WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

LAURIE ESCOBEDO, *Applicant*

vs.

SAN LUIS COASTAL UNIFIED. SCHOOL DISTRICT; AMTRUST, administered by SEDGWICK CLAIMS MANAGEMENT SERVICES, *Defendants*

Adjudication Number: ADJ11064080
San Luis Obispo District Office

OPINION AND ORDER GRANTING RECONSIDERATION AND DECISION AFTER RECONSIDERATION

Applicant Laurie Escobedo seeks reconsideration of the June 24, 2021 Findings and Award, wherein the workers' compensation administrative law judge (WCJ) found that applicant sustained an industrial injury on March 19, 2014, to her lumbar spine, thoracic spine, left knee and bilateral feet, while employed as a substitute cafeteria worker by the San Luis Coastal Unified School District. The WCJ found that as a result of her industrial injury, applicant sustained 60% permanent disability and awarded indemnity based on her part-time earnings, finding applicant did not establish she would have become a full-time employee but for her injury.

Applicant contests the award of 60% permanent disability, contending that she is entitled to an award of 100% permanent disability. Applicant argues that substantial medical and vocational evidence establishes that due to the effects of her industrial injury, she is not amenable to vocational rehabilitation and is unable to return to the competitive labor market, having lost 100% of her earning capacity.

Defendant filed an Answer to applicant's Petition for Reconsideration, asserting that applicant cannot rebut the scheduled permanent disability rating because she is amenable to vocational rehabilitation. The WCJ prepared a Report and Recommendation on Petition for Reconsideration (Report), recommending that the Petition be denied.

We have considered the Petition for Reconsideration, defendant's Answer and the WCJ's Report, and we have reviewed the record in this matter. For the reasons discussed below, we will

grant applicant's Petition for Reconsideration and amend the Findings and Award to find applicant is permanently totally disabled, and return this matter for a new award of 100% permanent disability.

STATEMENT OF FACTS

At trial on April 19, 2021, the parties stipulated that applicant sustained an industrial injury to her back while employed as a substitute cafeteria worker by the San Luis Coastal Unified School District. In his Findings and Award, the WCJ found applicant also sustained industrial injury to her left knee and bilateral feet, in addition to her lumbar and thoracic spine. The WCJ further found there was no legal apportionment to non-industrial causes, stating that the apportionment of permanent disability determined by Dr. Elliot Schaffzin, the Qualified Medical Evaluator (QME) in orthopedics, was "insufficiently articulated and illegal."[1]

Applicant sustained an admitted injury on March 19, 2014, while employed as a substitute cafeteria worker by the San Luis Coastal Unified School District. She was evaluated by Dr. Schaffzin on multiple occasions between 2017 and 2020. He issued reports of his physical examinations and supplemental reports reviewing medical and vocational expert reports. His deposition was taken in March of 2021.

According to the history in the medical record, applicant sustained injury when she slipped on a slippery floor and fell on her backside. She underwent a lumbar fusion at L3-S1 on July 6, 2016, after initial treatment with epidural injections. (Ex. 9, 7/25/17 Dr. Schaffzin QME Report, p. 2-3.) Dr. Schaffzin noted applicant's history of low back injuries and treatment prior to her employment by defendant. In his initial evaluation, Dr. Schaffzin reported applicant's physical symptoms and limitations due to her current injury.

Over the course of her treatment, applicant's complaints and limitations increased. Dr. Schaffzin diagnosed applicant with "post laminectomy syndrome." A spinal cord stimulator was implanted in 2018, to good effect, lessening her sciatic pain and reduced medication usage, but poor placement. It was subsequently removed in 2019, due to infection.

[1] No party has raised a challenge to the finding of injury to the non-stipulated body parts of left knee and bilateral feet, or to the finding that there should be no apportionment of applicant's permanent disability.

In June of 2019, applicant complained of pain through the thoracolumbar spine and into both lower extremities. She complained of nerve pain that interrupted her sleep, for which she was initially prescribed gabapentin for neuropathic symptoms, and later, Lyrica.

> Ms. Escobedo states that she continues to use ice on her back on a daily basis. Her right foot is swollen. The character of the discomfort in her back and lower extremities is sharp, throbbing and hot. Symptoms are significantly increased if she performs any activities such as sweeping or vacuuming. She has increased pain if she twists her back, walks or sets for too long a period of time. Medication is helpful. Her back is stiff and she experiences muscle cramping. She has also developed pain at the ball of the right foot since last being seen. Pain in this area intensifies with walking. Swelling in the right foot is also described.
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> The patient indicates that she has developed upper back pain since she was last seen. She also has developed pain at the bottom of her feet, primarily on the right foot, but a sensation of "cotton balls" and numbness under the ball of the foot bilaterally. Ms. Escobedo indicated that symptoms in this area started when the spinal cord stimulator setting was significantly reduced.
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> She points to the area from approximately T5-T12 as the primary area of upper back discomfort. Wearing a bra puts pressure over this area and produces discomfort as well. Increased discomfort is noted with sustained periods of immobility and with sitting.
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> Ms. Escobedo's sitting tolerance is 30 minutes or less and she is able to stand for a similar time period. She can walk up to ½ mile. When walking, her right foot and leg hurt, and she develops swelling and a feeling of heat. She also indicates that she fatigues easily. She is unable to ride a bike, skate, surf, hike, play tennis or engage in bowling. Lifting is limited to 10-20 pounds where previously she was able to 65 pounds.
>
> A pain diagram describes interscapular pain and a sensation of numbness, pain through the low back and into both buttocks with a burning sensation in the low back. The pain is described as extending through the posterior thigh and calf bilaterally, greater on the right with numbness and pain in the plantar aspect of the right foot and toes. She also describes some aching into the anterior thighs bilaterally.
> (Ex. 4. 6/11/19 Dr. Schaffzin QME Report, p. 3.)

He stated that a podiatric referral was medically necessary as the pain from applicant's plantar neuroma was interfering with her ability to walk.

At the time of his final examination in February of 2020, Dr. Schaffzin found applicant continued to have persistent low back and radicular symptoms and had also sustained a

compensable consequence injury to her left knee, and increased her usage of Lyrica for her pain, including during the daytime. She also developed pain in her left foot, in addition to the right. She described her pain level as 8/10, awakening 2 to 3 times per night.

> Ms. Escobedo states she is able to sit for 30 minutes at which time she has to stand and stretch. On days with higher pain levels, she shifts positions while seated frequently. She is able to stand for 20-30 minutes and walk for 20-30 minutes before she has to sit. She also uses a back brace at times. She describes marked ADL difficulties. When she has attempted increased housework or gardening activity, she has increased soreness for about 2 days.
> (Ex. 2. 2/25/20 Dr. Schaffzin QME Report, p. 4.)

Over time, applicant indicated she has had increased difficulty with activities of daily living, with more activities being labeled as being performed "with some difficulty," and "with difficulty." She noted she was unable to have restful sleep.

In his February 2020 evaluation, Dr. Schaffzin restated his 2018 work restrictions, finding applicant capable of returning to work "initially and potentially permanently on a part-time basis" with the ability to sit and stand as needed. He placed preclusions from sustained or repetitive bending, lifting or carrying over 10 pounds for very brief periods at waist level for one minute. (Ex. 2. 2/25/20 Dr. Schaffzin QME Report, p. 15.)

Applicant's vocational capacity to return to the labor market was evaluated by Mr. P. Steve Ramirez, for applicant, and Mr. Christopher Meyes, for defendant.

Mr. Ramirez initially evaluated applicant on October 25, 2017, and issued a report dated January 23, 2018. He interviewed applicant, reviewed the available medical records and conducted vocational testing, to evaluate her transferable skills, employability and earning capacity. (Ex. 18. 1/23/18 Ramirez "Corrected" Vocational Evaluation Report.)

He reviewed applicant's self-report of her physical and mental limitations, noting Dr. Schaffzin's work restrictions and the adverse effects applicant's medications have on her ability to focus, concentrate and on her memory. He noted applicant reported that her medications cause headaches in the morning, grogginess, dizziness and feeling unbalanced. "She states she is unable to fully function when she takes her medication." (Ex. 18, p. 4.) She reported constant pain in her low back and hip, and she spends five hours of her day resting due to her pain, and impairing her ability to sleep.

He found applicant would be amenable to vocational rehabilitation services if Dr. Schaffzin's work restrictions could be met. (Ex. 18, p. 7.) However, he sought clarification from Dr. Schaffzin regarding whether his bending restriction was consistent with contemplated sedentary and light occupations.

Upon receipt of Dr. Schaffzin's February 13, 2018 supplemental report indicating that the bending restriction would not impair applicant's ability to engage in sedentary employment, Mr. Ramirez concluded that applicant's access to her pre-injury labor market was reduced by 95%. (Ex. 16. 5/29/18 Ramirez Supplemental Report.)

However, with the consequential industrial injury to applicant's feet from the bilateral plantar neuroma, which led Dr. Schaffzin to add a restriction from lifting or carrying more than 10 pounds for very brief periods of time, and not more than 10 to 15 minutes total throughout the work day, Mr. Ramirez indicated applicant would experience an even greater loss of access to her pre-injury labor market. (Ex. 12. 8/28/19 Ramirez Supplemental Report, p. 2.) But since he was not able to quantify this greater loss of access, he maintained his prior opinion.

Upon review of Dr. Schaffzin's work restrictions limiting applicant to sedentary part-time work, as provided in his February 25, 2020 re-evaluation, Mr. Ramirez found applicant no longer had access to the labor market, having lost 100% of her earning capacity.

> Ms. Escobedo is now limited to a sedentary occupation where she can sit and stand at will, with the benefit of a movable work station, and be on her feet for short periods of time. For production and conveyor line work and some bench work occupations, a movable work station [raising and lowering ability] is not a workable option. However, for office related positions, this would be a reasonable accommodation.
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> The vocational concern here would be: Is Ms. Escobedo a qualified individual? Would she be able to perform the essential functions of the job? Her past work experience as a cook's helper, home day care, and foster parent does not offer much in the way of transferable work skills.
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> When looking at the lifting limitations, Ms. Escobedo is not only limited to lifting and carrying no more than 10 pounds, but also for no more than one minute, per episode. In the course of a workday, she is to lift/carry for no more than 10 to 15 minutes. Therefore, for the majority of a half day (part time work) Ms. Escobedo would be performing no lifting or carrying. These restrictions would exceed the requirement of occasionally lifting and carrying articles as described in the DOT and performed on a fulltime basis for sedentary work.

> Vocationally it would be difficult for an employer to accommodate Ms. Escobedo even in a part time position since she is only able to work within these medical restrictions on a part time basis, which further impacts her ability to be a productive employee for an employer even in a part time scenario. This further impedes Ms. Escobedo ability to return to suitable gainful employment.
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> After review of the supplemental report of Dr. Schaffzin recent medical report outlining her current medical restrictions additional research was done into how these impairments/restrictions would vocationally impact her in work setting, specifically sedentary occupations which has the least exertional requirements of an occupation was explored and discussed above. This results in Ms. Escobedo not being a candidate to return to the open labor market and she has lost 100% of her earning capacity.
> (Ex. 10. 5/12/20 Ramirez Supplemental Report, p. 3.)

Defendant retained Christopher Meyers to prepare a vocational evaluation. He issued a report, as well as a separate rebuttal to Mr. Ramirez's reporting, on July 7, 2020. (Ex. A1 & A2.) He interviewed applicant and conducted vocational testing via Zoom on May 27, 2020. He reported applicant's pain description, noting she always has pain in her low back, sacrum, hips, mid back, both legs and feet and toes, which she described, variously, as "aching, sharp, burning" "cramping, sharp pain, hot, feels like someone is snapping rubber bands on them," "pin and needles, swollen." She reported that her pain increases with increased activity and when sitting, standing or walking too long. (Ex. A1, 7/7/20 Meyers Vocational Report, p. 19.)

Mr. Meyers reported that applicant participated in a medical billing and medical coding training program offered by Mr. Ramirez through his school in March of 2018. Applicant completed a computer skills training but did not complete the medical coding training. She completed two out of four classes but stopped due to an infection at the implantation site of her spinal cord stimulator. She reported that she had good and bad days while participating in the program. She stated that it was difficult but that she persevered because she was motivated. (Ex. A1, p. 21.)

Mr. Meyers concluded that applicant's participation in the medical billing/coding training program demonstrates that she is amenable to vocational rehabilitation. (Ex. A1, p. 23.) He further opined that applicant has "multiple paths to return to the job market. Each path demonstrates that she is amenable to rehabilitation." (Ex. A1, p. 28.) He identified working from home as a medical biller, or through direct placement or on the job training performing sedentary work using an adjustable work station within the medical work restrictions set by Dr. Schaffzin.

> Why is Ms. Escobedo amenable to rehabilitation?
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> • Ms. Escobedo retains orthopedic sedentary work capacity with a sit stand option.
> • Dr. Schaffzin has made it clear that Ms. Escobedo is a good candidate for a vocational rehabilitation program.
> • Dr. Schaffzin has made it clear he believes Ms. Escobedo can and should return to work.
> • Ms. Escobedo is currently in the process of completing a vocational rehabilitation plan recommended by the applicant vocational expert Mr. Ramirez.
> • Ms. Escobedo has multiple vocational rehabilitation paths available to her that will allow her to re-enter the job market and earn income.
> • Ms. Escobedo expressed that she is motivated to overcome her limitations, re-enter the job market and earn income.
> (Ex. A1, p. 29-30.)

In supplemental reports in July and October of 2020, Dr. Schaffzin reviewed Mr. Ramirez's May 12, 2020 report, and Mr. Meyer's July 7, 2020 report. He agreed with Mr. Ramirez that applicant was not able to "return to the open labor market and she has lost 100% of her earning capacity." Dr. Schaffzin noted his opinion, as he expressed in his prior reporting, that he thought applicant was able to return to work on a part-time basis with restrictions.

> On review of the above information and reports of my prior evaluations of Ms. Escobedo, I note that she is demonstrating significantly increased impairment due to the long-term results of her March 2014 industrial injury.
>
> To reiterate, in light of her prior work experience, none of which is transferable to any occupation within her significant restrictions, Ms. Escobedo has lost 100% of her earning capacity. Even were she to undergo training in, i.e., medical coding and billing, there is a medical probability that she would be able to perform this activity only at home and intermittently at a maximum of 4 hours per day. Medication use (the patient finds maximum benefit from the use of progabalin, a sedating medication) would likely interfere with her ability to concentrate sufficiently for her to be able to engage in an activity such as this, one that requires full attention and concentration. Therefore, even with retraining, Ms. Escobedo can be considered as having lost 100% of her earning capacity.
> (Ex. 1. 7/10/20 Dr. Schaffzin Supplemental Report, p. 3.)

Dr. Schaffzin reviewed Mr. Meyers's vocational evaluation, and prepared an October 6, 2020 supplemental report. He noted Mr. Meyers's conclusion that applicant had multiple paths to access the labor market, and that she is amenable to vocational rehabilitation by virtue of her

participation in the medical billing/coding course. Dr. Schaffzin disagreed with Mr. Meyers's conclusion that applicant would be able to find work in the job market within her medical restrictions, or that she was a candidate for vocational rehabilitation. Dr. Schaffzin noted that Mr. Meyers did not address whether applicant was capable of performing the activities required of any of the occupations recommended by Mr. Meyers. He noted that though applicant had begun participation in the medical billing/coding program, she had not completed the course after two years. Dr. Schaffzin stated that applicant had reported to him that she could not predictably perform computer work on a full-time or part-time basis, and that when she performed simple activities at home, she experienced increased soreness in her low back for up to 2 days. He noted that she sometimes used her Lyrica medication during the day due to her symptoms and, at times, has significant sleep difficulties. "It is the opinion of the undersigned that, despite her attempts at approaching her impairment with optimism, she cannot be expected to perform any activity predictably, 5-7 days per week (i.e., childcare) for 4 hours per day despite any accommodations that can be provided." (Ex. 27. 10/6/20 Dr. Schaffzin Supplemental Report, p. 4.) He then concluded, stating:

> Based on the above discussion, I feel that Ms. Escobedo is 100% precluded from a return to gainful employment. Any attempt at regular work on a daily basis where she has to perform at 100%, i.e., despite the use of sedating medication and exacerbations in low back and lower extremity symptoms, will likely lead to increased symptoms, periods of absence from work, and ultimately an inability to perform at a level required from full-time, or regular part-time employment.
> (Ex. 27. 10/6/20 Dr. Schaffzin Supplemental Report, p. 4.)

In his subsequent deposition testimony in 2021, Dr. Schaffzin was asked whether he believed applicant was physically capable of completing the two remaining classes of the medical billing/coding course she had begun in 2018.

> Q. Well, my question is really - my question is very limited at this point as to just being able to complete that class. If she can sit and stand at will in front of a computer and do whatever programs are there on her own time, so there really shouldn't be any reason she can't complete that, is there?
> A. I agree.
> (Ex. 28. 3/17/21 Dr. Schaffzin Deposition Transcript, 9:24-25; 10:1-5.)

Dr. Schaffzin also agreed that there are opportunities for a person who completes the program to work remotely at home.

> Q. Now, I understand that you don't believe that she could work full-time or possibly even half-time, meaning 20 or 40 hours a week. But if she was able to find a position that had flexible hours of something less than 20 hours per week that she could do at her own pace, is there any reason when she couldn't do that?
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> A. I don't see any reason why she couldn't.
> (Ex. 28. 3/17/21 Dr. Schaffzin Deposition Transcript, 10:16-22.)

When questioned by applicant's counsel, Dr. Schaffzin opined that applicant would not be able to do the job functions performing medical billing due to the sedative effects of her pain medication.

> Q. Okay. And while she is taking that medication, would you expect her to be able to function at a job of doing work billing in a remote area in light of the drowsiness when she takes the medication?
> . . .
> A. . . . No, I don't think that she could. It takes a great deal of concentration. I don't quite understand the whole system even after all these years.
> Yes, it does affect a person's concentration. I think she would have a significant degree of difficulty focusing on this important aspect of medical office work.
> (Ex. 28. 3/17/21 Dr. Schaffzin Deposition Transcript, 11:16-22.)

Dr. Schaffzin further testified that while applicant could work part-time on an occasional basis, due to the effects of her pain medications, she would not be able to do it consistently.

> A. It would really depend – I can't say absolutely not – you know, that she could absolutely not do this or on some type of a part-time basis or something similar to it, in other words, some remote computer work that she can do at – on some days at various times. I'm not sure to what extent. And furthermore, I'm not sure that an employer would accept that type of requirement of restrictions from an employee, which was why I felt that she was precluded from returning to gainful employment.
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> Q. Okay. So, in other words, what you're telling us is that although she could perform some work maybe four hours a day, there would be days where she couldn't perform the work either because of the medication or because of pain? Would you agree with that?
>
> A. Yes.
> (Ex. 28. 3/17/21 Dr. Schaffzin Deposition Transcript, 12:17-25; 13:1-10.)

Dr. Schaffzin also stood by his opinion expressed in his October 6, 2020 report about her incapacity to return to the labor market. (Ex. 28. 3/17/21 Dr. Schaffzin Deposition Transcript, 13:11-14.)

Applicant testified at trial on that she did not feel should could work full-time. According to the WCJ's summary, applicant testified that:

> her body is totally debilitated. She has no stamina. She has nerve damage. She is on medications. She is foggy and cannot do small tasks. She falls asleep. Her pain wakes her up. She can do small tasks, but then she falls asleep. The pain wakes her up. She could never be dependable at a job, and she feels useless. She told Dr. Schaffzin that she has started a course with medical billing but she could not complete the course, and then she had surgery. She cannot even work at home now.
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> She has medication for pain, and she forgets things. She takes Lyrica, which puts her in a fog. She takes Norco at night, and she used to have a pain stimulator, but she had that taken out. The Norco makes her fall asleep. She uses ice packs. When asked whether she has difficulty getting her medications, she replied in the affirmative. It takes a week to get her medications. She has to advance her own money for her medications on occasion because they are not authorized timely. She cannot function without her meds, and she is suffering.
> (Minutes of Hearing and Summary of Evidence, 4/19/21, p. 5-6.)

The WCJ issued his Findings and Award on June 24, 2021, awarding 60% permanent disability for her March 19, 2014 industrial injury. The WCJ held, in relevant part, that applicant had not rebutted the permanent disability rating schedule, as she "is vocationally able to be retrained. There is no basis for *Lebeouf* and there is no *Ogilvie* issue."

DISCUSSION

Applicant contests the WCJ's finding that she did not rebut the scheduled rating because she is "vocationally able to be retrained." Applicant argues that this finding is not supported by the record, and that the WCJ ignored substantial medical evidence, corroborated by vocational evidence, that due to the effects of her industrial disability applicant is permanently totally disabled and unable to return to any gainful employment, either full-time or part-time.

Applicant contends that the finding that she is amenable to vocational rehabilitation fails to consider whether she is capable of meaningful participation in the labor market, and the evidence of her amenability does not address her actual physical limitations that led Dr. Schaffzin and Mr. Ramirez to conclude she was permanently totally disabled. Applicant argues that at best, she is

limited to working in a sheltered workshop and not in competitive employment, which justifies a finding of total disability, citing two panel decisions, *Dewey v. Limited/Lerner*, 2012 Cal. Wrk. Comp. P.D. LEXIS 232 and *Guzman v. Grimmway Enterprises*, 2012 Cal. Wrk. Comp. P.D. LEXIS 576 to argue that

In *Dewey*, the panel reversed a WCJ's award of 57% permanent disability, finding compelling the vocational evidence that the applicant was unable to complete a vocational rehabilitation program due to the pain caused by the industrial injury, and that her ability to work in a non-competitive sheltered environment did not support the WCJ's finding that she was not permanently totally disabled.

In *Guzman*, the panel reversed an award of 90% permanent disability, rejecting the vocational evidence the WCJ relied upon to conclude the applicant was not permanently totally disabled from a brain injury caused by a fall from a ladder. In that case, the defense vocational expert concluded that because the applicant was able to engage in some household activities he was capable of returning to light duty in entry-level position.

The issue here is whether applicant has successfully rebutted the permanent disability rating derived from application of the AMA Guide impairment ratings by establishing that she is not able to benefit from vocational rehabilitation and is not capable of returning to the open labor market, and has therefore lost all of her earning capacity.

In *LeBoeuf v. Workers' Comp. Appeals Bd*. (1983) 34 Cal.3d 234 [48 Cal.Comp.Cases 587, 594], the California Supreme Court held that an applicant's inability to qualify for vocational rehabilitation benefits is a "factor [that] should be considered in any determination of a permanent disability rating." "Just as retraining may increase a worker's ability to compete in the labor market, a determination that he or she cannot be retrained for any suitable gainful employment may adversely affect a worker's overall ability to compete." (Ibid.)

From this recognition of the role that an ability to participate in vocational rehabilitation plays in the determination of the extent of permanent disability, subsequent cases have held that where expert vocational evidence establishes an injured worker's ability to participate in vocational rehabilitation is impaired, and for that reason the injured worker's diminished future earning capacity is greater than that reflected in the permanent disability rating schedule, the injured worker's permanent disability is 100%. (*Ogilvie v. Workers' Comp. Appeals Bd.* (2011)

197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] (*Ogilvie*); *Contra Costa County v. Workers' Comp. Appeals Bd.* (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119].)

"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*. . . . An employee effectively rebuts the scheduled rating when the employee will have a greater loss of future earnings than reflected in a rating because, due to the industrial injury, the employee is not amenable to rehabilitation." (*Ogilvie* 197 Cal.App.4th 1262, 1275-1276.) Such loss of future earnings must be "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* at 1275.)

In *Dahl*, the court rejected a claim that the scheduled rating had been rebutted where the injured worker's vocational expert conceded the injured worker was a good candidate to participate in vocational rehabilitation. The court noted that under *LeBoeuf*, the focus is on whether a work related injury "precludes the claimant from taking advantage of vocational rehabilitation and participating in the labor force." (*Dahl*, 240 Cal.App. 4th at 759.) The court indicated, but did not decide, that an impairment, but not elimination, of access to vocational rehabilitation was insufficient to support a rebuttal of the rating schedule, since the injured worker there was a candidate for vocational rehabilitation services.

Here, the evidence establishes that applicant participated in, but did not complete, a vocational rehabilitation program in medical billing and coding in 2018. Applicant completed only 2 out of 4 classes when she underwent surgery to remove the pain stimulator implanted in her back due to infection. After that, her condition deteriorated, with consequential injuries to her bilateral feet and left knee. At trial, applicant testified that due to her pain and the effects of her medications, she feels totally debilitated, lacking stamina and is foggy and has difficulty performing small tasks. She testified that she could never be dependable at a job, and she feels useless. She could not complete the medical billing course and believes she cannot work at home.

Mr. Ramirez found applicant's increased level of impairment due to Dr. Schaffzin's additional work restrictions for her compensable consequence injuries resulted in a total preclusion from returning to the labor market.

> Vocationally it would be difficult for an employer to accommodate Ms. Escobedo even in a part time position since she is only able to work within these medical restrictions on a part time basis, which further impacts her ability to be a productive employee for an employer even in a part time scenario. This further impedes Ms. Escobedo ability to return to suitable gainful employment.

This is consistent with Dr. Schaffzin's view of applicant's limitations, as he found she had significantly increased impairment due to the long-term effects of her March 2014 industrial injury, notably the increased restrictions due to her additional complications. Dr. Schaffzin found she was more limited in her ability to perform competitive work, leading to his conclusion in his final report:

> I feel that Ms. Escobedo is 100% precluded from a return to gainful employment. Any attempt at regular work on a daily basis where she has to perform at 100%, i.e., despite the use of sedating medication and exacerbations in low back and lower extremity symptoms, will likely lead to increased symptoms, periods of absence from work, and ultimately an inability to perform at a level required from full-time, or regular part-time employment.

Defendant argues that applicant has not rebutted the permanent disability rating because Dr. Schaffzin found she was able to return to work so long as her physical restrictions are followed, citing his deposition testimony that applicant was able to work "a position that had flexible hours of something less than 20 hours per week that she could do at her own pace." Defendant argues that this is not equivalent to a sheltered workshop, since working from home "is now part of the normal workforce."

We are persuaded that the medical and vocational evidence establishes that applicant is not amenable to vocational rehabilitation and that she is precluded from returning to the open labor market.

First, though applicant enrolled in a vocational rehabilitation program for medical billing and coding, the record establishes that, despite what Dr. Schaffzin characterized as her optimism to do so, she was unable to complete the program after two years. Her attempted participation is not evidence that she is amenable to vocational rehabilitation, or that her ability to benefit from the program was only "impaired." She was ultimately unsuccessful in the program and achieved no benefit from her participation in terms of gaining skills to help her return to the work force.

Furthermore, the record establishes that applicant is not capable of returning to regular work, either full-time or part-time work. While defendant characterizes Dr. Schaffzin's deposition

testimony as affirming her ability to return to work, his testimony was not so clear. He testified that applicant could work, but less than 20 hours per week, i.e., less than 4 hours per day, if her medications do not interfere with her concentration, and if she can work at her own pace. But, he also testified that there would be days where she would not be able to work either because of her medications or because of pain. Thus, Dr. Schaffzin found that applicant would have some days where she could work less than 4 hours per day, and some days where she could not work at all.

Applicant's limited ability to work at home, at her own pace, for up to 4 hours per day, is akin to a sheltered workplace, and not the open labor market. An injured worker may be totally permanently disabled even if she may be able to perform some limited work in a sheltered and protected work environment. (*The Limited v. Workers' Comp. Appeals Bd*. (2012) 77 Cal.Comp.Cases 1003 (writ den.); *Garden Grove Unified School Dist. v. Workers' Comp. Appeals Bd*. (2010) 75 Cal. Comp. Cases 521 (writ den.); *Sparteck Plastics v. Workers' Comp. Appeals Bd*. (1998) 64 Cal. Comp. Cases 124 (writ den.); *Pacific Greyhound Lines v. Workers' Comp. Appeals Bd*. (1973) 38 Cal. Comp. Cases 359 (writ den.).)

This record does not support the WCJ's finding that applicant is not permanently totally disabled because she is "vocationally able to be retrained," or that she is capable of returning to the competitive labor market. Applicant's limited participation in, and inability to complete, vocational rehabilitation is not evidence that she is "amenable" to vocational rehabilitation. Further, the medical evidence establishes that due to the effects of her industrial injury, applicant is not capable of maintaining competitive employment in the open labor market.

Accordingly, we will grant applicant's Petition for Reconsideration and will amend the Findings and Award, to find applicant has rebutted the scheduled permanent disability rating and is permanently totally disabled. We will return the matter for a new award of permanent total disability, to be adjusted by the parties, or by the WCJ if the parties are unable to adjust the amount of benefits to which applicant is entitled.

For the foregoing reasons,

IT IS ORDERED that applicant's Petition for Reconsideration of the June 24, 2021 Findings and Award is **GRANTED.**

IT IS FURTHER ORDERED, as the Decision After Reconsideration of the Workers' Compensation Appeals Board, the June 24, 2021 Findings and Award is **AMENDED** as follows:

FINDING OF FACTS

1. Applicant, Laurie Escobedo, while employed on March 19, 2014, as a substitute cafeteria worker, occupation group number 322, at San Luis Coastal Unified School District in San Luis Obispo, insured and/or administered by Amtrust, York Risk Services Group and Sedgwick, sustained injury to her lumbar spine, thoracic spine, left knee and bilateral feet arising out of and in the course of her employment.
2. As opined by QME Schaffzin, the bilateral feet and left knee are compensable consequences of the original injury to the spine.
3. Applicant was not a full-time employee and the evidence did not establish that applicant would have become a full-time employee but for the injury. The evidence was inconclusive as to whether testing scores were in the top three such that she could interview for a full-time position. Accordingly, pursuant to the stipulation of the parties, applicant's temporary disability rate is $161.19 per week and her permanent disability rate is $160.00 per week.
4. The apportionment described by Dr. Schaffzin between industrial and non-industrial permanent impairment is insufficiently articulated and is illegal. There is no legal apportionment to non-industrial causes. The *Hikida* case is also instructive and warrants denial of apportionment.
5. Rescinded.
6. Applicant is permanently totally disabled and entitled to an award of 100% permanent disability, in an amount to be adjusted by the parties.
7. Rescinded.
8. Rescinded.
9. Applicant is entitled to future medical care to cure or relieve the effects of her industrial injuries.
10. Applicant has rebutted the scheduled rating of her permanent disability.
11. The parties are instructed to adjust the Labor Code Section 5811 costs, with jurisdiction reserved.
12. The penalties issue is off calendar.
13. Applicant's attorney is entitled to a reasonable fee equivalent to 15% of the permanent disability benefits awarded.

AWARD

AWARD IS MADE in favor of **LAURIE ESCOBEDO** and against **Amtrust**, **York Risk Services Group** and **Sedgwick**, as follows:

a. Applicant is awarded 100% permanent disability, in an amount to be adjusted by the parties, less a reasonable attorney's fee payable to applicant's attorney per Finding of Fact number 13, with jurisdiction reserved at the trial level in the event the parties are unable to agree upon the amount of benefits to which applicant is entitled.
b. Future medical care to cure or relieve the effects of her industrial injuries.
c. The parties are to adjust the Labor Code Section 5811 costs, with jurisdiction reserved. Defendants are to commence negotiations within thirty (30) days of this opinion.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ MARGUERITE SWEENEY, COMMISSIONER

/s/ JOSÉ H. RAZO, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

AUGUST 27, 2021

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

LAURIE ESCOBEDO
WILLIAM A. HERRERAS
STOCKWELL HARRIS

SV/*pc*

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