WORKERS' COMPENSATION APPEALS BOARD
STATE OF CALIFORNIA

VIRGINIA ANTUNEZ, *Applicant*

vs.

FONTANA UNIFIED SCHOOL DISTRICT, permissibly self-insured, *Defendant*

Adjudication Numbers: ADJ6604551, ADJ6604531, ADJ6606786, ADJ6604466
San Bernardino District Office

OPINION AND DECISION AFTER RECONSIDERATION

We granted reconsideration in order to further study the factual and legal issues in these cases. This is our Opinion and Decision After Reconsideration.

Applicant seeks reconsideration of the Findings, Award and Order (FA&O) issued by the workers' compensation administrative law judge (WCJ) on June 21, 2021.[1] By the FA&O, the WCJ found that applicant sustained 54% permanent disability in ADJ6604551. The WCJ also found that the addition method of permanent disability pursuant to *Kite*[2] is not applicable and there is a basis for apportionment per Labor Code[3] section 4663. (Lab. Code, § 4663.) The WCJ further found that applicant's earnings rate is $162.46 and she is not entitled to any additional periods of temporary total disability.

Applicant contends that the record supports addition of her impairment ratings rather than combining them using the combined values chart (CVC).[4] Applicant also contends that her total knee replacement constitutes an amputation, which entitles her to additional weeks of temporary total disability. Applicant argues that the apportionment opinion of the agreed medical evaluator (AME) is not substantial evidence and the record shows that she is permanently totally disabled. Lastly, she argues that the "Montana case rationale" is applicable to her case.

We received an answer from defendant. The WCJ issued a Report and Recommendation

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[1] The FA&O is dated June 11, 2021, but was not served until June 21, 2021.
[2] This is in reference to *Athens Administrators v. Workers' Comp. Appeals Bd.* (*Kite*) (2013) 78 Cal.Comp.Cases 213 (writ den.) [2013 Cal. Wrk. Comp. LEXIS 34].
[3] All further statutory references are to the Labor Code unless otherwise stated.
[4] Applicant's Petition was not verified as required by section 5902 and WCAB Rule 10510(d). (Lab. Code, §5902; Cal. Code Regs., tit. 8, § 10510(d).) Applicant is warned that failure to submit the required verification may constitute grounds for dismissal pursuant to WCAB Rule 10510(d).

on Petition for Reconsideration (Report) recommending that we deny reconsideration.

We have considered the allegations of applicant's Petition for Reconsideration, defendant's answer and the contents of the WCJ's Report with respect thereto. Based on our review of the record and for the reasons discussed below, we will amend the findings of fact for ADJ6604551 to clarify the date of injury (Finding of Fact No. 1) and find that applicant sustained permanent disability of 64% without apportionment (Findings of Fact Nos. 9, 10 and 12). The value of applicant's award will be deferred pending determination of whether an adjustment is warranted per section 4658(d). The award for ADJ6604551 will be amended accordingly.

FACTUAL BACKGROUND

Applicant claims four injuries while employed as a child care provider by Fontana Unified School District: 1) to the bilateral shoulders, bilateral wrists, bilateral knees and left ankle on August 8, 2007 (ADJ6604551); 2) to the nose, breathing and stomach through October 3, 2007 (ADJ6604466); 3) to the right elbow, bilateral shoulders, bilateral knees and bilateral wrists through December 14, 2007 (ADJ6604531); and 4) to the right elbow, bilateral shoulders, bilateral knees and bilateral wrists through July 7, 2009 (ADJ6606786).

Raymond Zarins, M.D. initially evaluated applicant as the orthopedic panel qualified medical evaluator (QME). Dr. Zarins provided impairment ratings to both shoulders, the left elbow, both wrists, both knees and the right ankle. (Joint Exhibit X-2, Medical report of Dr. Raymond Zarins, December 14, 2017, pp. 12-14.) He stated as follows regarding apportionment:

> With respect to the bilateral shoulders, I would apportion all of the applicant's disability to the August 8, 2007, injury.
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> With respect to the bilateral wrists, I would apportion all of the applicant's disability to the claimed continuous trauma.
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> With respect to the right knee, I would apportion 75% of the applicant's disability to the August 8, 2007, injury and the remaining 25% to nonindustrial degenerative disease for reasons reported above.
>
> With respect to the left knee, this is all due to the March 28, 2006, injury as claimed.
>
> (*Id.* at p. 15.)

Dr. Zarins passed away and the parties subsequently agreed to Dr. Peter Sofia as the orthopedic AME. Dr. Sofia made several diagnoses and concluded that applicant sustained injury to the bilateral knees, left ankle, bilateral shoulders and bilateral wrists as a result of the August 8, 2007 industrial injury. (Joint Exhibit W, Medical report of Dr. Peter Sofia, June 2, 2020, p. 7.) He also opined that applicant's "right elbow lateral epicondylitis is more consistent with cumulative trauma injury and both alleged periods of cumulative trauma would appear to have been injurious." (*Id.*) He provided permanent impairment ratings as follows: 30% whole person impairment (WPI) for the right knee, 20% WPI for the left knee, 1% each for pain for the right wrist, left wrist and right elbow, 9% WPI for the right shoulder and 1% WPI for the left shoulder. (*Id.* at p. 9.) With respect to apportionment, Dr. Sofia stated in full:

> All shoulders age starting at age 35 when the blood flow to the rotator cuff is interrupted. I do not believe Dr. Zarins addressed this, but I would say that her shoulder problems would be 20% nonindustrial based on that fact. The remaining 80% is apportioned to the specific injury of August 8, 2007.
>
> The elbow and the wrists would not have apportionment. The right elbow disability is apportioned 100% to cumulative trauma with the last day of injurious exposure appearing to be the last date of work. Absent a finding or permanent impairment prior to the second period of cumulative trauma. I am unable to further apportion between the two alleged periods of cumulative trauma. The cause of bilateral wrist permanent disability is apportioned 100% to the specific injury of August 8, 2007.
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> I note that Dr. Zarins felt the right knee permanent disability is 25% nonindustrial degenerative changes. Interestingly, he did not say that about the left knee, which I would; that is, both knees would be 25% nonindustrial degenerative changes. I also note that Dr. Zarins has apportioned the left knee permanent disability 25% to March 28, 2006 injury. However, it is my understanding that she received minimal treatment following that injury as was discharged as cure within approximately 2 weeks. I do not find sufficient evidence to apportion to that prior injury. Rather, I find that the cause of left knee permanent disability is apportioned 25% to non-industrial degenerative changes, 75% to the specific injury of August 8, 2007 and 0% to the March 28, 2006 work accident. The cause of right knee permanent disability is apportioned 25% to nonindustrial degenerative changes, 75% to the specific injury of August 8, 2007.
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> (*Id.* at p. 8.)

Applicant retained Tammie Alfaro as a vocational expert. Ms. Alfaro issued a 2-page report wherein she concluded that applicant "is unable to work in any capacity." (Applicant's

Exhibit No. 3, Vocational Rehab Expert Report from T. Donaldson Consulting, p. 2.) The report is not dated.

Richard Biama, M.D. is applicant's primary treating physician (PTP). Dr. Biama sent a one-page letter dated December 28, 2020 stating:

> It is my opinion that she is no longer able to compete in the labor market and she is 100% totally permanently disabled. She is in need of a total knee replacement in the near future. My opinion as stated herein is based upon a medical legal probability.
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> (Applicant's Exhibit No. 2, Declaration by Dr. Richard Biama, December 28, 2020.)

Defendant filed a declaration of readiness to proceed (DOR) on October 21, 2020. The record does not reflect an objection by applicant to the DOR.

Applicant's claims proceeded to trial on March 2, 2021, at which time all four cases were consolidated. (Minutes of Hearing; Order of Consolidation, March 2, 2021, p. 2.) The issues in dispute for ADJ6604551 included: earnings, temporary disability from 8/7/2008 to present, permanent disability, apportionment, "additional TTD per Parco," whether *Kite* applies and applicant's assertion that she is 100 percent disabled per the PTP and vocational expert. (*Id.* at p. 3.) Trial continued to a second day on April 7, 2021 to obtain applicant's testimony. (Minutes of Hearing and Summary of Evidence, April 7, 2021.)

The WCJ issued the FA&O as outlined above.

DISCUSSION

While the employee holds the burden of proof regarding the approximate percentage of permanent disability directly caused by the industrial injury, the employer holds the burden of proof to show apportionment of permanent disability. (Lab. Code, § 5705; see also *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604, 613 (Appeals Board en banc), *Pullman Kellogg v. Workers' Comp. Appeals Bd.* (*Normand*) (1980) 26 Cal.3d 450 [45 Cal.Comp.Cases 170].) To meet this burden, the employer "must demonstrate that, based upon reasonable medical probability, there is a legal basis for apportionment." (*Gay v. Workers' Comp. Appeals Bd.* (1979) 96 Cal.App.3d 555, 564 [44 Cal.Comp.Cases 817]; see also *Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 620.)

"Apportionment of permanent disability shall be based on causation." (Lab. Code, §

4663(a).) Physicians are required to address apportionment when evaluating permanent impairment. (Lab. Code, § 4663(b)-(c).) Section 4663(c) provides in pertinent part as follows:

> In order for a physician's report to be considered complete on the issue of permanent disability, the report must include an apportionment determination. A physician shall 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. If the physician is unable to include an apportionment determination in his or her report, the physician shall state the specific reasons why the physician could not make a determination of the effect of that prior condition on the permanent disability arising from the injury. The physician shall then consult with other physicians or refer the employee to another physician from whom the employee is authorized to seek treatment or evaluation in accordance with this division in order to make the final determination.
>
> (Lab. Code, § 4663(c).)

Section 4664(a) separately states that 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, § 4664(a).)

"Apportionment is a factual matter for the appeals board to determine based upon all the evidence." (*Gay*, *supra*, 96 Cal.App.3d at p. 564.) Thus, the WCJ has the authority to determine the appropriate amount of apportionment, if any. It is also well established that decisions by the Appeals Board must be supported by 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]; *Le Vesque v. Workmen's Comp. Appeals Bd.* (1970) 1 Cal.3d 627 [35 Cal.Comp.Cases 16].) Therefore, the WCJ must determine if the medical opinions regarding apportionment constitute substantial evidence. (See *Zemke v. Workmen's Comp. Appeals Bd.* (1968) 68 Cal.2d 794, 798 [33 Cal.Comp.Cases 358].)

As outlined in *Escobedo*:

> [I]n the context of apportionment determinations, the medical opinion must disclose familiarity with the concepts of apportionment, describe in detail the exact nature of the apportionable disability, and set forth the basis for the

> opinion, so that the Board can determine whether the physician is properly apportioning under correct legal principles.
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> (*Escobedo*, *supra*, 70 Cal.Comp.Cases at p. 621, citations omitted.)

The Court of Appeal has similarly held in relevant part:

> It is certain the mere fact that a report addresses the issue of causation of the permanent disability, and makes an apportionment determination by finding the approximate relative percentages of industrial and nonindustrial causation does not necessarily render the report one upon which the Board may rely.
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> (*E.L. Yeager Construction v. Workers' Comp. Appeals Bd.* (*Gatten*) (2006) 145 Cal.App.4th 922, 927-928 [71 Cal.Comp.Cases 1687].)

The orthopedic AME Dr. Sofia opined that 20% of applicant's "shoulder problems" would be non-industrial based on the fact that "[a]ll shoulders age starting at age 35 when the blood flow to the rotator cuff is interrupted." Dr. Sofia's general conclusion about all shoulders does not explain how and why 20% of applicant's permanent disability for the shoulders is attributable to non-industrial causes. Similarly, he apportioned 25% of the permanent disability for both knees to non-industrial degenerative changes, but did not explain how and why these degenerative changes contribute to applicant's permanent disability for the knees. As discussed above, a medical opinion addressing apportionment must explain the basis for the opinion and the mere fact that a report addresses apportionment does not make it substantial evidence upon which the trier of fact may rely in applying apportionment.

Accordingly, we agree with applicant that Dr. Sofia's apportionment conclusions do not constitute substantial evidence. Utilizing the ratings provided by the WCJ in the Opinion on Decision, applicant's permanent disability for the August 8, 2007 specific injury (ADJ6604551) rates as follows without apportionment:[5]

> Left shoulder: 16.02.01.00 - 1 - [7]1 - 214F - 1- 1
>
> Left wrist: 16.04.02.99 - 1 - [4]1 - 214G - 2- 3
>
> Right shoulder: 16.02.01.00 - 9 - [7]12 - 214F - 12- 15
>
> Right wrist: 16.04.02.99 - 1 - [4]1- 214G - 2- 3

[5] A rating of applicant's disability does not require the assistance of a DEU rater. (See *Blackledge v. Bank of America* (2010) 75 Cal.Comp.Cases 613, 624-625 (Appeals Board en banc).)

Left knee: 17.05.03.00 - 20 - [2]23 - 214F - 23- 27

Right knee: 17.05.10.08 - 30 - [2]34 - 214F - 34 - 39

39 C 27 C 15 C 3 C 3 C 1 = 64%

The August 8, 2007 injury caused permanent disability of 64% without apportionment. We will amend Findings of Fact numbers 9 and 10 to reflect this level of permanent disability for this injury and no basis for apportionment.

Applicant contends that the "Montana case rationale" applies to her case. No case citation was given in applicant's Petition, but it is presumed that applicant is referring to *Argonaut Ins. Co. v. I.A.C.* (*Montana*) (1962) 57 Cal.2d 589.[6] Section 4453(c)(4) permits calculation of average weekly earnings for purposes of temporary or permanent disability indemnity on the basis of earning capacity where the employment is for less than 30 hours per week or where any of the other statutory methods for calculating average weekly earnings "cannot reasonably and fairly be applied." (Lab. Code, § 4453(c)(4).) "An estimate of earning capacity is a prediction of what an employee's earnings would have been had he not been injured." (*Montana*, *supra*, 57 Cal.2d at p. 594.) It has long been held that where "there is specific demonstrable evidence that the injured employee, would, but for the injury, have received increased earnings, the fixed formula of [section 4453] subdivision (a) cannot be reasonably and fairly applied, and that in such circumstances average earnings can be computed on the basis of earning capacity under" section 4453(c)(4). (*Thrifty Drug Stores, Inc. v. Workers' Comp. Appeals Bd.* (*Kaye*) (1979) 95 Cal.App.3d 937, 944 [44 Cal.Comp.Cases 809].) Determining earning capacity involves consideration of several factors including the "applicant's ability to work, his age and health, his willingness and opportunities to work, his skill and education, the general condition of the labor market, and employment opportunities for persons similarly situated." (*Montana*, *supra*, 57 Cal.2d at p. 595.)

The only evidence offered at trial regarding applicant's average weekly earnings was a wage statement provided by defendant. No evidence was provided by applicant to show that her earning capacity was greater than reflected by the wage statement. The WCJ thus correctly calculated applicant's average weekly earnings rate based on the wage statement.

Although we reject applicant's argument about her earnings rate, we are unable to

[6] Although applicant did not specifically raise the issue of application of the *Montana* case at trial, applicant's earnings were identified as an issue. (Minutes of Hearing; Order of Consolidation, March 2, 2021, pp. 2-3.)

determine the value of applicant's permanent disability award without a determination regarding the application of section 4658(d). (Lab. Code, § 4658(d).) Section 4658(d) provides a 15% increase or decrease of permanent disability benefits for an injury occurring on or after January 1, 2005 depending on whether the employer offers the injured employee regular work, modified work or alternative work as required by this statutory subsection. Since permanent disability and apportionment were issues at trial, the application of section 4658(d) was also an issue to be determined. (See *Bontempo v. Workers' Comp. Appeals Bd.* (2009) 173 Cal.App.4th 689 [74 Cal.Comp.Cases 419].) The current record is insufficient to determine whether defendant has at least 50 employees and whether there must be an adjustment to applicant's permanent disability benefits per section 4658(d). Therefore, we will defer the value of applicant's permanent disability award and the corresponding attorney's fee until this issue has been determined.

There does not appear to be a dispute between the parties that this injury (ADJ6604551) occurred on August 8, 2007, but the date of injury is not included in Finding of Fact number 1. We will thus also amend Finding of Fact number 1 to clarify the date of injury for ADJ6604551.

We adopt and incorporate the following excerpts from the WCJ's Report in response to applicant's other contentions:

UNAVAILABILITY OF THE DOCTORS

> It appears that Petitioner raises an issue as to discovery during the case history discussion. Petitioner fails to recognize that this is a 2007 date of injury and there has been ample time to obtain and offer evidence in support of any of their contentions. In review of case file, EAMS reflects applicant filed a DOR dated 8/29/2014 indicating applicant was ready to move the case forward. By reference in the Petition, it appears that Petitioner now argues that the jointly offered, undisputed AME report of Dr. Sofia should not be relied on.
>
> Although not an issue raised at trial, due to the reference in applicant's case history, further comment for clarification is necessary. Record reflect that defendant filed a Declaration of Readiness on 10-21-2020. Applicant did not file an objection to the Declaration of Readiness. In fact, applicant's attorney did not appear at the hearing. Minutes of Hearing of 12-14-2020 (EAMS#73617931) reflect that defense counsel appeared and requested a joint continuance as they were exploring settlement. If this was not accurate, even after service of the Minutes of Hearing of 12-14-2020, applicant did not raise any objections or represent a need for further discovery. There was no evidence presented at trial that applicant's attorney was seeking to depose Dr. Sofia prior to the scheduling of the Mandatory Settlement Conference. At Trial, defense counsel represented the continuance was solely to pursue settlement.

At the following Mandatory Settlement Conference dated 1-11-2021, the Minutes of Hearing reflect the case was jointly set for trial. The Minutes of Hearing do not reflect any objection by applicant to the setting the matter for trial. In fact, parties were provided 7 days to complete the PTC Statement. Yet, applicant raises issues in the Petition that were not listed as issues in the Pre Trial Conference Statement nor raised at Trial. It should be noted, that at the time of the MSC, which closed discovery, Dr. Sofia was not deceased. If in fact discovery was an issue at the time of the MSC, an Objection to the Declaration of Readiness, or an Objection to the reporting of the Agreed Medical Examiner should have been offered and the issue raised in the Pre Trial Conference Statement, which it was not.

It has been held that if there is a failure to raise an issue at the MSC, the issue is deemed waived (*Hollingsworth v. WCAB* (1996) 61 CCC 715). As some issues raised in the Petition were not issues raised at Trial, any inferences or attention to the issue should be disregarded. In this instance, Petitioner raises multiple issues not previously raised.

KITE APPLICATION

Petitioner asserts that "Kite Application" should be applied. Petitioner argues due to applicant's upper and lower difficulties, and her overall medical condition support a "Kite Application". However, Petitioner fails to offer any evidence or medical report that asserts "Kite Application" is appropriate. In *Athens Administrators v. Kite* (2013) 78 CCC 213, the PQME discussed the synergistic effect concluding the most accurate description of injury would result from simple addition rather than combining the disability. Instead, Petitioner cites references to portions of multiple medical reports, some of which were not offered into evidence and then reaches her own unsupported conclusion.

Petitioner fails to recognize that parties jointly agreed to utilize an Agreed Medical Examiner. It is the AME, Dr. Sofia who is silent on this matter. In fact, every medical report offered is silent as to *Kite*. In *Kite*, the WCJ relied upon the opinion of a qualified medical evaluator who found there was a "synergistic effect" of the injury to the bilateral hips versus body parts from different regions. Unlike the QME in *Kite*, Dr. Sofia provided an impairment and states "I believe the above impairments are accurate and reasonable per the Almaraz-Guzman decision" (Jnt Ex W, pg 10). Dr. Sofia offered no discussion indicating *Kite* applied. It is well known that the determination as to whether the final permanent disability is rated using the combined values chart versus the addition, is based upon the medical evidence. As in *Kite*, impairments may be added if substantial medical evidence supports the physician's opinion that adding them will result in a more accurate rating. In this instance, Dr. Sofia did not provide a *Kite* analysis and was clear that the rating provided was "accurate and reasonable". Even the prior AME, Dr. Zarins provided a strict rating and did not offer a *Kite* analysis. Therefore, there is no basis to support Petitioner's contention of a "*Kite* Application".

At Trial, there was no evidence offered containing a substantial medical discussion or evidence supporting applicant's assertion that addition method is applicable as opposed to combining method. Although Petitioner recites random references in medical reporting by multiple providers, Petitioner fails to offer or refer to a report that provides a "Kite Analysis" or identifies a doctor that indicates the addition method is a more accurate rating.

It is well known that, an agreed medical examiner is chosen by the parties because of their expertise and neutrality. Thus, as set forth in *Power v. WCAB* (1986) 51 CCC 114, the opinion of the Agreed Medical Examiner should ordinarily be followed unless there is good cause to find the opinion unpersuasive. In this matter, there was no showing of good cause to deviate from the conclusions of the AME, Dr. Sofia. Neither AME that evaluated the applicant indicated the addition method was more accurate. Relying on the medical reporting of the AME, Dr. Sofia, there is no basis to rebut the CVC which is a more accurate rating based on the medical evidence.

PARCO APPLICATION

Petitioner next argues that "Parco" applies and contends that to enable the implantation of an orthopedic prosthesis for a knee joint replacement it includes severance of the applicant's bone which Petitioner compares to an amputation. Defendant contends that case law supports his position that a total knee replacement does not constitute an amputation.

In *Martinez v. Parco, Inc.*, 2018 Cal. Wrk. Comp. P.D. LEXIS 55, the WCAB held that removal of bone from the applicant's thumb, combined with its shortening by 7 mm, a result of the surgeries for the treatment of his industrial injury, constituted an amputation for the purposes of applying the LC 4656 (c) (3) (C) exception to the 104-week limit on temporary disability. In *Parco*, the evaluator utilized an alternative method of determining the injured workers impairment due to the nature of the injury, the surgery performed and the result of a shortening of the body part. All of which are absent from this case.

It appears that Petitioner's argument is that any "severance" would constitute an amputation. Although during many different surgical procedures, parts of a body are either removed, reduced or repaired, this is not necessarily comparable to a loss of a limb. An individual who undergoes an amputation above the knee, no longer has the use of his/her foot, calf and knee. An individual who undergoes a knee replacement, does so to provide a better mechanism than their own joint and continues to have use of their foot, calf, knee, etc. Additionally, there is a cosmetic effect after an amputation which is not present in a total knee replacement. As in Parco, the outcome was an obvious "shortening" of his thumb which is visibly recognizable which is not apparent in an individual who under goes a total knee replacement. Additionally, the loss of a limb has a more significant impact than that of a "repair of a joint". The petitioner did not offer any evidence that applicant suffered a loss of a limb or amputation. Instead,

Petitioner argues that the surgical procedure satisfies this component. It appears that Petitioner's contention is that a "severance" occurs during a total knee replacement, and therefore, the applicant should be entitled to additional TTD pursuant to Labor Code Section 4656(c)(3)(C) extending the window of TTD to 240 weeks. The exception to the time period of temporary total disability was designed to correlate with the impact of the severity of the loss as evidence by the identified exceptions. At Trial, the applicant did not testify to any loss of limb or any comparable defect as a result of her industrial injury. Additionally, no medical reports were offered discussing any impact comparable to an amputation. The applicant testified at Trial that her PTP, Dr. Biama indicated that her surgery went "okay" (SOE 4/7/21 pg 3, ln 14).

Furthermore, Petitioner argues that applicant should be awarded an additional "490 weeks of TTD" (Pet Recon pg 6, ln 3), without offering any evidence, authority or argument to support this position. Therefore, it is the undersigned's opinion that based on the above, Parco is not applicable in this matter as applicant did not suffer an "amputation" nor did Petitioner offer evidence that supported her contention.

…

TOTAL PERMANENT DISABILITY

Petitioner contends that the applicant is 100% disabled. Yet, the AME, Dr. Sofia, did not consider the applicant 100% disabled. Petitioner offered no medical reports in support of her contention. Instead, Petitioner offers a Declaration by her PTP, Dr. Biama as well as a Vocational Rehabilitation report. Defendant objected to both reports as they were obtained after the Mandatory Settlement Conference. Petitioner argues that discovery closes on the date of the completion of the MSC, referring to the second MSC.

In this matter it appears convenient that after failing to file an Objection to the Declaration of Readiness, applicant did not appear at the MSC on 12-14-2020, providing defendant reassurance that a continuance was to work on settlement. Instead, Petitioner pursued discovery even though an objection to the AME was not made, nor was it done immediately following the receipt of the AME report months earlier. Petitioner excuses the quality of the reporting of Dr. Biama as well as the Vocational Report due to the fact that it was "rushed".

The only evidence presented reflecting any efforts to obtain further reporting was done after the filing of the Declaration of Readiness. Dr. Sofia, AME, report is dated 6/2/2020, and is signed 6/25/2020. Parties received the report and no efforts were made to cross examine Dr. Sofia following receipt of the report. Dr. Sofia's conclusions were similar to that of the prior AME, Dr. Zarins, yet when provided a second chance with Dr. Sofia, Petitioner did not raise the issue. Petitioner was well aware of the issues in this case, and considering the dates of injury, Petitioner had ample time to submit the necessary questions to the evaluator prior to the initial evaluation or schedule a cross examination upon

receipt of the report. As indicated, no evidence was offered at Trial that applicant objected to the reporting of the Agreed Medical Examiner.

It is only after the 12-14-2021 MSC did petitioner pursue a medical report by Dr. Biama and a vocational rehab report. Neither the PTP Declaration nor the Vocational report are considered substantial medical evidence as both were lacking the necessary analysis nor did they address applicant's industrial and non-industrial conditions. In fact, the vocational evaluator never even interviewed the applicant, nor tested the applicant or obtained a valid history. The report also is undated and lacks the necessary declaration. Applicant had over a decade to develop the record and to pursue further clarification if needed and failed to do so. Now after not receiving the outcome that was desired, and without any evidence to support her contention, Petitioner now demands application of random cases, some not raised at trial, without justification nor providing analysis of the facts.

Now, Petitioner further argues that as to the claim of 100% permanent disability, the applicant's primary treating physician, Dr. Biama is better qualified to assess applicant's condition yet only offered a two paragraph declaration of his conclusion. The Declaration is a simple conclusion and fails to address industrial and non-industrial causation and apportionment, and is silent on any discussion on how he reached that conclusion. Petitioner did not offer any of Dr. Biama's medical reports for review or consideration. Nor did Petitioner offer evidence which includes a discussion of causation by Dr. Biama.
…
The Court of Appeal in *Contra Costa County vs. Workers' Compensation Appeals Board* (*Dahl*) (2015) 80 Cal.Comp.Cases 1119, discussing *Ogilvie*, stated "[t]he court interpreted LeBoeuf and its progeny as limited in application 'to cases where the employee's diminished future earnings are directly attributable to the employee's work-related injury, and not to nonindustrial factors'". In this instance, based on the findings of the Agreed Medical Examiner, Dr. Sofia, the applicant is not found to be 100% disabled. No evidence was offered at Trial, providing any discussion as to a finding of 100% or what contributed to Dr. Biama's conclusions in his Declaration.

Dr. Biama states in his Declaration that he has "treated her for various problems", although further discussion identifying those problems and causation is not included. Also absent in his Declaration is any discussion, analysis or even comment supporting his conclusion (App Ex 2). In reviewing the extensive record review by Dr. Sofia, a review of Dr. Biama's reports are noted, none of which indicates the applicant is 100% disabled (Jnt Ex W, RR pg 13).

Petitioner also offered the brief reporting of a vocational evaluator at Trial which was found not to be substantial medical evidence. The opinions of a vocational expert based upon inaccurate history, facts or legal theory do not constitute substantial evidence. *Barbara Joberg v. Illuminations, Inc., Arrowood Indemnity Co.* (2014) (panel decision) 2014 Cal.Wrk.Comp.P.D. Lexis 717

citing *Garza v. Workers' Compensation Appeals Board* (1970) 33 Cal.Comp.Cases 500. In this case, Vocational Rehabilitation report contains limited information. The report contains no details, discussion or analysis and only states a conclusion. Ms. Alfaro, Petitioner's Vocational Rehab evaluator, fails to address applicant's multiple injuries and conditions both industrial and non-industrial, nor accurately records the apportionment.

Furthermore, by review of the report, it appears that no history was taken from the applicant, and her conclusions were drawn from the review of 1 report and the Declaration of the PTP. This 1½ page vocational report only summarizes applicant's date of birth, employment, and complaints. The report notes the only documents provided were the Application, letter, PQME report and PTP Declaration. As the report references Dr. Sofia, it appears the evaluator was unaware that he was the Agreed Medical Evaluator. In identifying the apportionment, Ms. Alfaro completely leaves out any percentage as to the applicant's knees. It does not appear that any reporting by the applicant's PTP was reviewed, she merely reviewed the declaration of Dr. Biama.

…

There is also no discussion as to what the applicant can and cannot do as well as past education and experience. No testing was completed. At best, it appears the vocational evaluator regurgitated what limited information she reviewed in her report. Due to the lack of quality, accuracy and content, the reporting is found not to be substantial evidence. The report lacks the documentation, facts and discussion to allow the reader to reach the conclusion that applicant is 100% disabled. Nor did it address that applicant was not vocationally feasible due only to the specific injury of 8/8/07 or that she has diminished future earnings directly attributable to her work-related injury. It is found applicant has not rebutted the 2005 PDRS.

…

No credible evidence was offered at trial supporting the applicant's contention that she is 100% disabled on an industrial basis.

(WCJ's Report, August 2, 2021, pp. 2-13.)

In conclusion, we will amend the FA&O as outlined herein. The FA&O is otherwise affirmed.

For the foregoing reasons,

IT IS ORDERED as the Decision After Reconsideration of the Workers' Compensation Appeals Board that the Findings, Award and Order issued by the WCJ on June 21, 2021 is **AFFIRMED** except that it is **AMENDED** as follows for ADJ6604551:

FINDINGS OF FACT (ADJ6604551) MF

1. The applicant sustained injury arising out of and in the course of employment on August 8, 2007 to her bilateral shoulders, bilateral wrists and bilateral knees while employed by the Fontana Unified School District.

* * *

9. Applicant's injury caused permanent disability of 64%. The value of applicant's permanent disability award is deferred pending determination of application of Labor Code section 4658(d). Defendant is entitled to credit for all sums previously paid for this date of injury and applicant's attorney is entitled to 15% of the award for an attorney fee.

10. There is no legal basis for apportionment pursuant to Labor Code section 4663.

* * *

12. The reasonable value of services and disbursements of applicant's attorney fee is deferred pending determination of the value of the award.

* * *

AWARD - ADJ6604551 (MF)

AWARD is made in favor of **VIRGINIA ANTUNEZ** against **FONTANA UNIFIED SCHOOL DISTRICT** of:

(a) Permanent disability of 64%, the value of which is deferred per Finding of Fact No. 9.

(b) Further medical treatment reasonably required to cure or relieve from the effects of this injury.

(c) Reasonable attorney fees from applicant's permanent disability award, to be commuted from the far end of the Award, to the extent necessary to pay one lump sum. The amount of attorney fees is deferred per Finding of Fact No. 9.

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ CRAIG SNELLINGS, COMMISSIONER

JOSÉ H. RAZO, COMMISSIONER
PARTICIPATING NOT SIGNING

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

SEPTEMBER 12, 2022

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

LAW OFFICES OF MICHAEL CARUTHERS
LAW OFFICES OF PARKER & IRWIN
VIRGINIA ANTUNEZ

AI/*pc*

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