gastrointestinal system, Dr. Weissman increased applicant's impairment to 60% WPI, corresponding to Class 4 under Table 6-4 at page 128 of the AMA Guides. (*Id.* at p. 6.) Dr. Weissman applied this increased WPI in accordance with *Almaraz v. Environmental Recovery Services/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) (*Almaraz/Guzman II*). (*Ibid.*) In substantiating his analogy, he stated as follows:

> Here, I would turn to the Almaraz-Guzman considerations and believe that he best fits in Class 4 if one reads the considerations there where they would include a limitation of activity. Continued restriction in diet and medication do not entirely control symptoms. That essentially characterizes his difficulties as the only place where they indicate the need to restrict one's diet. Actually, he needs to avoid eating to avoid symptomatology. This section also at the top deals with evidence of colonic or rectal disease or anatomic loss or alteration. He has a loss of function in the sense that he has fecal incontinence, which would be similar to someone who might have impairment of their anal sphincter although in this case, it is due to sudden uncontrolled diarrhea.
>
> It is for this reason that he can only work in close proximity to a bathroom. It would appear that, given these considerations, I believe a more appropriate impairment rating would be a 60% impairment rating based on Almaraz-Guzman because of

> the symptomatology and limitations imposed by his problem with this extreme irritable bowel syndrome.

(*Id.* at pp. 5-6.)

With respect to applicant's chronic renal disease, he has 48% WPI, consistent with Class 4 under Table 7-1 on page 146 of the AMA Guides based on his current creatinine clearance of less than 40 to 60 liters in 24 hours. (*Id.* at p. 6.) With respect to cognitive impairment, applicant has 20% WPI, consistent with a Clinical Dementia Rating of 1.0 under Table 13-5 on page 320 of the AMA Guides based on reduced cognitive function with memory and recall difficulties. This translates to a Class 3 impairment under Table 13-6 on page 320 of the AMA Guides. (*Id.* at p. 7.) Dr. Weissman apportioned 100% of applicant's permanent disability for his hypertensive heart disease and coronary heart disease, gastrointestinal system, chronic renal disease and cognitive impairment to industrial factors. (*Id.* at pp. 5-8.)

With respect to the methodology for aggregation of the WPIs, Dr. Weissman opined as follows:

> [U]sing the Combined Values Chart, he would have an 82% impairment of the whole person. That, however, I do not believe would fairly reflect his residual impairment. It may be noted that there is also a synergism between these impairments or disability that further compounds his problems. As a case in point, restricting his fluid intake may have an adverse effect on his kidney function but is necessary for reasons of his irritable bowel syndrome.
>
> Excessive use of medications for the irritable bowel have an adverse effect on kidney function as well. The various medications that he does require for these various problems may also increase to some extent the problems with cognitive function and memory.
>
> It is my opinion that the severity of the combined impairments is such that he is not capable of return to gainful employment. It is of note that at the present time, he goes to the office for 9-12 hours a week but he indicates he does not do any work. He simply answers questions for people and is there as the figurehead but really not doing much of anything else. It may be noted that the report of Vocational Rehabilitation Evaluation further defines the inability of this individual to compete in any way in the open labor market and the fact that he would not be a candidate for vocational rehabilitation. It would not appear necessary to comment further concerning this report which clearly defines these considerations.
>
> Given that the combined impairment taken with the conclusions of the vocational rehabilitation expert would lead to his being totally and permanently disabled, there is a further consideration here. If one looks at the Kite Decision and adds the

> impairments up rather than combining them, they total 193% disability. That, I believe would more clearly reflect the severity of his residual impairment.
>
> As noted, I believe he is clearly permanently and totally disabled based on either the combined impairment with the further considerations put forth by the expert in vocational rehabilitation or by the addition of these various impairments as recommended under the Kite Decision.

(*Id.* at pp. 8-9).

In Dr. Weissman's report dated March 29, 2020 (App. Ex. 16), he expanded on his opinion as follows:

> In this situation, I believe the Kite Case provides a reasonable approach where whether one accepts the conclusions of Dr. Brautbar or mine as to impairment, they clearly add up to more than 100% and would clearly indicate what I believe to be his total disability and my feeling that he should retire at this time which he is now contemplating doing.
>
> * * *
>
> In this case, I believe a strong argument can be made that the limitations in his activities resulting from his irritable bowel syndrome with the inability to work if he eats and has problems because of that, it would appear to preclude his return to gainful employment. That alone, I believe, one might see as totally disabling. There may be an added effect of the fatigue he experiences because of the medication he requires for heart disease. That would be a further obstacle to any attempt to return to work and is one more reason why I believe he should be seen as totally disabled under Kite since that is something necessary for his heart and hypertension. There is also the added concern that if one adversely affects kidney function, this may have an added adverse effect on hypertension. It is my impression that he is clearly totally disabled for return to gainful employment based on the Kite case and perhaps also Almaraz-Guzman II. Finally, I should note that at this time, he is no longer working in the sense of doing work but is still involved with the company of which he is a founder in trying to deal with certain financial considerations and other situations relating to the law firm. However, he is not doing any type of legal work and will be leaving permanently as soon as possible. It is my impression, as noted, that he is clearly totally and permanently disabled for return to gainful employment.

(*Id.* at pp. 17-18.)

In Dr. Weissman's report dated February 6, 2021 (App. Ex. 8), he concluded as follows:

> Given the cerebral insult alone, he has never been able to work since that time as an attorney. He has not really worked since then but has gone to the office as the principal partner of the law firm who remains there and goes to his office and indicates that when he does go in, he does essentially nothing but go to the office, meaning his personal office, and is available if someone wants to know if he is there

> and speak with him. He, however, does nothing essential to the corporation but is simply there at times to be noted.
>
> He does not, however, do any work and has been incapable of doing any work as an attorney since he was found to be permanent and stationary in 2013.
>
> It may be noted that it is a reasonable medical probability that the other conditions that are industrially related have been synergistic in increasing the progression of his underlying kidney disease.
>
> One example is the fact he has the irritable bowel syndrome that has been accepted as industrially related and as a result of which he does not eat throughout the day and does not take in any fluid to avoid diarrhea. The result is that he is generally dehydrated, having an adverse effect on renal function.
>
> In addition to his problems with cognitive function, he has significant fatigue and therapy for hypertension with Metoprolol Succinate and Amlodipine is known to increase fatigability and further confound any ability to work.
>
> In addition to these medications, he is also taking Olmesartan for blood pressure control. He does not, however, have a form of chronic kidney disease associated with proteinuria where this medication has been seen to necessarily be beneficial. It is, however, known that elevation of blood pressure will have an adverse effect on renal function and impaired renal function may further contribute to elevation of blood pressure.
>
> Given the above considerations, I believe it is a reasonable probability, as noted, that these other medical problems that have been accepted as industrially related have had a synergistic effect with his progressive renal failure.

(*Id.* at pp. 2-3.)

In Dr. Brautbar's report dated July 31, 2018 (App. Ex. 11), after evaluating applicant, diagnosed him with irritable bowel syndrome (*Id.* at p. 51) and explosive diarrhea (*Id.* p. 53) related to severe work stress requiring him to plan his life near a bathroom before consuming food and fluids, impacting his activities of daily living (ADLs). (*Ibid.*) Dr. Brautbar opined that, with respect to applicant's heart, he has 40% WPI, consistent with Class 3 under Table 3-6a on page 36 of the AMA Guides based on his recovery from coronary artery surgery and continued treatment. (*Id.* at p. 54.) With respect to his hypertension, he has 45% WPI, consistent with Class 2 under Table 4-2 on page 66 of the AMA Guides based on asymptomatic and decreased creatinine clearance of 20% to 50%. (*Ibid.*) With respect to the upper gastrointestinal system, applicant has 20% WPI, consistent with Class 2 under Table 6-3 on page 121 of the AMA Guides, based on clinical signs and symptoms of upper digestive disease, the need for ongoing dietary modification and

medication and a substantial loss of weight. (*Ibid.*) With respect to the lower gastrointestinal system, he has 40% WPI, consistent with Class 3 under Table 6-4 on page 128 of the AMA Guides, based on objective evidence of colonic disease, moderate to severe exacerbations resulting in disturbed bowel function and activity restrictions, the need for a special diet and medication, and associated weight loss. (*Ibid.*) With respect to his chronic renal failure, he has 60% WPI, consistent with Class 4 under Table 7-1 on page 146 of the AMA Guides, based on reduced upper urinary tract function, as demonstrated by a creatinine clearance measuring between 40 and 60 liters per 24-hour period. (*Ibid.*) Dr. Brautbar apportioned 30% of the permanent disability of the hypertensive cardiovascular disease, 30% of the permanent disability of the kidney failure, 30% of the permanent disability of the heart disease, 40% of the permanent disability of the kidney disease and 100% of the permanent disability of the irritable bowel syndrome to industrial factors. (*Id.* at pp. 55-56.)

With respect to the methodology of aggregating the WPIs, Dr. Brautbar endorsed adding them rather than utilizing the CVC and explained his rationale as follows:

> This case is extraordinary and requires adding the impairments, because of the involvement of the life threatening vital organs, is more disabled than one, two or even three of these serious conditions. There is clear synergism between hypertension, chronic kidney failure stage 3, irritable bowel syndrome and explosive diarrhea requiring food and fluid restriction. Furthermore, more reduced protein intake for kidney failure does not help with diabetes treatment and the chronic use of Imodium for the irritable bowel and explosive diarrhea is harmful to Mr. Floyd's diverticulosis, which already caused diverticulitis in the past. In other words, irritable bowel syndrome and fluid and food restrictions aggravate, not improve, kidney function. Hypertension is further affected, by reduced kidney function secondary to fluid restriction, and therefore these impairments are synergistic. Based on the synergistic effects of Mr. Floyd's disabilities and after apportionment, adding each disability: heart 30% + hypertension 30% + upper GI 20% + lower GI 40% + chronic renal failure 40% = 160% of WPI.

(*Id.* at pp. 56-57.)

Dr. Brautbar, in his supplemental report dated March 10, 2021 (App. Ex. 12), further supported adding the WPIs as follows:

> Given the constellation of Mr. Floyd's industrial impairments, including deteriorating renal failure, inoperable blocked artery branch and IBS alone, he would not be fit from vocational rehabilitation and is not amenable to same. This is without yet considering his significant fatigue from amlodipine and metoprolol necessary for keeping his high blood pressure under control, multiple specialist appointments, other vascular insufficiencies and lack of physical stamina. Mr. Floyd goes into work, but performs no true duties of a lawyer. He has no caseload,

> has only performed 2 trials and several depositions in the last 8 year period. Management duties have been delegated to other members of the firm or otherwise outsourced. Before his triple bypass grafts and concomitant left endarterectomy, he interviewed in-person everyone hired by the firm for the entire state of California. Since then, he has participated with other partners in only a small fraction. Mr. Floyd, although goes into the office (pre-pandemic) a couple of hours a day, several days a week, he takes no vacations and no longer participates in his pre-injury hobbies or interests. He is clearly not amenable to vocational rehabilitation. His activities of daily living (ADLs) are severely limited as well.
>
> The technical rating of Mr. Floyd's numerous body system impairments do not sufficiently, nor accurately, reflect his true disability given the synergies involved in the various industrially injured body parts. His renal function is complicated by his hypertension, and his hypertension in turn affects his kidneys. The medications he takes have to be monitored very carefully as they could accelerate its deterioration. Likewise, Mr. Floyd takes no food and little liquids during the day to control his IBS. This is not ideal as dehydration has a negative synergistic effect on his kidney function, but it is the only way for him to have some assurance of having some control over his IBS. The prescription drugs and over-the-counter anti-diarrhea medications do more harm than good with regards to the body's ability to direct fluids away from intestines.

(*Id.* at p. 4.)

Finally, Mr. Meyers stated, in his October 8, 2018 report (App. Ex. 9), that, after evaluating applicant, in the last four and a half years, he has no longer performed any meaningful attorney duties or responsibilities. (*Id.* at p. 27.) He has memory and concentration issues, difficulty finding words, stutters, and cannot control his bowels. (*Id.* at p. 29.) He has severely limited his ADLs (e.g., shopping, cooking, sweeping, vacuuming, washing dishes, mowing the grass, working around the house and doing house repairs) due to fatigue. (*Id.* at p. 30.) Mr. Meyers found that applicant has no transferrable skills because "he has less than part-time work capacity, needs a non-competitive work environment, needs to be in close proximity to a bathroom, has significant fatigue, and cognitive deficits." (*Id.* at p. 43.) Mr. Meyers opined that applicant is not amenable to vocational rehabilitation due to the work restrictions imposed by Dr. Weissman, particularly those related to applicant's irritable bowel syndrome and fecal incontinence (*Id.* at p. 40). He further opined that applicant is permanently and totally disabled, with 100% of the disability apportioned to the March 27, 2001, through April 15, 2013 date of injury, based on Dr. Weissman's November 14, 2017, report. (*Id.* at pp. 41, 43; App. Ex. 1).

Applicant testified at trial that he has no active caseload, has not made any court appearances in the past two years, has not filed any petitions for removal or reconsideration in the

past five years, has tried only one case in that five-year period, and has taken only four depositions in the past six years. (Minutes of Hearing / Summary of Evidence (MOH/SOE), 01/19/2022, 8:4-6.) He only sporadically comes into the office for incidental work-related purposes. (*Id.* at p. 8:7-11.) Otherwise, he works from home, located near his bathroom, and participates in monthly firmwide virtual town hall meetings, as well as virtual meetings with the firm's lien unit. (MOH, 01/20/2022, 3:6-15.) His typical day consists of waking up, getting dressed, checking e-mail, occasionally going into the office, watching television, taking a nap, and speaking with his partners and associate attorneys. (*Id.* at p. 4:4-6.)

On May 19, 2022, the WCJ issued his F&A, awarding applicant 100% permanent disability based on the reports of Dr. Brautbar and Dr. Weissman as well as the vocational reports of Mr. Meyers.

It is from this F&A that both applicant and defendant seek reconsideration.

DISCUSSION

I.

The law requires the Appeals Board to base its decisions on substantial evidence. (Lab. Code, §§ 5903, 5952(d); *Lamb v. Workmen's Comp. Appeals Bd.* (1974) 11 Cal.3d 274 [39 Cal.Comp.Cases 310]; *Garza v. Workmen's Comp. Appeals Bd.* (1970) 3 Cal.3d 312 [35 Cal.Comp.Cases 500]; *LeVesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) To constitute substantial evidence, a medical or vocational opinion must state its conclusions in terms of reasonable probability, avoid speculation, rely on pertinent facts and an adequate examination and history, and explain the reasoning supporting its conclusions. (*Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 621 (Appeals Board en banc) (*Escobedo*).) Medical and vocational reports do not constitute substantial evidence when they contain known errors or rely on facts that are no longer germane, inadequate medical histories or examinations, or incorrect legal theories. Likewise, a medical or vocational opinion cannot support the Appeals Board's findings if it rests on surmise, speculation, conjecture, or guesswork. (*Hegglin v. Workmen's Comp. Appeals Bd.* (1971) 4 Cal.3d 162, 169 [36 Cal.Comp.Cases 93].)

In *Department of Corrections and Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607 [83 Cal.Comp.Cases 1680], the Court found that impairments "are generally combined" using the CVC, but the "scheduled rating [under the CVC]

is not absolute" and other methodologies may be used to calculate permanent disability. (*Id.* at pp. 613-614.)

For example, in *Athens Administrators v. Workers' Comp. Appeals. Bd*. (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ denied), the Appeals Board concluded that impairments resulting from a cumulative injury to the bilateral hips may be added where substantial medical evidence supports a physician's opinion that adding impairments will result in a more accurate rating of the level of disability than the rating that results from using the CVC. (See *De La Cerda v. Martin Selko & Co*. (2017) 83 Cal.Comp.Cases 567 (writ denied) (requires following a physician's opinion as to the most accurate rating method if they provide a reasonably articulated medical basis for doing so and does not require use of the term "synergistic").)

In *Vigil v. County of Kern* (2024) 89 Cal.Comp.Cases 686 (Appeals Board en banc) (*Vigil*), the Appeals Board held that an injured employee may rebut the CVC under the PDRS and add impairments upon establishing the impact of each impairment on activities of daily living (ADLs). To do so, the employee may demonstrate either that the rated body parts affect separate and distinct ADLs with no overlap, or that any overlap in the affected ADLs results in an increased or amplified overall functional impact. The Appeals Board explained that medical expertise is required:

> In determining whether the application of the CVC table has been rebutted in a case, an applicant must present evidence explaining what impact applicant's impairments have had upon their ADLs. Where the medical evidence demonstrates that the impact upon the ADLs overlaps, without more, an applicant has not rebutted the CVC table. Where the *medical evidence* demonstrates that there is effectively an absence of overlap, the CVC table is rebutted, and it need not be used.

(*Id.* at p. 692, italics added.)

In addition, while the AMA Guides function as advisory frameworks, they are not strict texts subject to rote or literal application. Instead, an evaluating physician may use their experience and expertise to interpret and apply any portion of the entire AMA Guides. Pursuant to *Almaraz/Guzman II*, the Appeals Board held that:

> [W]hile the AMA Guides often sets forth an analytical framework and methods for a physician in assessing WPI, the Guides do not relegate a physician to the role of taking a few objective measurements and then mechanically and uncritically assigning a WPI that is based on a rigid and standardized protocol and that is devoid of any clinical judgment. Instead, the AMA Guides expressly contemplates that a physician will use his or her judgment, experience, training, and skill in assessing WPI.

(*Almaraz/Guzman II, supra*, 74 Cal.Comp.Cases. at pp. 1103-1104; affirmed by *Milpitas Unified School District v. Workers' Comp. Appeals Bd.* (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837] (*Guzman III*).)

The overarching goal of rating permanent impairment is to achieve accuracy (*Guzman III*, *supra*, 187 Cal.App.4th at p. 822) and the standard for calculating WPI is to determine the most accurate reflection of impairment as measured by any chart, table, or methodology contained within the entire AMA Guides. Thus, the proper application of *Almaraz/Guzman II* requires a physician to provide a strict AMA Guides rating, explain why that strict rating does not accurately reflect the injured employee's functional limitations, and, with reasoned explanation, support an alternative rating derived from within the AMA Guides that more accurately reflects the employee's level of disability. (*Id.* at p. 828-829; *Leiva v. Webcor Construction* [2025 Cal. Wrk. Comp. P.D. LEXIS 390, *29-30]; *Linstad v. City of Richmond* [2025 Cal. Wrk. Comp. P.D. LEXIS 5, *9]; *Martin v. Cox Castle & Nicholson, LLP* [2024 Cal. Wrk. Comp. P.D. LEXIS 212, *17]; *Kelley v. Lawrence Berkeley National Laboratory* [2024 Cal. Wrk. Comp. P.D. LEXIS 115, *11].)[3]

As noted above, the court in *Fitzpatrick* also acknowledged that it is permissible to depart from the scheduled rating based on a vocational expert opinion that an injured employee has a greater loss of future earning capacity than reflected in a scheduled rating. (*Fitzpatrick*, *supra*, 27 Cal.App.5th at pp. 613-614 and 618-620; see *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262, 1274 [76 Cal.Comp.Cases 624]; *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746, 758 [80 Cal.Comp.Cases 1119]; *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587, 594].)

Finally, to rebut the PDRS and establish permanent total disability, applicant must prove the following:

1) Applicant has received a work restriction(s), which requires substantial medical evidence.
2) The work restriction(s) precludes applicant from rehabilitation into another career field, which requires vocational expert evidence.
3) The work restriction(s) precludes applicant from competing on the open labor market,

[3] Unlike en banc decisions, panel decisions are not binding precedent on other Appeals Board panels and WCJs. (See *Gee v. Workers' Comp. Appeals Bd.* (2002) 96 Cal.App.4th 1418, 1425, fn. 6 [67 Cal.Comp.Cases 236].) However, panel decisions are citable authority and we consider these decisions to the extent that we find their reasoning persuasive, particularly on issues of contemporaneous administrative construction of statutory language. (See *Guitron v. Santa Fe Extruders* (2011) 76 Cal.Comp.Cases 228, 242, fn. 7 (Appeals Board en banc); *Griffith v. Workers' Comp. Appeals Bd.* (1989) 209 Cal.App.3d 1260, 1264, fn. 2 [54 Cal.Comp.Cases 145].) Here, we refer to these panel decisions because they considered a similar issue.

which requires vocational expert evidence.
4) The cause of the work restriction(s) is 100% industrial, which requires substantial medical evidence.

(*Valdovinos v. Universal Site Services, Inc.* [2025 Cal. Wrk. Comp. P.D. LEXIS 76, *14] (*Valdovinos*))

Here, upon independent review of the record, we conclude that Dr. Weissman adequately addressed *Almaraz/Guzman II* with respect to the gastrointestinal system. He did so by analogizing applicant's 35% WPI, corresponding to Class 3 under Table 6-4 of the AMA Guides, found not sufficiently accurate, to Class 4 under the same table, because of the symptomatology and limitations imposed by his extreme irritable bowel syndrome to achieve an increase to 60% WPI.

We also find that Mr. Meyers's opinion on permanent disability is substantial vocational evidence pursuant to *Valdovinos* based on applicant's medically supported work restrictions rendering him unable to work in the open labor market. In addition, Mr. Meyers relies on Dr. Weissman's apportionment opinion to preclude apportionment to pre-existing factors.

However, neither Dr. Weissman nor Dr. Brautbar provide a complete discussion supporting adding all the WPIs leaving their analyses incomplete. The F&A here issued on May 19, 2022, and our en banc decision in *Vigil* issued on June 10, 2024. Therefore, their opinions regarding addition of applicant's impairments require further development to address our holdings in *Vigil*.

"[I]n order to ensure reliance on substantial evidence, and a complete adjudication of the issues consistent with due process," the WCJ and the Appeals Board both have a duty to further develop the record where there is an absence of, or insufficient evidence to determine the issues raised for trial. (*Tyler v. Workers' Comp. Appeals Bd.* (1997) 56 Cal. App.4th 389, 393-395 [62 Cal.Comp.Cases 924]; *McClune v. Workers' Comp. Appeals Bd.* (1998) 62 Cal.App.4th 1117, 1121-1122 [63 Cal.Comp.Cases 261]; see Lab. Code, §§ 5701 and 5906; *McDuffie v. Los Angeles County Metropolitan Transit Authority* (2001) 67 Cal.Comp.Cases 138, 139 (Appeals Board en banc).) Indeed, the Appeals Board has a constitutional mandate to "ensure substantial justice in all cases," and is therefore "clearly permitted" to admit evidence even after the discovery cut-off under section 5502(d)(3). (*Kuykendall v. Workers' Comp. Appeals Bd.* (2000) 79 Cal.App.4th 396, 403-405 [65 Cal.Comp.Cases 264].) "[A]llowing full development of the evidentiary record to enable a complete adjudication of the issues is consistent with due process in connection with workers' compensation claims" and militates in favor of our presuming the continued vitality of sections 5701 and 5906, absent a clear legislative intention to the contrary. (*Tyler, supra*,

56 Cal.App.4th at p. 394.) An adequately developed record affords all parties due process of law and further provides for meaningful review by the Appeals Board of a WCJ's decision. (*Evans v. Workers' Comp. Appeals Bd.* (1968) 68 Cal.2d 753, 755 [33 Cal.Comp.Cases 350]; *Hernandez v. Staff Leasing* (2011) [76 Cal.Comp.Cases 343, 346-347] (Appeals Board significant panel decision).)

Pursuant to sections 5701 and 5906, a WCJ or the Appeals Board may not leave undeveloped issues that, through the exercise of its specialized knowledge, recognizes as requiring further evidentiary development. (*Kuykendall, supra*, 79 Cal.App.4th at p. 404.)

We therefore must defer the issue of permanent disability and attorney fees to allow for supplementation of the evidentiary record in accordance with *Vigil* and to address the issues of apportionment discussed in Section II below.

II.

Apportionment is the process utilized to segregate permanent disability or the residuals caused by an industrial injury from those attributable to other industrial injuries or to nonindustrial factors, to allocate legal responsibility fairly. (*Brodie v. Workers' Comp. Appeals Bd.* (2007) 40 Cal.4th 1313, 1321 [72 Cal.Comp.Cases 565]; *Marsh v. Workers' Comp. Appeals Bd.* (2005) 130 Cal.App.4th 906, 911 [70 Cal.Comp.Cases 787.].) A medical evaluator must parcel out industrial and non-industrial causation of permanent disability. (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927 [71 Cal.Comp.Cases 1687].)

Apportionment of permanent disability is "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." (Lab. Code, §§ 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 (Appeals Board en banc) (*Escobedo*).) Apportionment now includes pathology, asymptomatic prior conditions, and retroactive prophylactic work preclusions, provided there is substantial evidence establishing that these other factors have caused permanent disability. Pursuant to *Escobedo*, a physician's opinion must constitute reasonable medical probability, must not be speculative, rely on pertinent facts and/or an adequate examination and history, and must set forth the reasoning in support of its conclusions.

(*Id.* at p. 621.) That is, the physician must explain the "how and why" of their apportionment opinion. (*Ibid*.)

Pursuant to *Benson v. Permanente Med. Group* (2007) 72 Cal.Comp.Cases 1620 (Appeals Board en banc), a physician must consider all potential causes of disability, whether from a current, prior or subsequent industrial or nonindustrial injury or condition. (*Id.* at p. 1622.)

The burden of proof to establish apportionment falls on defendant. (*Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450, 456 [45 Cal.Comp.Cases 170]; *Kopping v. Workers' Comp. Appeals Bd.* (2006) 142 Cal.App.4th 1099, 1115 [71 Cal.Comp.Cases 1229] (*Kopping*).) In other words, applicant does not have the burden of disproving apportionment. (*Alcantar v. Martinez* [2025 Cal. Wrk. Comp. P.D. LEXIS 231, *9]; *Moraido v. County of San Diego* [2024 Cal. Wrk. Comp. P.D. LEXIS 375, *13, fn. 3]; *Arias v. William Roofing Co.* [2024 Cal. Wrk. Comp. P.D. LEXIS 29. *5.]; *Matias v. Naturipe Berry Growers* [2024 Cal. Wrk. Comp. P.D. LEXIS 52, *4.].)

With respect to apportionment pursuant to section 4664, in *Kopping*, the Court of Appeal determined that, pursuant to section 4664, defendant retains the burden of proving overlap between the current permanent disability and previously awarded disability to establish its right to apportionment. (*Kopping, supra* 142 Cal.App.4th at p. 1103.) If all factors of permanent disability existed before the work injury, because of a prior injury or condition, there is total overlap and the employee is not entitled to any additional disability. If the subsequent industrial injury caused some additional factors of disability that were not preexisting, there is partial overlap and the employer is only responsible for the additional disability and only to the extent that the subsequent work injury resulted in additional restrictions or disability. (*Id.* at pp. 1106-1107; *Seafus v. County of Los Angeles* [2013 Cal. Wrk. Comp. P.D. LEXIS 671, *7-8].) Particularly where one disability is rated under the former PDRS and another under the current PDRS, establishing overlap is more difficult and requires medical evidence addressing the extent of any overlap. (*Contra Costa Fire Protection District v. Workers' Comp. Appeals Bd.* (*Minvielle*) (2010) 75 Cal.Comp.Cases 896, 902-903 (writ denied); see *Pearsall v. City of Vallejo* 2018 Cal. Wrk. Comp. P.D. LEXIS 289, *23 ["[D]isabilities do not overlap if they affect different abilities to compete and to earn, either in whole or in part." citing *Sanchez v. County of Los Angeles* (2005) 70 Cal.Comp.Cases 1440, 1455 (Appeals Board en banc); see also *Barnett v. County of Los Angeles* 2009 Cal. Wrk. Comp. P.D. LEXIS 217, *3 ["The permanent disability caused by the current injury was calculated using the

AMA Guides . . . and it is not appropriate under section 4664 to simply subtract the percentage of permanent disability previously awarded because a different standard (old schedule) was used to calculate the permanent disability."].)

With respect to vocational expert evidence, pursuant to *Nunes v. State of California, Dept. of Motor Vehicles* (2023) 88 Cal.Comp.Cases 741 (Appeals Board en banc) (*Nunes I*), the Appeals Board held as follows:

1. Section 4663 requires a reporting physician to make an apportionment determination and prescribes the standard for apportionment. The Labor Code makes no statutory provision for "vocational apportionment."

2. Vocational evidence may be used to address issues relevant to the determination of permanent disability.

3. Vocational evidence must address apportionment, and may not substitute impermissible "vocational apportionment" in place of otherwise valid medical apportionment.

(*Id.* at pp. 743-744.)

In addition, "[v]ocational evidence may also be used to parse permanent disability caused by multiple body parts or systems" to determine if applicant's permanent total disability was related to a single body part. (*Id.* at pp. 751-752.)

Here, as discussed above, Mr. Meyers relied on Dr. Weissman's reporting to find no reasonable basis for apportionment under section 4663.

However, with respect to apportionment under section 4664, the prior April 30, 2007 Award of 45% permanent disability relied on the January 24, 2003 report of PQME Dr. Weissman (Joint Ex. E). That report imposed work restrictions precluding undue emotional distress and very heavy work and contemplated a 25% loss of applicant's pre-injury capacity for bending, lifting, stooping, pushing, pulling, climbing, and comparable physical activities (*Id.* at p. 8), having now increased to being disabled from the open labor market. A determination of permanent total disability based on work restrictions and vocational non-feasibility could entitle defendant to apportionment under section 4664 if it can demonstrate that disabilities overlapped. However, a determination of permanent total disability based on the AMA Guides could preclude apportionment under section 4664 due to the different criteria used to determine permanent disability and in the absence of any compelling medical evidence demonstrating overlap. As such,

for those reasons and since we are already deferring the issue of permanent disability for further development of the record under *Vigil*, we likewise defer the issue of apportionment.

Accordingly, as our Decision After Reconsideration, we rescind the F&A and substitute a new F&A that reflects the proper period of injurious exposure, corrects clerical errors with respect to the defendants, removes the finding that applicant's weekly rate is $1,066.72, and defers the issues of permanent disability, apportionment, and attorney fees.

We make no other substantive changes to the F&A.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings of Fact & Award dated on May 19, 2022 is **RESCINDED** and the following is **SUBSTITUTED** therefore:

FINDINGS OF FACT

1. John Floyd, while employed during the period of March 27, 2001 to April 15, 2013 as an attorney, occupational group number 110, at Westlake, California by Floyd, Skeren & Kelly, LLP, sustained injury arising out of and in the course of employment to his circulatory system, brain, excretory system, intestinal system, digestive system, irritable bowel syndrome, internal organs and heart.

2. At the time of the injury, the employer was insured for workers' compensation by State Compensation Insurance Fund, Commerce and Industry Insurance Company, administered by AIG Claims Services, Inc., and Cypress Insurance Company, administered by Berkshire Hathaway Homestate Companies and Chubb Group of Insurance Companies. Applicant has elected to proceed against Cypress Insurance Company, administered by Berkshire Hathaway Homestate Companies.

3. At the time of the injury, applicant's earnings were sufficient to produce a maximum rate for temporary disability and permanent disability.

4. The employee has been adequately compensated for all periods of temporary disability claimed through April 25, 2013.

5. The employer has furnished some medical treatment.

6. The primary treating physician is Robert Weissman, M.D.

7. No attorney fees have been paid and no attorney fee arrangements have been made.

8. Dr. Emrani and Dr. Monosson, both reporting as PQMEs, retired and were

replaced by Dr. Caren, also reporting in the capacity of a PQME.

9. Applicant became permanent and stationary on January 24, 2014.

10. The issues of permanent disability and apportionment are deferred.

11. It is found there is a need for further medical treatment to cure or relieve the effects of the industrial injury.

12. It is found applicant is entitled to be reimbursed for all out-of-pocket expenses incurred with the industrial injury in an amount, according to proof and to be adjusted by the parties.

13. The issue of attorney fees is deferred.

AWARD

AWARD is made in favor of applicant, John Floyd, against Cypress Insurance Company, administered by Berkshire Hathaway Homestate Companies, as follows:

1. Further medical treatment in accordance with Finding of Fact 11 above.

2. Reimbursement for self-procured medical care per Finding of Fact number 12 above.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE WILLIAMS DODD, COMMISSIONER

I CONCUR,

/s/ KATHERINE A. ZALEWSKI, CHAIR

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

July 15, 2026

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

JOHN FLOYD
ROSE, KLEIN & MARIAS, LLP
LAUGHLIN, FALBO, LEVY & MORESI, LLP

DLP/ md

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