WORKERS' COMPENSATION APPEALS BOARD

STATE OF CALIFORNIA

STEVEN SCHIEFFER, ***Applicant***

vs.

STATE OF CALIFORNIA, SALINAS VALLEY STATE PRISON, legally uninsured, adjusted by STATE COMPENSATION INSURANCE FUND, ***Defendant***

Adjudication Numbers: ADJ9533852; ADJ9561719
Salinas District Office

OPINION AND ORDER
DENYING PETITION
FOR RECONSIDERATION

Defendant State of California, Salinas Valley State Prison, legally uninsured, seeks reconsideration of the December 7, 2020 Findings and Award, wherein a workers' compensation administrative law judge (WCJ) found applicant Steven Schieffer sustained permanent total disability as a result of two industrial injuries, on December 28, 2012, and cumulatively over the period ending April 3, 2013, to his bilateral knees and back while employed as a plumber/pipefitter at Salinas Valley State Prison. The WCJ found applicant rebutted the scheduled rating of his impairment and was entitled to a single combined award of permanent disability. The WCJ further found applicant was entitled to an unapportioned award, determining that the Qualified Medical Evaluator's (QME) apportionment determination was not substantial medical evidence. The WCJ awarded permanent disability indemnity at the rate of $694.67 per week for life, less credit for sums paid and a 15% attorney's fee, and further medical treatment.

Defendant contests the finding that applicant is permanently totally disabled. Defendant contends that the finding that applicant rebutted the scheduled permanent disability rating failed to address the QME's apportionment to non-industrial disability or address the evidence that applicant's non-industrial cirrhosis of the liver contributed to his vocational disability. Defendant next argues that the WCJ erred in finding that applicant rebutted the scheduled rating, because he did not calculate applicant's scheduled rating pursuant to Labor Code section 4660, and reprises its argument that the WCJ failed to follow the QME's apportionment. Defendant further asserts that further discovery was necessary to address the effect applicant's non-industrial cirrhosis has

on his ability to compete in the labor market. Next, defendant argues that the disability caused by the specific and cumulative trauma injuries were improperly merged into a single award, because the QME did not adequately explain why he was unable to separately apportion the permanent disability to each injury. Defendant next argues, again, that further discovery was necessary because the QME retired before offering a supplemental report on applicant's vocational capacity, and because defendant sought additional evidence regarding applicant's cirrhosis.

We have received applicant's Answer to the Petition for Reconsideration. 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, the Answer and the contents of the Report, and we have reviewed the record in this matter. For the reasons discussed below, we will affirm the Findings and Award and deny defendant's Petition for Reconsideration.

FACTS

Defendant provides a limited statement of facts in its Petition for Reconsideration. Defendant states that it accepted applicant's claim for specific and cumulative trauma injuries, and that the WCJ's finding of permanent total disability was based on the November 30, 2018 opinion of applicant's vocational expert, Tom Sullivan, and the opinion of panel QME Dr. McCreesh. Defendant notes Dr. McCreesh's impairment ratings, his 25% apportionment to non-industrial degenerative changes, and his finding that the injuries were "inextricably intertwined." Defendant also asserts that the WCJ did not provide a rating of Dr. McCreesh's report.

After setting forth the material evidence in the record, we will review defendant's arguments.

Applicant testified at trial on September 2, 2020, that he worked as a plumber/pipefitter for 38 years, beginning in 1967, obtaining work through his union membership. He was only employed at Salinas Valley State Prison for four months, and only three weeks into his job when he sustained an admitted injury on December 28, 2012. Applicant worked as a plumber and also taught trustees to do the plumbing work.

According to the history of injury given to Mr. Sullivan, applicant's vocational expert, applicant left knee gave out when he was climbing on the roof of a building where he was installing an air conditioning unit.

> Mr. Schieffer stepped from one roof over onto another roof that had a steeper pitch. As he stepped over the rain gutter putting his left foot on the roof he put all his pressure on that leg to get up onto the other roof. His left leg gave way. He yelled to the co-worker who pulled him up onto the roof. He knew his knee was hurt and he sat for a while.
> (Ex. 8. 11/30/18 Sullivan Vocational Report, p. 5.)

He received medical treatment on site, and then rested over the New Year's holiday. He returned to work in January 2013, and worked with increased knee pain. He continued to work until April 3, 2013, when his symptoms were too disabling and there was no modified work available. (Ex. 8, p. 6.)

Applicant testified at trial about his current problems with his knees and back. His left knee hurts all of the time, and has lost control and feeling. His three small toes do not function and he cannot move them. He uses a cane when he has bad days. He has trouble dressing, cannot wear shoes and just wears house slippers. His wife assists with dressing, and bathing.

He can sit for 15 minutes before he has to get up. He can stand in place for 10 minutes and then needs to lean on something for support. He can only walk for 10 minutes at a time. He cannot kneel, stoop, crawl, squat or climb. He lies down more than once during the day. He can do a little light work for about 10 minutes. He cannot work for eight hours, or even four hours per day.

With regard to work activities identified by defendant's vocational expert, applicant testified that he does not believe he can perform work as an entry level clerk or customer service representative for eight hours per day, due to his inability to stand or sit for long. He would have to take breaks to lie down.

His wife testified that applicant has balance problems when he stands or walks due to his left foot. He sleeps in a different room because he gets up all through the night. He uses a recliner or lies in bed for one to two hours, before he needs to get up to change positions. There is no prolonged period of time when he is comfortable. He cannot stay up for more than 10 minutes.

He was diagnosed with Hepatitis C in 1994, and was cured. He now receives treatment for Stage 4 cirrhosis of the liver. He testified that he is tired a lot due to his liver problem.

His wife testified to the effects of his liver disease. He experiences fatigue and elevated ammonia, which makes his thinking fuzzy, if it is not controlled by medication. He has a reduced energy level. It is his leg and back problems that prevents him from walking and standing, and stops him from socializing and fishing. He has given up fishing because he cannot walk on trails to the lake where he would fish. He is on a liver transplant list.

Applicant testified he received chiropractic treatment for back pain in the past.

Applicant's treating physician for his orthopedic injuries was Dr. Reynolds. In his July 25, 2016 report, he found applicant to be permanent and stationary as of July 19, 2016, and assigned a 20% Whole Person Impairment (WPI) rating for applicant's left knee replacement and 1% WPI for atrophy. He did not apportion applicant's impairment to any non-industrial factors. He placed work restrictions of a 10 pound maximum lifting capacity, limiting standing, walking and sitting to less than 2 hours in an 8 hour day, no pushing with his left lower extremity, and no climbing, balancing, stooping, kneeling, crouching, crawling or twisting. (Ex. A-14, 7/25/16 Dr. Reynolds PR-4 Report.)

Applicant was evaluated by QME Dr. McCreesh on several occasions, the last being on March 1, 2017, from which he prepared an April 1, 2017 permanent and stationary report. (Ex. A-1. 4/1/17 Dr. McCreesh QME Report.) He reviewed the medical treatment provided, including a February 2014 left knee arthroscopic surgery by Dr. Reynolds, following which applicant developed lower back pain with left sciatica, which "progressed to include weakness of the left foot and ankle." (Ex. A-1, p. 2.) Applicant also underwent lumbar surgery in August of 2014, consisting of discectomies, foraminotomies and dural repair at L4-5 and L5-S1. Applicant had some improvement in his severe back and left leg pain. Dr. McCreesh found applicant's right knee and lumbar radiculopathy symptoms were compensable consequences of his left knee specific injury, as well as a cumulative industrial trauma. Applicant's condition subsequently required a total left knee replacement surgery in December of 2015, which resulted in left foot numbness. Dr. McCreesh noted that though applicant's left knee replacement procedure eased applicant's severe pain, he still complained of persistent significant left knee pain. Applicant's pain complaints have increased since 2015, and due to his impaired balance he requires the use of a cane.

> He reports some level of pain which is frequent to constant. On a 0 to 10 scale, with 0 being no pain and 10 being the most severe pain imaginable, he reports pain levels as varying between a 3 and an 8 level. Walking a block he would associate with a 7 level pain. Standing for more than a half hour without weight relief he would associate with a 9 level pain. He avoids recreational and social activities associated with flaring pain.
> (Ex. A-1, p. 3.)

Dr. McCreesh placed work restrictions of no heavy lifting, repetitive bending, or stooping. No prolonged standing. No climbing, squatting, or crawling. No ladder work. (Ex. A-1, p. 10.)

Dr. McCreesh agreed with Dr. Reynolds that applicant reached permanent and stationary status as of July 19, 2016, and provided impairment ratings for the knees and lumbar spine; 20% WPI for the left knee, 8% WPI for the right knee, and 30% WPI for the lumbar spine. He indicated the cause of applicant's disability "is attributed to the combined effects of his specific work injury of 12/28/2012 and cumulative industrial trauma through 04/03/2013."

Addressing apportionment, Dr. McCreesh indicated 75% of applicant's disability was caused by industrial factors and 25% to non-industrial factors, noting applicant performed "arduous work for nearly four decades. There are degenerative changes notable on his imaging studies of the knees·and lumbar spine. The majority, but not all of the degenerative changes are attributable to industrial factors." (Ex. A-1, p. 9.)

In his deposition testimony, Dr. McCreesh indicated that he was not able to apportion applicant's disability between the dates of injury, without engaging in speculation, due to the fact that the two injuries were close in time. "They're close in time. There's multiple impairments; and I'd have to speculate to parse the two, the specific from the cumulative trauma." (Ex. A-2, Deposition Transcript, Mr. McCreesh, 6/28/17, 17:1-16.) He agreed that the impairments in all three body parts from the specific and cumulative trauma injuries "are inextricably intertwined." (Ex. A-2, 18:1-5.) Dr. McCreesh agreed that one injury could prevent the other from healing properly, and one injury could render a body part unusually weak and contribute to damage caused by the other injury. (Ex. A-2, 17:17-24.)

With regard to apportionment to non-industrial factors, Dr. McCreesh indicated that he apportioned to the degenerative changes seen on diagnostic imaging studies, and applicant's history of chiropractic treatment for chronic intermittent low back pain from a 1994 injury, based on his training and experience. He noted that the applicant's claim for the 1994 injury was denied, and there was never any associated disability. When asked to describe "the exact nature of the apportionable disability in any of his body parts," Dr. McCreesh stated: "I tried to in my report in April of 2017 when I concluded that a quarter of his disability involving the knees and low back are attributable to nonindustrial degenerative change." But he said he was unable to describe it in more detail. (Ex. A-2, 18:9-25; 19:1-11.) Dr. McCreesh said it would be speculative for him to assess the percentage of applicant's disability that was attributable to his 1994 back injury. (Ex. A-2, 25:1-10.)

Dr. McCreesh also indicated that "to get an accurate picture of this man's impairment," the most accurate method for combining the separate disabilities was "using simple addition as opposed to the combined values chart, which has a compressive effect."

In a 2019 supplemental report, Dr. McCreesh reviewed the vocational expert reports the parties had obtained. His response to a request to assess their differing opinions on applicant's ability to return to work in the open labor market was to recommend that applicant undergo a functional capacity evaluation. (Ex. A-3, 8/27/19 Dr. McCreesh QME Supplemental Report.) Dr. McCreesh closed his medical practice in May of 2019, and was unavailable for further reporting. (Ex D-14.)

Applicant obtained a vocational evaluation from Tom Sullivan, who reported on November 30, 2018. (Ex. A-8. 11/30/18, Sullivan Vocational Report.) Based upon his review of the medical record, his vocational testing of applicant, applicant's work restrictions, as well as applicant's expressed and observed physical limitations, Mr. Sullivan concluded that applicant lack the ability to return to the open labor market and was not amenable to vocational rehabilitation.

Mr. Sullivan described applicant's report of left knee pain and limitations. He knee gets numb and sore, hot and stiff for approximately a third of each day. Three toes of his left foot are numb, without feeling. He left calf frequently has painful cramps, with pain at level 8. His knees lock and pop, with pain at a level 8 to 9, occurring when he stands for too long, and lasting a quarter of the day. Each day, he lies down for one and a half to two hours. Some days he will need to lie down a second time due to pain. (Ex. A-8, p. 14-15.)

Mr. Sullivan evaluated applicant's transferable skills in relation to the medical work restrictions, and after finding five positions in the region, he determined applicant was not feasible for any of them "without considerable training and physical improvements." (Ex. A-8, p. 23.) He further noted applicant had significant physical limitations that impaired his ability to obtain and maintain employment.

> My observations of Mr. Schieffer in two sessions of vocational interviews and one session of testing gave me the impression that he is having significant physical difficulties. He was up and down frequently during the interviews and changed positions frequently also in the vocational testing. At no time during the vocational interviews did he stand longer than four minutes and usually varied between two and three minutes. He could sit for up to twenty five minutes but then he sat less time as the interview progressed. At one time when he was

> standing his right knee popped and his whole body jerked. I believe this would be very alarming for any employer who observed that.
>
> Mr. Schieffer's actual performance in the vocational testing was much more limited than he had indicated he was capable of performing. He reported he could sit normally for approximately 20 minutes. At no time did he sit longer than 15 minutes during the vocational testing. He sat for 15 minutes twice and 11 minutes twice. His other sitting times were 8, 8, and 4 minutes. His average sitting time was 10.3 minutes. When he stood, he stood at a stand-up desk with a slant top in which he could rest much of his body weight on his forearms or elbows. The longest he stood was 14 minutes leaning heavily on the stand up desk. The next longest was 7 minutes then 5, 4, 3 and 3 minutes. His average standing time was 6 minutes with the assistance of leaning on his arms. The paper and pencil tests he completed during the vocational testing are far easier physically than any of the potential matching occupations from the TSA results using the restrictions of Dr. McCreesh.
>
> Based upon my observations it is highly doubtful Mr. Schieffer could obtain and maintain employment. After completing two hours and 20 minutes of vocational testing time he was exhausted and felt he needed to go home and take a nap. He does not demonstrate the stamina needed to perform work. All of the matching occupations that were listed for him as possibilities require a certain amount of production skills. Mr. Schieffer does not demonstrate the capacity to work at a competitive and sustained work level.
> (Ex. A-8, p. 30.)

Mr. Sullivan further noted that applicant was not amenable to participate in vocational rehabilitation, citing a limited capacity to work at a competitive and sustained work level.

> Mr. Schieffer demonstrates substantial physical difficulties. He performs very limited daily activities as movement increases pain. His hireability presentation is poor. As a result of this evidence based vocational assessment it is my opinion that Mr. Schieffer is not amenable to vocational rehabilitation. I do not believe he can successfully compete in an open labor market. He has no vocational employability and therefore has sustained a total loss of future earning capacity.
> (Ex. A-8, p. 38.)

Defendant obtained a vocational evaluation from Thomas Linder, dated April 12, 2019. In his assessment of applicant's limitations, Mr. Linder reviewed the restrictions placed by Dr. Reynolds and Dr. McCreesh, and concluded that applicant "was, conservatively, limited to light work which does not require prolonged standing and walking." (Ex. D-1, 4/12/19 Linder Vocational Report, p. 3.) No reference is made to Dr. Reynold's 2 hour sitting limitation, though he indicated applicant was qualified for light work that allowed alternating between standing and

sitting at will. (Ex. D-1, p. 5.) Mr. Linder found that based on applicant's prior experience as his union local's business manager for 3 years, he is qualified for basic office jobs such as customer service representative or general office clerk. (Ex. D-1, p. 7.) Mr. Linder also indicated that applicant's non-industrial liver condition did not exert a negative impact on his employability, as it did not significantly impact his physical and mental functioning. (Ex. D-1, p. 10.)

Mr. Linder concluded that applicant was amenable to participate in vocational rehabilitation, though he excluded direct placement for plumbing supervisory jobs and on-the-job training options based on his physical limitations. He found applicant was capable of participating in classroom training which could accommodate applicant's work restrictions.

At trial, defendant raised an issue of whether discovery should remain open so it could obtain a report from a replacement QME, since Dr. McCreesh retired before he could respond to counsel's request for his opinion on the vocational reporting. The WCJ concluded applicant was not required to be evaluated by a replacement QME. He explained in his Opinion on Decision that it was not necessary to further develop the record on the issue, even though the request for a supplemental report by Dr. McCreesh was "within the broad scope of discovery." The WCJ stated:

> However, I find that Dr. McCreesh's role as the panel QME did not require him to decide which vocational expert was more persuasive, a determination which, in the final analysis, is more appropriately made by the Worker's Compensation Judge. The doctor's opinion on this issue, though possibly relevant, was not indispensable. Thus, the case for replacing him as the panel QME is far outweighed by the level and sufficiency of his contribution to the record and by the constitutional mandate for an expedited remedy.

The WCJ further indicated the basis for his finding that applicant is permanently totally disabled, stating that applicant had rebutted the schedule rating based on the combined effects of his two industrial injuries. He credited Dr. McCreesh's opinion that he could not, without speculation, separate the disability from applicant's industrial injuries. The WCJ found the combined effects of the injuries "renders applicant not amenable to vocational rehabilitation, unemployable and permanently totally disabled."

> I base my decision on the restrictions imposed by both Dr. Reynolds, as well as Dr. McCreesh, and on the credible testimony of applicant and his wife at the trial. I found Mr. Sullivan's view more convincing than Mr. Linder's, among other reasons because of what applicant and his wife said at trial and during the vocational evaluations, about applicant's need to lie down periodically during the day, for up two hours at a time.

Additionally, the WCJ concluded that applicant was entitled to an unapportioned award of permanent disability, finding Dr. McCreesh's 25% apportionment to non-industrial factors was not legally adequate.

> Dr. McCreesh has not articulated a sufficient rationale, as mandated by *Escobedo.* What is missing is any explanation of why and how the degenerative factors and the ancient 1994 injury, with episodic treatment by a chiropractor thereafter, prove contribution to the current overall PD; nor a statement that the current level of PD would be less, without these prior factors. On the contrary, he testified in deposition that he was unable to assign a component of the PD to them, without engaging in speculation. As noted by Mr. Linder, there is no evidence that non-industrial factors have ever caused disability, either mentally or physically. Furthermore, Dr. Reynolds found no apportionment in his PR4 report.

DISCUSSION

Defendant's first contention is that the WCJ erred in awarding applicant a combined award of permanent total disability, because he combined the disability from applicant's two separate injuries. Defendant asserts that pursuant to *Benson v. Workers' Comp. Appeals Bd*. (2009) 170 Cal.App.4th 1535 [74 Cal. Comp. Cases 113], it is not permissible to merge separate injuries into a single award of permanent disability. Defendant argues that the limited exception provided in *Benson*, when a medical evaluator is unable to parse out the disability caused by separate injuries, is not present in this case. Defendant cites *Guritzky v. Regents of the Univ. of Calif.* (2016) Cal. Wrk. Comp. P.D. LEXIS 349, a panel decision, to argue that Dr. McCreesh's opinion that he could not assign a separate permanent disability rating to each date of injury was "conclusory" and is not substantial medical evidence. Defendant argues that Dr. McCreesh did not give a substantial explanation in his reporting or in his 2017 deposition to explain "why he cannot apportion to applicant's work for 38 years as a pipefitter and how that could have affected his final permanent disability rating." (Petition, p. 8.) Defendant then asserts that Dr. McCreesh made himself unavailable for further analysis by retiring in 2019.

Defendant's argument compounds separate apportionment analyses, between dates of injury and, separately, to non-industrial factors. It is not relevant to argue that Dr. McCreesh did not explain why he cannot apportion to applicant's work history when discussing whether there is substantial medical evidence to support apportionment between dates of injury. It is also not

convincing to argue that defendant was unable to further question Dr. McCreesh about this issue, when defendant queried him on this topic at his deposition in 2017, and he retired two years later.

Contrary to defendant's contention, the only medical evidence relevant to this issue establishes that this limited *Benson* exception is applicable, and that the disability caused by the two injuries should be rated as one, as the WCJ found. As noted above, Dr. McCreesh testified that to offer separate ratings for each injury would be speculative, and he was unable to apportion applicant's disability between the dates of injury. "They're close in time. There's multiple impairments; and I'd have to speculate to parse the two, the specific from the cumulative trauma." (Ex. A-2, Deposition Transcript, Mr. McCreesh, 6/28/17, 17:1-16.) He agreed that the impairments in all three body parts from the specific and cumulative trauma injuries "are inextricably intertwined." (Ex. A-2, 18:1-5.) Dr. McCreesh also agreed that the effects of the first injury would prevent the subsequent injury from healing properly, and one injury could render a body part unusually weak and contribute to the damage caused by the other injury. (Ex. A-2, 17:17-24.) This testimony, subject to defendant's cross-examination, constitutes substantial medical evidence to support the WCJ's joint award of permanent disability.

Defendant separately argues that the WCJ failed to provide any reason for finding defendant did not meet its burden of proof to establish apportionment, rejecting Dr. McCreesh's 25% non-industrial apportionment. Defendant asserts that the WCJ improperly relied upon Dr. Reynolds to find no apportionment, where Dr. Reynolds did not offer an opinion on apportionment.

The WCJ explained in his Opinion on Decision, and reiterated in his Report, that he found Dr. McCreesh's apportionment determination did not constitute substantial medical evidence since he was unable to describe the nature of the disability he apportioned to non-industrial factors, as required by *Escobedo v. Marshalls* (2005) 70 Cal.Comp.Cases 604 (en banc).

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." (Labor Code sections 4663, subd. (a) & 4664, subd. (a).) "The plain reading of 'causation' in this context is causation of the permanent disability." (*Escobedo v. Ma*rshalls, 70 Cal.Comp.Cases at 611.) Examining physicians therefore must "make an apportionment determination by finding what approximate percentage of the permanent disability was caused by the direct result of injury arising out of and occurring in the course of employment and what approximate percentage of the permanent disability was caused

by other factors both before and subsequent to the industrial injury, including prior industrial injuries." (§ 4663, subd. (c).)

Escobedo requires that for a medical opinion on apportionment to constitute substantial evidence,

> ". . . a medical opinion must be framed in terms of reasonable medical probability, it must not be speculative, it must be based on pertinent facts and on an adequate examination and history, and it must set forth reasoning in support of its conclusions.
>
> "For example, if a physician opines that approximately 50% of an employee's back disability is directly caused by the industrial injury, the physician must explain how and why the disability is causally related to the industrial injury (e.g., the industrial injury resulted in surgery which caused vulnerability that necessitates certain restrictions) and how and why the injury is responsible for approximately 50% of the disability.
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> "And, if a physician opines that 50% of an employee's back disability is caused by degenerative disc disease, the physician must explain the nature of the degenerative disc disease, how and why it is causing permanent disability at the time of the evaluation, and how and why it is responsible for approximately 50% of the disability." (Escobedo, 70 Cal.Comp.Cases at 621-622.)

The WCJ states in his Report:

> What is missing is any explanation of why and how the degenerative factors and the ancient 1994 injury, with episodic treatment by a chiropractor thereafter, prove contribution to the current overall PD; nor a statement that the current level of PD would be less, without these prior factors. On the contrary, he testified in deposition that he was unable to assign a component of the PD to them, without engaging in speculation.

We concur with the WCJ's analysis of the shortcomings in Dr. McCreesh's apportionment determination, and concur that applicant is entitled to an unapportioned award.

Defendant further contests the WCJ's determination, arguing that further discovery should have been allowed to investigate the effect applicant's cirrhosis had on his ability to compete in the open labor market. Defendant argues that the finding of permanent total disability was based on vocational evidence that applicant lacked stamina to complete vocational testing, and trial testimony from applicant and his wife that his fatigue was caused by his cirrhosis, diagnosed in 2018, and "makes his thinking fuzzy," and affected his mental state.

From this, defendant argues that the finding of permanent total disability was based on non-industrial factors, to which there should be apportionment. Defendant argues the WCJ ignored evidence that applicant's inability to work was based on his liver disease.

Contrary to defendant's argument, the finding of permanent disability did not ignore applicant's liver condition, but rather was based upon objective factors of disability caused by his orthopedic injuries as described by Dr. Reynolds, Dr. McCreesh, the vocational experts and the trial testimony. Defendant offers no substantive evidence that applicant's disability was related to his liver disease. The vocational experts were aware of, and reported on, applicant's cirrhosis diagnosis, but did not ascribe any limitations or work restrictions to it. Rather, the record provides ample evidence that applicant's disability is related to the pain and physical limitations caused by his bilateral knee and low back injuries. The issue of fatigue was not found relevant to the limitations on standing, walking and sitting or applicant's need to lie down for several hours each day due to the pain those activities trigger.

Defendant further contests the WCJ's finding that applicant had rebutted the scheduled rating of his permanent disability and found applicant to be permanently totally disabled as a consequence of his two industrial injuries. Defendant contends that in doing so, the WCJ ignored evidence that non-industrial factors were responsible for some of his permanent disability.

As discussed above, we concur with the WCJ's conclusion that applicant is entitled to an unapportioned award. Thus, defendant's argument that the vocational evidence the WCJ relied upon did not properly address apportionment, does not compel a different outcome.

Further, as discussed in the WCJ's Report, there is substantial evidence in the record to support a finding of permanent total disability, based upon the vocational evidence that applicant's ability to benefit from vocational rehabilitation has been impaired such that he has lost 100% of his ability to return to gainful employment. We concur with the WCJ that applicant has successfully rebutted the scheduled permanent disability rating, per *Ogilvie v. Workers' Comp. Appeals Bd.* (2011) 197 Cal.App.4th 1262 [76 Cal.Comp.Cases 624] and *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234, 245-246 [48 Cal.Comp.Cases 587].

Labor Code section 4660 provides that permanent disability is determined by consideration of whole person impairment within the four corners of the AMA Guides to the Evaluation of Permanent Impairment, Fifth Edition (AMA Guides), the proper application of the PDRS in light of the medical record and the effect of the injury on the worker's future earning capacity. (*Brodie*

v. Workers' Comp. Appeals Bd. (2007) 40 Cal.4th 1313, 1320 [72 Cal.Comp.Cases 565] ["permanent disability payments are intended to compensate workers for both physical loss and the loss of some or all of their future earning capacity"]; *Department of Corrections & Rehabilitation v. Workers' Comp. Appeals Bd*. (*Fitzpatrick*) (2018) 27 Cal.App.5th 607, 614 [83 Cal.Comp.Cases 1680]; *Almaraz v. Environmental Recovery Service/Guzman v. Milpitas Unified School District* (2009) 74 Cal.Comp.Cases 1084 (Appeals Board en banc) as affirmed by the Court of Appeal in *Milpitas Unified School Dist. v. Workers' Comp. Appeals Bd*. (*Guzman*) (2010) 187 Cal.App.4th 808 [75 Cal.Comp.Cases 837].)

The scheduled rating is not absolute. (*Fitzpatrick*, *supra* at 1685.) A rating obtained pursuant to the PDRS may be rebutting by showing the diminished future earning capacity is greater than the factor supplied by the PDRS. (*Ogilvie*, supra; *Contra Costa County v. Workers' Comp. Appeals Bd*. (*Dahl*) (2015) 240 Cal.App.4th 746 [80 Cal.Comp.Cases 119].) The court in *Ogilvie, supra,* addressed the question of: "What showing is required by an employee who contests a scheduled rating on the basis that the employee's diminished future earning capacity is different than the earning capacity used to arrive at the scheduled rating?" (*Ogilvie*, 197 Cal.App.4th at p. 1266.) The primary method for rebutting the schedule rating is based upon a determination that the injured worker is "not amenable to rehabilitation and, for that reason, the employee's diminished future earning capacity is greater than reflected in the scheduled rating." The employee's diminished 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*, 197 Cal.App.4th at pp. 1274–1275, 1277).

Here applicant's vocational expert found applicant's future earning capacity was less than reflected in a scheduled rating based upon the effects of his industrial injuries, without consideration of impermissible non-industrial factors.

As the Ogilvie Court acknowledged:

> [C]ases have long recognized that a scheduled rating has been effectively rebutted … when the injury to the employee impairs his or her rehabilitation, and for that reason, the employee's diminished future earning capacity is greater than reflected in the employee's scheduled rating. This is the rule expressed in *LeBoeuf v. Workers' Comp. Appeals Bd.* (1983) 34 Cal.3d 234 [193 Cal. Rptr. 547, 666 P.2d 989].

Finally, defendant argues that the medical record should have been left open for further discovery, and defendant allowed to obtain a new panel QME to offer an opinion on the vocational evidence. As addressed in the WCJ's Report, the issue was raised late in the proceedings and was not required for the WCJ to be able to make a determination, as the trier of fact, on the persuasiveness of the vocational evidence. The delay inherent in last minute discovery was contrary to the mandate that workers' compensation proceedings be expeditious and unencumbered. As the WCJ stated in his Report at pages 5-6:

> In August of 2019, applicant's attorney asked Dr. McCreesh to choose between the two vocational experts and report to the parties which of the two he agreed with. Dr. McCreesh responded on 8/27/19 (Ex. A-3), requesting that a Functional Capacities Evaluation (FCE) be done, to assist him in choosing between the VR experts. The chronology as to what followed is set forth in the Minutes of Hearing from April 6, 2020. Applicant's inability to complete an FCE was supported by a letter from his treating physician (Ex. A-13). Dr. McCreesh was then asked to dispense with the FCE and provide his best opinion on the issue (see my letter to the doctor dated May 12, 2020), but the doctor responded that he could not respond, as his practice had closed. Defendant then obtained a replacement panel, from which Dr. Robinson was selected. I ruled that a new QME panel was not necessary, because the only remaining issue for the QME was to choose which VR expert was more persuasive, an issue that was more appropriately to be decided by the WCJ; and because the record was otherwise sufficiently developed to enable me to decide the issues. I determined that the need for a replacement panel was outweighed by the Constitutional mandate for an expeditious, unencumbered and inexpensive remedy.

Defendant has not been denied due process of law by reason of the WCJ's determination that the record was adequately developed when discovery closed to decide the issues. Accordingly, we affirm the WCJ's Findings and Award and deny defendant's Petition for Reconsideration.

Additionally, we note that applicant's Answer to the Petition for Reconsideration raises an issue regarding the commutation of the award of attorney fees. Any party aggrieved by a final determination must file a timely Petition for Reconsideration. The Answer was not a timely and appropriate means for seeking review of this issue. Therefore, we cannot address applicant's request for relief.

For the foregoing reasons,

IT IS ORDERED that defendant's Petition for Reconsideration of the December 7, 2020 Findings and Award is **DENIED**

WORKERS' COMPENSATION APPEALS BOARD

/s/ KATHERINE A. ZALEWSKI, CHAIR

I CONCUR,

/s/ JOSÉ H. RAZO, COMMISSIONER

/s/ DEIDRA E. LOWE, COMMISSIONER

DATED AND FILED AT SAN FRANCISCO, CALIFORNIA

March 1, 2021

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

STEVEN SCHIEFFER
SAMARRON & SCHWARTZAPFEL
STATE COMPENSATION INSURANCE FUND

SV/*pc*

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